This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW SCHOOL
LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

..THE...

KENTUCKY

LAW REPORTER.

VOL. XIV.

JULY 1, 1892, TO JUNE 15, 1893.

Frankfort, Ky.
GEO. A. LEWIS, PUBLISHER.
1893.

Digitized by Google

Rec. Feb. 9, 1903

Digitized by Google

TABLE OF CASES.

Page

Abell, L & N. R. R. Co. v..... 239
Abernathy, By. &c. v. Ross, &c.. 282
Adams, E. T., V. & G. Ry. Co. v. 862
Adams v. Frazier 311
Adkins, Adm'r, Paducah Street Ry. Co. v 425
Adkinson v Rausdell..... 258
Albro v. Robinson, &c..... 124
Alexander v. Commonwealth..... 290
Allen, &c., Home Ins. Co. v..... 161
Allen, &c., Liverpool and London and Globe Ins. Co. v 161
Ambergy's Adm'r v. Baker, Receiver 432
Ambrose, Caruthers & Bro. v 109
American Land & Improvement Co. v. Crawford..... 702
Anderson, Denham v..... 366, 391
Anderson v. Eminence, &c., Turnpike Co 110
Anderson, &c., Hurst v..... 766
Anderson v. Samuels 48
Anderson, &c. v. City of Mayfield, &c 370
Andrews, By, &c. v. Hurt's Adm'r 765
Angel v. Commonwealth..... 10
Armstrong, Cox, &c. v 350
Armstrong, &c., McJohnson & Co. v..... 621
Arterburn v. Bullitt 623
Ashland Coal & Iron Ry. Co. v. Davidson, &c 339
Ashland Coal & Iron Ry. Co. v. McKenzie, &c 636
Atchison, &c., Crabtree v..... 313
Atkinson v. Tennill 922
Avery & Sons v. Meek 814
Azbill v. Azbill 105
Bailey, &c. v. Boyse 283
Bailey v. C., N. O. & T. P. Ry. Co 226
Bailey, &c. v. Robinson & Co.... 670
Bain v. Sawyers..... 857
Baird v. Beall, &c 658
Baker v. Commonwealth 185
Baker, &c. v. Kinnaird..... 695
Baker, &c., Smith, &c. v..... 718
Baker, Receiver, Ambergy's Adm'r v..... 432
Baldwin & Co. v. Kendall..... 302
Ball, &c., Kelly, &c. v..... 132
Barber v. C., N. O. & T. P. Ry. Co 869
Barbour, &c., Brey v 655

Page.

Barbour, &c., Peoples Bank of Kentucky v..... 98
Barbourville Real Estate Co. v. Matthews..... 767
Barker, Cincinnati, &c., Railway Co. v 143
Barker, &c., C., N. O. & T. P. Ry. Co. v..... 750
Barlow, McLellan Stone Co. v . 621
Barnes, Maxville, W. & L. Turnpike Road Co 481
Bates v. Commonwealth..... 177
Bates, &c. v. Sloan 591
Bates, Cincinnati Cooperage Co. v 141, 469
Baughman, &c. v. Louisville, E., &c., R. R. Co 108, 268, 755
Beall, &c., Baird v 658
Beall, &c., Preston v 61
Beard, &c. v. Morris, &c 97
Beaver v. Lancaster..... 658
Beckham v. Morrison 241
Beiser, &c., Tohermes v 440
Belknap, &c. v. City of Louisville, &c 420
Bell, Montague v..... 890
Bellevue, Town of v. Genoway, &c..... 804
Belt Electric Line Co. v. Creason. 208
Bennett, &c. v. Caddell..... 858
Bentle v. Gerke Brewing Co..... 766
Bernheim & Co. v. Loch..... 768
Berry, City of Newport v 29
Berry, &c. v. Kinnard, &c 578
Betz, Sheriff, Commonwealth v .. 476
Bickel, Caldeway v 925
Black, Huls, &c. v 805
Blackburn v. Williams 109
Blackwell, Commonwealth v 246
Blackwell v. McBride, &c 760
Blair v. Commonwealth 495
Bloomfield, Town of, Terrell v .. 577, 614
Board of Managers of World's Columbian Exposition, Norman, Auditor v..... 529
Bogard, &c. v. O'Brien, &c 648
Bogenschultz, Smith v..... 305
Bohannon, &c. v. Travis, &c..... 912
Boles, Locke v..... 578
Bonhayo, L. & N. R. R. Co. v .. 737
Boswell's Adm'r, &c., Citizens National Bank of Louisville v.. 17
Bourman v. Commonwealth.. ... 174
Bourne, &c. v. Bourne's Adm'r, &c 189

Digitized by Google

Page.
Bourne, &c., Stiney, &c. v ... 398
Bowen, Long v ... 205
Bowers' Ex'or, &c. v. Linn, Ass'ee, &c ... 889
Bowman, Maize v ... 121
Bowman v. Wood ... 926
Boyer v. Commonwealth ... 167
Boyes, Bailey, &c. v ... 283
Bradbury v. Walton, &c ... 823
Bradley, Thompson, Superintendent, &c. v ... 767
Bradshaw's Adm'r, &c. v. L. & N. R. R. Co ... 688
Bramel, Cooper v ... 399
Bramlege, By, &c., Covington, City of v ... 395
Brandenburg, &c., Daniel v ... 310
Brandts' Ex'or v. Donnelly ... 819
Brann, Monroe v ... 764
Brannin, Brand & Glover v. Broaddus, &c ... 726
Brannin, &c. v. Gleason, &c ... 109
Brannin, Brand & Glover, Cecil v. 923
Brannin, Brand & Glover, Cottrell v ... 580
Brannin, &c., Stockoff & Dewitt v ... 717
Brannin, Trustee, &c. v. Wigginton ... 720
Brewer, &c. v. Commonwealth ... 270
Brey v. Barbour, &c ... 655
Bridgeford & Co. v. Ky. Glass Works Co ... 144
Britschu, Stembridge v ... 408
Broaddus, &c., Brannin, Brand & Glover v ... 726
Broadfoot, &c. v. Rowe ... 895
Broadwell, Fowler v ... 768
Bronger, Weigelman v ... 576
Brook & Gregory v. Woody ... 141
Brook v. Yadon, &c ... 863
Brown's Adm'r v Brown ... 893
Brown, &c., Commonwealth v ... 301
Brown, Fournier, &c. v ... 204
Brown, L. & N. R. R. Co. v ... 111
Brown v. Ready ... 583
Brown v. Tinsley, Sheriff, &c ... 745
Brown, &c. v. Vancleave, &c ... 821
Brown, &c., Wilson v ... 240
Brumnett, L. & N. R. R. Co. v ... 239
Bryant v. Bryant ... 358
Bryant's Adm'r, &c., Dungan v ... 675
Bryant, &c., Vissman v ... 874
Bryant, Sr.'s Adm'r, &c., Ware, &c. v ... 852
Buckhannan, &c., Warren Deposit Bank v ... 205
Buckler v. Reese ... 80
Buckler's Adm'r v. Wells, Adm'r. 78
Bullitt, Arterburn v ... 623
Bullock, &c., Mullins v ... 40
Burba, &c., By, &c. v. Richardson ... 233
Burbridge, Craddock v ... 366
Cable v. Commonwealth ... 253
Caddell, Bennett, &c. v ... 353
Caldwell v. Stephens ... 894
Caldeway v. Bickel ... 925

Page.
Campbell, &c., Wilson v ... 512
Caperton, Gillham v ... 834
Carden v. Dearing ... 78
Carlisle's Adm'r v. Green, &c ... 373
Carpenter, Speed v ... 271
Carrico, N., C. & St. L. Ry. Co. v. 481
Carson, &c. v. Jones, &c ... 667
Carter, Commonwealth v ... 301
Carter, Sanders v ... 271
Carter v. West, &c ... 191
Cartwright, &c., Hobson v ... 293
Caruthers & Bro. v. Ambrose ... 109
Cavanaugh v. Riley, &c ... 268
Cave, &c., Fireman's Fund Ins. Co. v ... 810
Cave Hill Cemetery Co., Dickens v ... 347
Cecil v. Brannin, Brand & Glover. 923
Cecil, K. & I. Bridge Co. v ... 477
Central Passenger Railway Co. v. Chatterson ... 205, 663
Central Passenger Railway Co. v. Rose ... 204
Central Passenger Railway Co. v. Stevens, &c ... 803
Chatterson Central Passenger Railway Co. v ... 205, 663
Chemical National Bank of New York v. Wagner, Ass'ee ... 510
C. & O. Ry. Co., &c., Commonwealth, for Greenup County v ... 681
C. & O. Ry. Co., Covington, City of v ... 487
C. & O. R. R. Co., Stickley, &c. v ... 417
Chiles, Thompson & Co., Esterling v ... 287
Chiles, Thompson & Co. v. Ringo, &c ... 302
Chiles, Thompson & Co., Traders' Deposit Bank v ... 617
Chinn v. Courtney, Trustee ... 422
Christie, &c. v. Garrity, &c ... 910
Church, Home Construction Co. v. 807
Cincinnati Cooperage Co. v. Bate ... 141, 460
Cin. Elevated Ry. & B. T. Co., Commonwealth v ... 836
C., N. O. & T. P. Ry. Co., Bailey v ... 226
C., N. O. & T. P. Ry. Co., Barber v ... 569
Cincinnati, &c., Railway Co. v. Barker ... 148
C., N. O. & T. P. Ry. C. v. Barker, &c ... 750
C., N. O. & T. P. Ry. Co. v. Conley's alias Ward's Adm'r ... 568
Cincinnati, &c., R. R. Co. v. Green, &c ... 815
Cincinnati, &c., R. R. Co. v. Richardson ... 367
C., N. O. & T. P. Ry. Co., Ritchie v ... 831
Cincinnati, &c., R. Co. v. Stakhouse ... 926
C., N. O. & T. P. Ry. Co., Wright v ... 788

Digitized by Google

Page.
Cist, &c., Herd v. 644
Citizens' Nat. Bank of Lou. v. Boswell's Adm'r, &c 17
Clark, &c., German Ins. Co v 810
Clark, Sheriff, Louisville Water Co. v. 886
Clark v Renaker 465
Clay, Jr., &c. v. Newton, &c. 445
Clay, Nickels v. 625
Clements, &c. v. Sherley, &c. 140
Clemens v. Speed 625
Clemshire, &c. v. Harbison, Gd'n. 481
Cobb, &c., Mechanics Trust Co. v. 444
Cocanougher, &c. v. Green 507
Cofer, Postal Telegraph Co. v 574
Coffey, &c. v. Proctor Coal Co., &c 415
Cole, &c. v. Payne, &c. 107
Collins, Francis, &c. v 479
Collins v. Powell, &c 119
Colson, Field v. 315
Combs v. Commonwealth 245, 283, 703
Combs, Grigsby, &c. v. 651
Common School District, &c., Glover's Gd'n, &c. v 240
Common School District, &c., Ratcliffe, &c. v 240
Commonwealth, Alexander v. 290
Commonwealth, Angell v. 10
Commonwealth, Baker v. 185
Commonwealth, Bates v 177
Commonwealth v. Betz, Sheriff 476
Commonwealth v. Blackwell 246
Commonwealth, Blair v 495
Commonwealth, Bourman v. 174
Commonwealth, Boyer, v. 167
Commonwealth, Brewer, &c. v. 270
Commonwealth v. Brown, &c 301
Commonwealth, Cable v. 253
Commonwealth v. Carter 301
Commonwealth v. Cin. Elevated Ry. & B. T. Co 836
Commonwealth, For Greenup Co. v. C. & O. Ry. Co., &c. 681
Commonwealth, Combs v 245, 283, 703
Commonwealth v. Cov. & Cin. Bridge Co 836
Commonwealth, Crump v. 450
Commonwealth, Daviess Gravel Road Co. v 812
Commonwealth, Devlin v. 167
Commonwealth, Doss v. 384
Commonwealth, Drake v 677
Commonwealth, Driscoll v. 376
Commonwealth v. Eckert 250
Commonwealth v. Elliston 216
Commonwealth v. Enright 894
Commonwealth, Faustre v. 56
Commonwealth, Fields v 207
Commonwealth, Green v. 169
Commonwealth, Griffith v. 808
Commonwealth, Hall v 781
Commonwealth, Harper v 168
Commonwealth v. Hart 862
Commonwealth, Higgins v 729
Commonwealth, Hinkson, &c. v. 2[illegible]3

Page.
Commonwealth, Hite v 308
Commonwealth, Hornsba v. 166
Commonwealth v. Howard 430
Commonwealth, Johnson v. 257
Commonwealth, Jones v. 228
Commonwealth, Kendall v 15
Commonwealth, King v 254
Commonwealth, Kitchen v 764
Commonwealth, Lewis v 212, 231
Commonwealth, L. & N. R. R. Co. v 400, 432
Commonwealth, Lovell v 496
Commonwealth, Macklin v 180
Commonwealth, Martin v 95
Commonwealth, Massie v. 564
Commonwealth, Mathedy v. 182
Commonwealth, McCarty v. 285
Commonwealth, McGraw v. 344
Commonwealth, McIntosh v. 820
Commonwealth v. McKay 407
Commonwealth v. McPeek 215
Commonwealth, Messer v. 492
Commonwealth, Miller v 225
Commonwealth v. Miles & Co 107
Commonwealth, Mudd v. 672
Commonwealth, Muir's Committee v 478
Commonwealth, Mullins v. 569
Commonwealth, Nantz v 592
Commonwealth v. N. C. & St. L. Ry. Co 442
Commonwealth v. New Hope Distillery Co 107
Commonwealth, N. N. & M. V. Co. v 47, 196
Commonwealth, Osborn v 246
Commonwealth, Payne v 302
Commonwealth, By, &c. v. Powell, 892
Commonwealth, Proctor v 248
Commonwealth v. Rice 876
Commonwealth, Roberts v. 219
Commonwealth, Ross v 259, 590
Commonwealth, Smith v. 225, 260, 578
Commonwealth, By, &c. v. Singer Mfg. Co. 732
Commonwealth v. Somerset, City of 288
Commonwealth, Spurlock v 605
Commonwealth, Stamper v. 325
Commonwealth, For Use, &c. v. Stout 576
Commonwealth, Stroud v 179
Commonwealth, Thomas v. 288, 334
Commonwealth, Trice v 272
Commonwealth, Traux v. 207, 299
Commonwealth, Upton v 165
Commonwealth, Walkup v. 337
Commonwealth, West v. 217
Commonwealth, Woodson v. 797
Conley's, alias Ward's Adm'r, C., N. O. & T. P. Ry. Co. v. 568
Connelly, &c., Ransom, &c. v. 73
Connecticut Fire Insurance Co., &c. v. Meschendorf, &c. 757
Connor, &c. v. Covington Transfer Ry. Co., &c 185
Connor v. Cruzan 85[illegible]

Digitized by Google

Page.
Connor, &c., Farmers & Traders National Bank of Covington v.. 316
Connor v. Garrard, &c..... 214
Continental Ins. Co. v. Coons. 110, 136
Conyers v. Scott..... 784
Cook v. Newton 860
Coomes, Phœnix Ins. Co. of Brooklyn, N. Y. v 603
Coons, Continental Ins. Co. v... 110, 136
Cooper v. Bramel..... 399
Cooper v. Jackson 479
Cooper, &c., Williams v 284
Copas, L. & N. R. R. Co. v 672
Cornell, Louisville, City of v..... 398
Cornett, Whitaker v..... 871
Cottrell v. Brannin, Brand & Glover 580
Courtney, Trustee, Chinn v 422
Covington, City of v. Bramlege, By, &c... 395
Covington, City of v. McDonald, &c 817
Covington, City of v. C. & O. Ry. Co..... 487
Covington & Cin. Bridge Co. v. Commonwealth..... 836
Covington & Cin. Bridge Co. v. South Cov. & Cin. St. Ry. Co.. 52
Covington & Lex. T. R. Co. v. Sanford, &c 689
Covington, City of, &c. v. Geyler, &c 145
Covington, City of v. Simrall, &c. 896
Covington Transfer Ry. Co., &c., Connor, &c. v 135
Covington, City of v. Shinkle ... 158
Covington, City of v. Ulrich 302
Coxe, &c., Ky. Lumber Co. v 143
Cox, &c. v. Armstrong 356
Coy, &c. v. Roof 112
Cowan v. Prowse..... 273
Grabtree v. Atchison, &c 313
Craddock v. Burbridge..... 366
Craig v. Wilcox's Ex'or, &c..... 908
Crawford, American Land & Improvement Co. v..... 702
Creason, Belt Electric Line Co. v. 203
Creason, Phœnix Ins. Co. v .. 573
Croan, &c. v. Phelps' Adm'x, &c 915
Cromie, Crozier's Ass'ee v 858
Cromwell v. Trustees Common School District, &c..... 173
Crozier's Ass'ee v. Cromie..... 858
Crozier's Ass'ee v. Johnson..... 858
Crow, &c. v. Straus..... 206
Crum, &c. v. Rouse, &c 126
Crump v. Commonwealth..... 450
Cruzan, Connor v..... 859
Cully, Imboden v 701
Cumberland Valley Bank, Faulkner, &c. v 923
Cunningham, Day, &c. v. 112
Curtis v. Louisville City Railway Co 272
Dailey, Lostutter v..... 926
Daniel v. Brandenburgh, &c 310
Daniel v. Robinson 623

Page.
Dant, Head v..... 742
Darnell's Ex'or, Quaintance v. 238, 332
Davenport, Peters & Co. v. Rule & Co.'s Trustee 175
Davezac v. Seller..... 497
Davidson, &c., Ashland Coal & Iron Ry. Co. v 339
Davidson v. Ritchie, &c 330
Daviess Gravel Road Co. v. Commonwealth..... 812
Davis, Gibbs, &c. v 500
Davis v. Jenkins, &c..... 342
Davis' Ex'ors v. Justice, &c..... 741
Davis v. City of Louisville..... 170
Davis, L. & N. R. R. Co. v..... 716
Davis, Settle v. 718
Davis, &c. v. Wilson's Ex'tx 301
Day, &c. v. Cunningham..... 112
Day, &c. v. Renaker..... 923
Deshamp, &c., Henderson Belt R. R. Co. v 44
Decker's Adm'r, N. N. & M. V. Co. v. 108
Dedman v. Miltey..... 79
Dedman v. Nally..... 229
Deer Bros., Freeman's Adm'r v .. 813
Dehoney v. Kimball..... 858
Delph & Son v. Wainscott 304
Denham v. Anderson..... 366, 391
Devers, &c , Wood, Ex'or, &c. v.. 81
Devlin v. Commonwealth..... 167
Dickens v. Cave Hill Cemetery Co. 347
Dickson's Adm'r v. Lunan, &c.. 884
Dodge, &c. v. Kennedy, &c..... 795
Dolfinger, Trustee, &c., Pfingst, &c. v 489
Donnelly, Brandt's Ex'or v..... 819
Doss v. Commonwealth 334
Drake v. Commonwealth..... 677
Driscoll v. Commonwealth..... 376
Droege v. Woods..... 431
Drury v. McCracken & Co 208
Duckworth v. Hisle, &c..... 220
Dudley, &c. v. Weinhart, &c 434
Duff, Faulkner v..... 227
Duncan, Long v..... 812
Duncan v. Mason, &c..... 318
Dungan v. Bryant's Adm'r, &c .. 675
Eakins, &c. v. Eakins, &c..... 562
Earick, &c., Whipple, &c. v 85
Eagle Distilling Co. v. McFarland. 860
East End Improvement Co. v. Lipp 924
Easterling v. Chiles, Thompson & Co 287
E. T., V. & G. R. R. Co. v. Adams..... 862
Eckert, Commonwealth v..... 250
Eeton v. City of Louisville..... 170
Ecton, &c., Newman, &c. v 793
Edmonson, Kellar v..... 594
Edwards v. McKinney's Adm'r... 925
Eisenman, &c., Louisville Banking Co. v 705
Elam, &c., Ratliff v..... 779
Elliston, Commonwealth v 216
Elkton, Board of Trustees of v. Gill 755

Digitized by Google

Page.
Eminence, &c., Turnpike Co., Anderson v 110
Enright, Commonwealth v 894
Evans, &c. v. Evans 628
Evans & Co. v. Loch 768
Evansville Grain Co. v. Stout 927
Fain, &c. v. Turner's Adm'r 478
Falls City Bank, Ass'ee v. Head. 334
Farmers & Traders Nat. Bank of Covington v. Connor, &c 316
Faulkner, &c. v. Cumberland Valley Bank 923
Faulkner v. Duff 227
Faulkner, &c., Mullins v 436
Faustre v. Commonwealth 56
Ferrell, &c., York, Ass'ee v 207
Fidelity Trust & Safety Vault Co., &c. v. McFerran, &c 777
Fidelity Trust, &c., Co. v. Shannahan, &c 111
Fidelity Trust & Safety Vault Co., Snyder, &c. v 615
Field v. Colson 315
Fields v. Commonwealth 207
Fields, &c. v. Fields, &c 865
Fielder v. Harbison, Gd'n 481
Fireman's Fund Ins. Co. v. Caye, &c 810
Fireman's Fund Ins. Co., &c. v. Meschendorf, &c 757
First National Bank, &c., Kenton Ins. Co. v 82
First National Bank of New York v. Wagner, Ass'ee. 510
First National Bank of Stanford v. Mattingly, &c 68
Fitch, Gaines v 620
Fitch, Overton v 113
Fletcher v. Radford's Ass'ee 303
Flower & Bros., Hegan Bros. v 717
Forbes, &c. v. Kentucky Mutual Security Fund Co 811
Forsythe, Vilford v 395
Fournier, &c. v. Brown 204
Fowler v. Broadwell 768
Francis, &c. v. Collins 479
Frazier, Adams v 311
Frazier, Shake v 798
Freeman v. Sallee Brothers, &c 367
Freeman's Adm'r v. Deer Bros 813
Friddle, &c. v. Kohn 312
Gaines v. Fitch 620
Galbraith v. Rogers 238
Gardner, &c. v. Richardson 669, 863
Garner, &c. v. Jones, &c 792
Garrard, &c., Connor v 214
Garrity, &c., Christie, &c. v 910
Gatewood v. Long, &c 774
Gatewood, L., St. L. & T. P. R. Co. v 108
Gayheart v. Patton 570
Gay's Adm'r, &c. v. Herd 400
Gay, Jr., &c. v. City of Louisville, &c 327
Genoway, &c., Bellevue, Town of v 304
Gentry, Vinson v 804
Gentry v. Walker, &c 351

Page.
George's Ex'or, Roche v 584
Gerke Brewing Co., Bentle v 766
German Ins. Co., &c. v. Clark, &c 810
German-American Ins. Co., Morris, &c. v 859
Gerreiss, Ky. Central Ry. Co., &c. v 397
Geyler, &c., Covington, City of v. 145
Gibbs, &c. v. Davis 500
Gill, Elkton, Board of Trustees of v 755
Gillham v. Caperton 334
Givens, Morgan v 93
Gleason, &c., Brannin, &c. v 109
Glover's Gd'n v. Common School District, &c 240
Goodin v. Tinsley, &c 107
Goodin's Ex'or, L. & N. R. R. Co. v 623
Gosnell, &c., Parkland Improvement Co. v 719
Gosnell, &c. v. Louisville 719
Goose v. Leonard 174
Goosling, &c., Litz, &c. v 91
Gouge v. Gouge 571
Gough, Headly v 620
Gowdy, Steinberger, &c. v 88
Graham v. Hite 502
Gray, Owensboro, F. R. & B. R. Co. v 79
Gray v. City of Paducah 476
Green, &c., Carlisle's Adm'r v 373
Green, &c., Cincinnati, &c., R. R. Co. v 815
Green, Cocanougher, &c. v 507
Green v. Commonwealth 169
Greenup County v. Maysville & B. S. R. R. Co 699
Greenville, Trustees Town of v. Townes, Trustee Jury Fund 582
Greenwood v. McHenry Coal Co 336
Greer v. L. & N. R. R. Co 876
Greer, L. & N. R. R. Co. v 876
Gregory v. L. & N. R. R. Co 667
Griffin, &c. v. Griffin 656
Griffith v. Commonwealth 303
Griffith v. Owensboro, &c., Ry. Co 236
Grigsby, &c. v. Combs 651
Grimes, Ex'or, Preston, &c. v 810
Grissom, Owsley v 923
Grover, &c., Peak, &c. v 764
Grover's Ex'ors, Peak v 206
Gunter's Ex'ors, &c., McCrae, &c. v 5
Guthrie v. Turner's Ex'ors 336
Hackworth v. Harlan's Heirs 76
Hadden v. Mannin 652
Hagemeyer & Co., Lawrence, by Gd'n v 566
Haldeman, Hayworth & Co. v 202
Hall v. Commonwealth 731
Hamilton, &c., Mt. Sterling & O. T. R. Co. v 720
Hamilton, N. C. & St. L. Ry. Co. v 431
Hamilton, Shackelford v 11

Digitized by Google

Page.
Hammill v. L. & N. R. R. Co ... 291
Harbison, Gd'n, Fielder v ... 481
Hardin county v. L. & N. R. R. Co ... 401
Harding, &c. v. Putnam, &c ... 677
Hardin, &c., Mundy's Landing & H. Turnpike Co. v ... 460
Harding v. Phillips ... 335
Hargan v. Purdy ... 383
Harlan's Heirs, Hackworth v ... 76
Harper v. Commonwealth ... 163
Harper's Trustee v. Wagner, Ass'ee, &c. ... 721
Harris, Haynes, &c. v ... 303
Harris, Trustee, &c., Lyons, &c. v ... 143
Hart, Commonwealth v ... 862
Hartford Life & Annuity Ins. Co. v. Wayland, &c ... 243
Hart Hardware Co., Ingalls & Co. v ... 447
Haycroft v. Walden ... 892
Haynes, &c. v. Harris ... 303
Hayworth Co. v. Haldeman ... 202
Head v. Dant ... 742
Head, Falls City Bank, Ass'ee v. 334
Head, &c., Straus & Frank v ... 740
Headly v. Gough ... 620
Heck, Royster v ... 141, 266
Hegan Bros. v. Flower & Bros ... 717
Helfrich Saw & Planing Mill Co. v. Render ... 624
Helwig, Middlesborough Town Co. v ... 430
Henderson Belt R. R. Co. v. DeChamp, &c ... 44
Henderson Belt R. R. Co. v. Schlamp ... 44
Henderson, City of v. Schlamp ... 575
Henderson Belt Railway Co. v. Stapp ... 111
Henderson &c. v. Perkins ... 782
Hendricks, Symser, &c. v ... 47
Herd v. Cist, &c ... 644
Herd, L. & N. R. R Co. v ... 670
Herd, Gay's Adm'r. &c. v ... 400
Herndon v. Waters' Ex'or ... 667
Herringer, &c., Holmes, &c. v ... 286
Higdon v. Higdon, &c ... 107
Higginbotham, L. & N. R. R. Co v ... 927
Higgins v. Commonwealth ... 729
Hill, Jarrard v ... 575
Hill, &c. v. McGarvey ... 101
Hill v. Thixton, &c ... 900
Hinkson, &c. v. Commonwealth .. 203
Hisle, &c., Duckworth v ... 220
Hite v. Commonwealth ... 308
Hite, Graham v ... 502
Hite's Devisees v. Hite's Ex'ors, &c ... 385
Hobbs, &c., Illinois Central R. R. Co. v ... 767
Hobbs & Co. v. Miller ... 719
Hobson v. Cartwright, &c ... 293
Hogan, &c. v. Ky. U. Ry. Co ... 678
Hogg, Horsley v ... 80
Holmes, &c. v. Herringer, &c ... 286
Holmes & Co., N. N. & M. V. Co. v ... 853
Holstead, Jones v ... 768
Holt, Neighbors v ... 235
Holtzhauer, L. & N. R. R. Co. v. 737
Home Construction Co. v. Church. 807
Home Ins. Co. v. Allen, &c ... 161
Hoover v. Hoover ... 680
Hornsba v. Commonwealth ... 166
Horsley v. Hogg ... 80
Horseley, Wollums v ... 642
Hoskins, L. & N. R. R. Co. v . 717
Hoskins, Merchants Dispatch Transportation Co. v ... 927
Houchin, &c. v. Houchin, &c ... 453
Howard, Commonwealth v ... 430
Howard Insurance Co. v. Owen's Adm'x ... 881
Howard, L. & N. R. R. Co. v ... 864
Howard, &c., N. N. & M. V. Co. v ... 476
Howe, &c , Johnson, &c. v ... 897
Huffman v. Williamson ... 657
Huls, &c. v. Black ... 8 5
Hunt's Heirs, &c., Northern Bank of Kentucky, &c. v ... 1
Hurry v. Kline ... 330
Hurst v. Anderson, &c ... 766
Hurt's Adm'r, Andrews, By, &c. v ... 765
Hurst's Adm'r, L. & N. R. R. Co. v ... 632
Illinois Central R. R. Co. v. Hobbs, &c ... 767
Illinois Central R. R. Co. v. Sandusky ... 766
Imboden v. Culley ... 701
Ingalls & Co. v. Hart Hardware Co., &c ... 447
Jackson, Cooper v ... 479
Jackson, &c., Myall v ... 48
Jacoby, K. C. R. R. Co. v ... 768
James, Adm'r v. McMinimy, &c . 486
James, &c., Prichard v ... 243
Jamison's Adm'x, K. C. Ry. Co. v ... 345
Jarrard v. Hill ... 575
Jenkins, &c., Davis v ... 342
Jenkins v. Keith ... 75
Jenkins, &c., McDonald, Justice, &c. v ... 157
Johnson v. Commonwealth ... 257
Johnson, Crozier's Ass'ee v ... 858
Johnson v. Wilson & Muir ... 668
Johnson, &c., Louisville, City of v ... 813
Johnson, &c. v. Howe, &c ... 897
Johnston's Adm'r v. Johnston ... 116
Jones v. Commonwealth ... 228
Jones v. Holstead ... 768
Jones & Denton v. Terhune ... 895
Jones, &c., Carson, &c. v ... 667
Jones, &c., Garner, &c. v ... 792
Jones, &c. v. Jones, &c ... 556
Jones, &c. v. Miracle ... 639
Jones v. Tye ... 448
Jordan, Surv. Part., &c. v. Swift Iron & Steel Works ... 194

Digitized by Google

Page.
Justice, &c., Davis' Ex'ors, &c. v. ... 741
Kahn Brothers v. Simons ... 201
Keith, Jenkins v ... 75
Kellar v. Edmonson ... 894
Kellem's Adm'r, L. & N. R. R. Co. v. ... 734
Kelly, &c. v. Ball, &c ... 132
Kelley, By, &c. v. The Barber Asphalt Co ... 356
Kendall, Baldwin & Co. v ... 302
Kendall v. Commonwealth ... 15
Kennedy, &c., Dodge, &c. v ... 795
Kenton Ins. Co. v. First Nat. Bank, &c ... 32
Ky. Central Ry. Co., &c. v. Gerreiss ... 397
Ky. Central Ry. Co. v. Jacoby ... 763
Ky. Central Ry. Co. v. Jameison's Adm'x ... 345
Ky. Central Ry. Co., McDermott, By, &c. v ... 437
Ky. Central Ry. Co. v. Musselman ... 893
Ky. Central Ry. Co. v. Smith, By, &c. ... 455
Kentucky Flour Co. v. Smith, &c ... 237, 297
Ky. Glass Works Co., Bridgeford & Co. v ... 144
K. & I. Bridge Co. v. Cecil ... 477
K. & I. Bridge Co. v. Kreiger, &c 151
Ky. Lumber Co. v. Coxe, &c ... 148
Kentucky Mut. Security Fund Co., Forbes, &c. v ... 811
Ky. Mutual Security Fund Co. v. Turner, &c ... 257, 461
Kentucky Nat. Bank, &c. v. Stone, &c ... 645
Ky. U. Ry. Co., Hogan, &c. v ... 678
Kimball, Dehoney v ... 858
Kimball, &c. v. Thurman, &c ... 718
King v. Commonwealth ... 254
King, &c., Rains v ... 49
Kinnaird, Baker, &c. v ... 695
Kinnaird, &c., Berry, &c. v ... 578
Kitchen v. Commonwealth ... 764
Kline, Hurry v ... 330
Klotz v. Klotz ... 80, 231
Kohn, Friddle, &c. v ... 312
Kohn Bros. & Co., Rothchild's Adm'r, &c. v ... 36
Kreiger, &c., K. & I. Bridge Co. v ... 151
Lancaster, Beaver v ... 658
Lane, &c. v. Traders' Deposit Bank ... 873
Laurel County Court v. Trustees Laurel County Seminary ... 412
Laurenz, School v ... 228
Law, L. & N. R. R. Co. v ... 175, 850
Lawrence, By Gd'n v. Hagemeyer & Co ... 566
Lebus, Gd'n, &c., Perrin, Com'r, &c. v ... 26
Lebus, &c. v. The Wayne-Ratterman Co., &c ... 794

Page.
Lee v. Pendleton County Court, &c ... 159
Lee, Adm'r, &c. v. Smith ... 922
Leforce, &c., Smith v ... 349
Leonard, Goose v ... 174
Levis & Broxholm v. Zinn, &c ... 867
Lewis v. Commonwealth ... 212
Lewis, L. & N. R. R. Co. v ... 770
Lewis v. Prather ... 749
Lewis Co. v. Scott ... 718
Linn, Ass'ee, Bowers' Ex'or, &c. v. ... 889
Linville, &c., Wilson, Receiver, &c v ... 150
Lipp, East End Improvement Co. v ... 924
Litz, &c. v. Goosling, &c ... 91
Liverpool and London and Globe Ins. Co. v. Allen, &c ... 161
Lloyd, Trustee v. Wagner, Ass'ee, &c ... 721
Loch, Bernheim & Co. v ... 763
Loch, Evans & Co. v ... 763
Loch, Peckham & Co. v ... 763
Locke v. Boles ... 573
Locke v. Locke ... 148
Long v. Bowen ... 205
Long v. Duncan ... 812
Long, &c., Gatewood v ... 774
Lostutter v. Dailey ... 916
Lotspeich, Main Jellico Coal Co. v. 595
Louisville, City of, Belknap, &c. v ... 420
Louisville, City of v. Cornell ... 898
Louisville, City of, Davis v ... 170
Louisville, City of, Ecton v ... 170
Louisville, City of, Gay, Jr., &c. v ... 327
Louisville, Gosnell, &c. v ... 719
Louisville, City of v. Johnson, &c. 813
Louisville, City of, L. & N. R. R. Co. v ... 813
Louisville, City of v. Nevin ... 203
Louisville, City of, Steel v ... 170
Louisville, City of, Walton v ... 170
Louisville City Ry. Co., Curtis v. 272
Louisville Banking Co. v. Eisenman, &c ... 705
Louisville, E., &c., R. R. Co., Baughman, &c. v ... 108, 268, 775
L., N. A. & C. Ry. Co. v. Schick. 833
L. & N. R. R. Co. v. Abell ... 239
L. & N. R. R. Co. v. Bonhayo ... 737
L. & N. R. R. Co., Bradshaw's Adm'r, &c. v ... 688
L. & N. R. R. Co. v. Brown ... 111
L. & N. R. R. Co. v. Brummett ... 239
L. & N. R. R. Co. v. Commonwealth ... 400
L. & N. R. R. Co. v. Constantine. 432
L. & N. R. R. Co. v. Copas ... 672
L. & N. R. R. Co. v. Davis ... 716
L. & N. R. R. Co. v. Goodin's Ex'ors ... 622
L. & N. R. R. Co. Greer v ... 876
L. & N. R. R. Co. v. Greer ... 876
L. & N. R. R. Co., Gregory v. ... 667
L. & N. R. R. Co., Hammill v ... 291

Digitized by Google

Page.
L. & N. R. R. Co., Hardin County v. ... 401
L. & N. R. R. Co. v. Herd ... 670
L. & N. R. R. Co. v. Higginbotham ... 927
L. & N. R. R. Co. v. Holtzhauer. 787
L. & N. R. R. Co. v. Hoskins ... 717
L. & N. R. R. Co. v. Howard ... 864
L. & N. R. R. Co. v. Hurst's Adm'r ... 632
L. & N. R. R. Co. v. Kellem's Adm'r ... 734
L. & N. R. R. Co. v. Law ... 175, 850
L. & N. R. R. Co. v. Lewis ... 770
L. & N. R. R. Co. v. City of Louisville ... 813
L. & N. R. R. Co. v. McCloskey. 668
L. & N. R. R. Co. v. McGinnis .. 398
L. & N. R. R. Co. v. Meader ... 112
L. & N. R. R. Co., Mefford's Adm'r v ... 327
L. & N. R. R. Co. v. Montgomery ... 477, 622
L. & N. R. R. Co. v. Morris, Adm'x ... 466
L. & N. R. R. Co. v. Murray ... 928
L. & N. R. R. Co. v. Owen, &c.. 118
L. & N. R. R. Co. v. Richerson . 925
L. & N. R. R. Co. v. Ricketts ... 19
L. & N. R. R. Co. v. Schweitzer's Adm'r ... 855
L. & N. R. R. Co., Simpson County v. ... 673
L. & N. R. R. Co. v. Smith ... 814
L. & N. R. R. Co. v. Sparks ... 398
L. & N. R. R. Co. v. Thompson. 815
L. & N. R. R. Co. v. Trustees School District ... 863
L. & N. R. R. Co. v. Wilson ... 719
L. & N. R. R. Co., Wintuska's Adm'r v ... 579
Louisville, St. Louis & T. P. R. Co. v. Gatewood ... 108
L., St. L. & T. Ry. Co. v. Stephens, Trustee ... 919
L., St. L. & T. Ry. Co., Wren's Adm'r v ... 324
Louisville Underwriters v. Pence 21
Louisville Water Co. v. Clark, Sheriff ... 886
Lovell v. Commonwealth ... 496
Lowery, Adm'x, N. W. Mut. Ins. Co. v ... 600
Luman, &c., Dickson's Adm'r, &c. v ... 884
Lynch, Maysville & B. S. R. R. Co. v ... 671
Lyons, &c. v. Harris, Trustee, &c. 143
Macklin v. Commonwealth ... 180
Macquitby, The L. Dodge Lumber Co. v ... 142
Main Jellico Mountain Coal Co. v. Lotspeich ... 595
Maize v. Bowman ... 121
Mannin, Hadden v ... 652
Marion National Bank v. Russell 368
Marquis v. Temple ... 768
Martin v. Commonwealth ... 95
Martin v. Martin ... 769
Martin v. Richardson ... 847
Mason, &c., Duncan v ... 318
Massie v. Commonwealth ... 564
Mathedy v. Commonwealth ... 182
Matthews, Barbourville Real Estate Co. v ... 767
Matthews, &c., Mattingly v ... 300
Matthews' Ex'tx v. Wohl, &c ... 623
Mattingly, &c., First National Bank of Stanford v ... 68
Mattingly v. Matthews, &c ... 300
Mattingly, Stone v ... 113
Maxville, Willisburg & Louisville Turnpike Road Co. v. Barnes .. 431
Mayfield, City of, &c., Anderson, &c. v ... 370
Mayfield, City of, &c., Tice v ... 370
Mays, &c. v. Slemmons, &c ... 660
Maysville & B. S. R. R. Co., Greenup County v ... 699
Maysville & B. S. R. R. Co. v. Lynch ... 761
Maysville & B. S. R. R. Co. v. Woods ... 624
Maysville & B. S. R. R. Co. v. Sparks, &c. ... 671
McBride, &c., Blackwell v ... 760
McBride, &c., Shelby v ... 760
McBurnie v. Semple, &c ... 30
McCarty v. Commonwealth ... 285
McCloskey, L. & N. R. R. Co. v. 668
McCrae, &c. v. Gunter's Ex'ors, &c ... 5
McCracken & Co., Drury v ... 208
McDermott, By, &c. v. Ky. Central Ry. Co ... 437
McDonald, &c., Covington, City of v ... 817
McDonald, Justice, &c. v. Jenkins, &c ... 157
McDowell, Wolford v ... 896
McFarland, Eagle Distilling Co. v. 860
McFerran, &c., Fidelity Trust & Safety Vault Co. v ... 777
McGarvey, Hill, &c. v ... 101
McGill's Adm'r v. McGill's Adm'r, &c ... 173
McGinnis, L. & N. R. R. Co. v .. 398
McGoodwin, &c. v. Williams, &c. 204
McGraw v. Commonwealth ... 344
McHenry Coal Co., Greenwood v. 336
McIntosh v. Commonwealth ... 320
McJohnston & Co. v. Armstrong, &c ... 621
McKay, Commmonwealth v ... 407
McKenzie, &c., Ashland Coal & Iron Ry. Co. v ... 636
McKinney's Adm'r, Edwards v ... 925
McLellan Stone Co. v. Barlow .. 621
McMahon, Swartz v ... 301
McMeekin v. Smith ... 732
McMillan, &c., Smith's Ex'tx, &c. v ... 433
McMinimy, &c., James, Adm'r v. 486
McPeek, Commonwealth v ... 215
Meader, L. & N. R. R. Co. v ... 112
Mechanics Trust Co. v. Cobb, &c. 444

Digitized by Google

Page.
Meek, Avery & Sons v 814
Mefford's Adm'r v. L. & N. R. R. Co. 827
Merchants' Dispatch Transportation Co. v. Hoskins 927
Merchants' National Bank of Louisville v. Sears, &c 840
Merritt, Petty & Bro. v 815
Meschendorf, &c., Connecticut Fire Ins. Co. v 757
Meschendorf, &c., Fireman's Fund Ins. Co. v 757
Messer v. Commonwealth 492
Meyer, &c. v. Zell 816
Meyerfield, Bloom & Co. v. Roberts 478
Meyer & Co., &c., Scruggs v 109
Middlesborough Town Co. v. Helwig 430
Miles & Co., Commonwealth v 107
Miller v. Commonwealth 225
Miller, Hobbs & Co. v 719
Miller, &c. v. Nelson, &c 829
Miracle, Jones, &c. v 639
Mitchell v. Mitchell 826
Mitchell v. Owenton, &c., Turnpike Co 924
Mitley, Dedman v 79
Moberly's Adm'r, Turner, &c. v 623
Monks, &c., Osborne's Adm'x v 606
Monroe v. Brann 764
Montague v. Bell 890
Montgomery, L. & N. R. R. Co. v 477, 632
Monyhan v. Nelms, &c 366
Moody, &c., Rodman v 202
Morgan v. Givens 93
Morgan v. Morgan, &c 623
Morris, &c, Beard, &c. v 97
Morris, &c. v. German-American Ins. Co 859
Morris, Adm'x, L. & N. R. R. Co. v 466
Morris, Sr., &c. v. Morton's Ex'ors, &c 230
Morris v. Morris' Trustee 574
Morris v. Valle, &c 117
Morrison, Beckham v 241
Morton's Ex'ors, &c., Morris, Sr., &c. v 360
Mouser, Overstreet v 480
Mt. Sterling & O. T. R. Co. v. Hamilton, &c 710
Mudd v. Commonwealth 672
Muir's Committee v Commonwealth, By 478
Mulholland, Paducah Land, Coal & Iron Co. v 861
Mullins v. Bullock, &c 40
Mullins v. Commonwealth 569
Mullins v. Faulkner, &c 436
Mullins, &c., Winter v 670
Mundy's Landing & H. Turnpike Co. v. Hardin, &c 460
Murray, L. & N. R. R. Co. v 928
Musselman, K. C. R. R. Co. v 893
Mutual Life Ins. Co of Ky., Richardson v 187
Mutual Life Ins. Co. of New York v. Thomson, &c 800
Myall v. Jackson, &c 48
Myers v. Patterson 143
Nally, Dedman v 229
Nantz v. Commonwealth 592
Nash, &c., Swearingen's Ex'tx v. 735
N., C. & St. L. Ry. Co. v. Carrico. 481
N. C. & St. L. Ry. Co., Commonwealth v 442
N., C. & St. L. Ry. Co. v. Hamilton 481
Neale, &c. v. Rouse, &c 126
Neighbors v. Holt 237
Nelms, &c., Monyhan v 366
Nelson, &c., Miller, &c. v 829
Nevin, Louisville, City of v 203
New Hope Distillery Co., Commonwealth v 107
Newman, &c. v. Ecton, &c 793
Newport, City of v. Berry 29
Newport, City of, &c. v. Newport Light Co 845
Newport Light Co. v. City of Newport 55, 464
N. N. & M. V. Co. v. Commonwealth 47, 196
N. N. & M. V. Co. v. Decker's Adm'r 108
N. N. & M. V. Co. v. Holmes & Co 853
N. N. & M. V. Co. v. Howard, &c 476
N. N. & M. V. Co., Wadlington v. 559
N. N. & M. V. Co. v. Walker 175
Newton, &c., Clay, Jr., &c. v 445
Newton, Cook v 860
Nickles v. Clay 925
Norman, Auditor v. Ky. Board of Managers of World's Columbian Exposition 529
N. W. Mut. Life Ins. Co. v. Lowery, Adm'x 600
Northern Bank of Ky., &c. v. Hunt's Heirs, &c 1
Northern Bank of Kentucky, Walker v 57
O'Brien, &c., Bogard, &c v 648
Ohio Valley Ry. Co. v. Watson's Adm'r 611
O & M. R. R. Co., Weir v 875
O'Nan, Wood v 863
Onzts, &c., Tyler v 821
Osborn v. Commonwealth 246
Osborne's Adm'x v. Monks, &c 606
Otter, Tillman v 586
Overstreet v. Mouser 480
Overton v. Fitch 113
Owen's Adm'x, Howard Insurance Co. v 881
Owen, &c., L. & N. R. R. Co. v. 118
Owens, &c., Supreme Lodge, K. & L. of H. v 199
Owensboro & Nashville R. R. Co., Seasongood, Mendelson & Co. v. 430
Owensboro, City of, v. Weir, Weir & Walker 710

Digitized by Google

Page
Owensboro, F. R. & B. R. R. Co. v. Gray 79
Owensboro, &c. Ry. Co., Griffith v 236
Owenton, &c., Turnpike Co., Smith v 924
Owenton, &c., Turnpike Co., Mitchell v 924
Owsley v. Grissom 923
Paducah, City of, Gray v 476
Paducah Land, Coal & Iron Co. v. Mulholland 861
Paducah Street Railway Co. v. Adkins' Adm'r 425
Paducah Water Supply Co. v. Paducah Lumber Co 141
Parkland Improvement Co. v. Gosnell, &c 719
Parks v. Union Manufacturing Co 206
Patterson, Myers v 143
Patton, Gayheart v 570
Payne, &c., Cole, &c. v 207
Payne v. Commonwealth 302
Payne v. Sebree 862
Peak v. Grover's Ex'ors 206
Peak, &c. v. Grover, &c 764
Peckham & Co. v. Loch 763
Pence, Louisville Underwriters v. 2
Pendleton County Court, &c., Lee v. 159
People's Bank of Kentucky v. Barbour, &c 98
Perkins, Henderson, &c. v 782
Perkins, &c., Smith v 399
Perrin, Com'r, &c. v. Lebus, Gd'n, &c 26
Petty & Bro. v. Merritt 815
Pfingst, &c. v. Dolunger, Trustee, &c 489
Phelps' Adm'x, &c., Croan, &c. v 905
Phœnix Ins. Co. of Brooklyn, N. Y. v. Coomes 603
Phillips, Harding v 335
Phillips, Varble, Jr, v 363
Phillups, &c. v. Phillups' Adm'r, &c 493
Phœnix Insurance Co. v. Creason 573
Postal Telegraph Co. v. Cofer 574
Powell, &c., Collins v 119
Powell, Commonwealth, By, &c. v 892
Prather, Lewis v 749
Prater v. Vincent, &c 140
Preston v. Ball, &c 61
Preston, &c. v. Grimes, Ex'or 810
Prichard v. James, &c 243
Proctor v. Commonwealth 248
Proctor Coal Co., Coffey, &c. v 415
Proctor & Troutman's Ass'ee v. Wilson & Muir 480
Prowse, Cowan v 273
Puckett, &c., Trimble v 209
Purdy, Hargan v 383
Purdy v. Squires, &c 271
Putnam, &c., Harding, &c. v 677
Quaintance v. Darnell's Ex'or 233, 332

Page.
Radford's Ass'ee, Fletcher v 303
Rains v. King, &c 49
Ranson, &c. v. Connelly, &c 73
Ratcliff v. Elam, &c 722
Ratcliffe, &c. v. Common School District, &c 240
Rausdall, Adkinson v 258
Ready, Brown v 583
Reed, Rogers, Ex'or v 811
Reese, Buckler v 80
Renaker, Clark v 465
Renaker, Day, &c. v 923
Render, Helfrich Saw and Planing Mill Co. v 624
Reynolds v. White, &c 525
Rhodes, Ward v 80
Rice, Commonwealth v 376
Rice, &c., Stephens v 669
Richardson, Burba, &c., By, &c. v 233
Richardson, Cincinnati, &c., R. R. Co. v 367
Richardson, Gardner, &c. v 863
Richardson, &c., Gardner, &c. v. 669
Richardson, Martin v 847
Richardson v. The Mutual Life Insurance Co. of Ky 187
Richardson, Walters v 410
Richerson, L. & N. R. R. Co. v .. 925
Ricketts, L. & N. R. R. Co. v 19
Riley, &c., Cavanaugh v 263
Ringo, &c., Chiles, Thompson & Co. v 302
Ritchie v. C., N. O. & T. P. Ry. Co 831
Ritchie, &c., Davidson v 830
Roberts v. Commonwealth 219
Roberts, Myerfield, Bloom & Co. v 473
Roberts v. Yancey, &c 42
Robertson, &c. v. Robertson 505
Robinson, &c, Albro v 124
Robinson & Co., Bailey, &c. v 670
Robinson, Daniel v 623
Robinson, &c. v. Turner 79
Rodman v. Moody, &c 202
Rogers, Galbraith v 238
Rogers, Ex'or v. Reed 811
Rogers, &c., Tydings, &c. v 142
Roof, Coy, &c. v 112
Ross, &c., Abernathy, By, &c. v. 282
Ross v. Commonwealth 259
Rothchild's Adm'r, &c. v. Kohn Bros. & Co 36
Ronse, &c., Crum, &c. v 126
Rouse, &c., Neale, &c. v 126
Rowe, Broadfoot, &c. v 895
Rowe v. Simmons, &c 780
Royster v. Heck 141, 266
Rule & Co., Trustee, Davenport, Peters & Co. v 175
Runner v. Young 828
Russell's Adm'r v. Russell's Gd'n, &c 236
Ruth, &c., Spreen v 154
Rutherford's Adm'r v. Rutherford's Ass'ee 397
Sallee Brothers, &c., Freeman v .. 367

Digitized by Google

Page.
Sallee, &c., Morris v. ... 117
Samuels, Anderson v ... 48
Sandusky, Illinois Central R. R. Co. v ... 766
Sanford, &c., Cov. & Lex. T. R. Co. v ... 689
Sanders v. Carter ... 271
Sawyers, Bain v ... 857
Schick, L., N. A. & C. Ry. Co. v. 833
Schlamp, Henderson Belt R. R. Co. v ... 44, 575
Scholl v. Laurenz ... 228
School, Symser, &c. v ... 47
Schweitzer's Adm'r, L. & N. R. R. Co. v ... 855
Scott, Conyers v ... 784
Scott, Lewis Co. v ... 713
Scott, &c. v. Strauss, Pritz & Co. 892
Scruggs v. Meyer & Co., &c ... 109
Sears, &c., Merchants Nat. Bank of Louisville v ... 340
Seasongood, Mendelson & Co. v O. & N. R. R. Co. ... 430
Sebastian v. Steel ... 311
Sebree, Payne v ... 862
Seiler, Davezac v ... 497
Selecman, Tunnell's Mill, &c., Turnpike Road Co. v ... 171
Semple, &c., McBurnie v ... 30
Settle v. Davis ... 718
Shackelford v. Hamilton ... 11
Shake v. Frazier ... 798
Shannahan, &c., Fidelity Trust, &c., Co. v ... 111
Shelby v. McBride, &c ... 760
Sherley, &c., Clements, &c. v ... 140
Shinkle, Covington, City of v ... 558
Simmons, &c., Rowe v ... 780
Simons, Kahn Brothers v ... 201
Simpson County v. L. & N. R. R. Co ... 673
Simrall, &c, Covington, City of v ... 896
Singer Mfg. Co., Commonwealth, By, &c. v ... 732
Sisk, Utley v ... 335
Sloan, Bates, &c. v ... 591
Slemmons, &c., Mays, &c. v ... 660
Smith, &c. v. Baker, &c ... 718
Smith v. Bogenschultz ... 305
Smith, Commonwealth v. 225, 260, 573
Smith, Lee, Adm'r, &c. v ... 922
Smith v. Leforce, &c ... 399
Smith, By, &c., K. C. Ry. Co. v. 455
Smith, &c., Ky. Flour Co. v. 237, 297
Smith, L. & N. R. R. Co. v ... 814
Smith, McMeekin v ... 732
Smith's Ex'tx, &c. v. McMillan, &c ... 433
Smith v. Owenton, &c., Turnpike Co ... 924
Smith v. Perkins, &c ... 399
Smith, &c., v. Smith, &c ... 369
Snadon, &c., Watkins' Ex'ors v ... 490
Snyder, &c. v. Fidelity Trust & Safety Vault Co ... 615
Somerset, City of, Commonwealth v ... 238
South Cov. & Cin. Street Ry. Co., Cov. & Cin. Bridge Co. v ... 52
South Cov. & Cin. Street Ry. Co., Taylor's Adm'r v ... 355
Sparks, L. & N. R. R. Co. v ... 398
Sparks, &c., Maysville & B. S. R. R. Co. v ... 671
Speed v. Carpenter ... 271
Speed, Clemens v ... 625
Spreen v. Ruth, &c ... 154
Spurlock v. Commonwealth ... 605
Spurrier, &c., Vanmeter, &c. v ... 85
Squires, &c., Proctor v ... 271
Stakhouse, Cincinnati R. R., &c., Co. v ... 926
Stamper v. Commonwealth ... 325
Stapp, Henderson Belt Railway Co. v ... 111
Steele v. City of Louisville ... 170
Steel, Sebastian v ... 311
Stephens, Caldwell v ... 894
Stephens, Trustee, L., St. L. & T Ry. Co. v ... 919
Stephens v. Rice, &c ... 669
Stevens, &c., Central Passenger Ry. Co. v ... 803
Stickley, &c. v. Chesapeake & Ohio R. R. Co ... 417
Stembridge v. Britschu ... 408
Steinberger, &c. v. Gowdy ... 88
Stinsey, &c. v. Bourne, &c ... 398
Stockhoff & DeWitt v. Brannin, &c ... 717
Stone, &c., Kentucky Nat. Bank, &c. v ... 645
Stone v. Mattingly ... 113
Stout, Commonwealth, For Use of, &c. v ... 576
Stout, Evansville Grain Co. v ... 927
Straus, Crow, &c. v ... 206
Stroud v. Commonwealth ... 179
Stovall v. Stovall's Adm'r ... 668
Strauss, Pritz & Co., Scott, &c. v. 892
Straus & Frank v. Head, &c ... 740
Sturrier, &c., Vanmeter, &c. v ... 684
Supreme Lodge K. and L. of H. v. Owens, &c ... 199
Swartz v. McMahon ... 301
Swearingen's Ex'tx v. Nash, &c. 735
Swift Iron & Steel Works, Jordon, Surv. Part., &c. v ... 194
Smyser, &c. v. Hendrick ... 47
Smyser, &c. v. School ... 47
Taylor's Adm'r v. South Cov. & Cin. Street Ry. Co ... 355
Taylor v. Taylor, &c ... 379
Taylor v. Watts ... 451
Temple, Marquis v ... 768
Tennill, Atkinson v ... 922
Terhune, Jones & Denton v ... 895
Terrell v. Town of Bloomfield, &c. 577, 614
The Barbour Asphalt Co., Kelley, By, &c. v ... 356
The L. Dodge Lumber Co. v. Macquithy ... 142
The Wayne-Ratterman Co., &c., Lebus, &c. v ... 794

Digitized by Google

Page.
Thixton, &c., Hill v 900
Thomas v. Commonwealth... 288, 334
Thompson, L. & N. R. R. Co. v.. 815
Thompson, Superintendent, &c. v. Bradley 767
Thomson, &c., Mutual Life Ins. Co. of New York v 800
Thurman, &c., Kimball, &c. v... 718
Tice v. City of Mayfield, &c 370
Tilford v. Forsythe 335
Tillman v. Otter 586
Tinsley, Sheriff, &c., Brown v ... 745
Tinsley, &c., Goodin v 107
Tobermes v. Beiser, &c 440
Townes, Trustee Jury Fund, Greenville, Trustees town of v.. 582
Traders Deposit Bank v. Chiles, Thompson & Co. 617
Traders Deposit Bank, Lane, &c v 873
Travis, &c., Bohannon, &c. v.... 912
Trice v. Commonwealth 272
Trimble v. Puckett, &c 209
Traux v. Commonwealth..... 207, 249
Trustee Common School District, &c., Cromwell v. 170
Trustee School District, L. & N. R. R. Co. v.. 863
Trustees Laurel County Seminary, Laurel County Court v 412
Tunnell's Mill, &c., Turnpike Road Co. v. Sleeman..... 174
Turner's Adm'r, Fain, &c. v. 478
Turner and Wife v. Moberly's Adm'r 628
Turner's Ex'ors, Guthrie v ... 336
Turner, &c., Ky. Mutual Security Fund Co. v 257, 461
Turner, Robinson, &c. v 79
Tydings, &c. v. Rogers, &c..... 142
Tye, Jones v 448
Tyler v. Onts, &c 321
Tyler v. Tyler, &c. 149
Ulrich, Covington, City of v 502
Underwood v. Wood, &c 129
Union Manufacturing Co., Parks v. 206
Upton v. Commonwealth 165
Utley v. Sisk 335
Vancleave, &c., Brown, &c. v.... 821
Vanmeter, &c. v. Spurrier, &c .. 102, 684
Varble, Jr. v. Phillips 383
Vincent, &c., Prater v 140
Vinson v. Gentry..... 804
Vissman v. Bryant, &c 874
Wadlington v. N. N. & M. V. R. R. Co 539
Wagner, Ass'ee, Chemical Nat'l Bank of N. Y. v. 510
Wagner, Ass'ee, First Nat'l Bank of N. Y. v 510
Wagner, Ass'ee, &c., Harper's Trustee v 721
Wagner, Ass'ee, &c., Lloyd, Trustee, &c. v 721
Wainscott, Delph & Son v 304
Walden, Haycroft v 892
Walker, &c., Gentry v 501
Walker, N. N. & M. V. Co. v..... 175
Walker v. Northern Bank of Kentucky 57
Walker, Willging v 144
Walker, &c. v. Yowell's Adm'r, &c 829
Walkup v. Commonwealth..... 337
Walters v. Richardson 410
Walton, &c., Bradbury v 823
Walton v. City of Louisville 170
Ward v. Rhodes 80
Ware, &c. v. Bryant, Sr.'s Adm'r, &c 852
Warren Deposit Bank v. Buckhannan, &c.. 205
Walters' Ex'ors, Herndon v..... 667
Watkins' Ex'ors v. Snadon, &c .. 490
Watson's Adm'r, Ohio Valley Ry. Co. v. 611
Watson, Williams v 786
Watts, Taylor v 451
Watts v. Wilson, &c..... 463
Wayland, &c., Hartford Life & Annuity Ins. Co. v.. 243
Weigelman v. Bronger 576
Weinhart, &c., Dudley, &c. v 434
Weir v. O. & M. R. R. Co..... 875
Weir, Weir & Walker, Owensboro, City of v 710
Wells, Adm'r, Buckler's Adm'r v. 78
West, &c., Carter v 191
West v. Commonwealth..... 217
Whipple, &c. v Earick, &c..... 85
Whitaker v. Cornett..... 871
Wigginton, Brannin, Trustee, &c. v..... 720
Wilcox's Ex'or, &c., Craig v..... 908
Wilcox, Wood & Co. v..... 574
Williams, Blackburn v 109
Williams v. Cooper, &c 284
Williams, &c., McGoodwin, &c. v. 204
Williams v. Williams 744
Williams v. Watson 786
Williamson, Huffman v..... 657
Willging v. Walker 144
Wilson v. Brown, &c..... 240
Wilson v. Campbell, &c..... 512
Wilson's Ex'tx, Davis, &c. v 301
Wilson, L. & N. R. R. Co. v 719
Wilson & Muir, Johnson v..... 668
Wilson & Muir, Proctor & Troutman's Ass'ee v 480
Wilson, &c , Watts v..... 463
Wilson, Receiver, &c. v. Linville, &c. 150
Winter v. Mullins, &c..... 670
Wintuska's Adm'r v. L. & N. R. R. Co 579
Wohl, &c., Matthews' Ex'tx v.... 623
Wolford v. McDowell..... 896
Wollums v. Horsley 642
Wood, Bowman v..... 926
Wood, Ex'or, &c. v. Devers, &c .. 81
Wood v. O'Nan..... 863
Wood, &c., Underwood v 129
Wood & Co. v. Wilcox..... 574
Woods, Droege v..... 431

Digitized by Google

Page.
Woods, Maysville & Big Sandy R. R. Co. v. 624
Woodson v. Commonwealth..... 797
Woody, Brook & Gregory v 141
Wren's Adm'r v. St. L. &. T. Ry. Co..... 324
Wright v. C., N. O. & T. P. Ry. Co 788

Page.
Yadon, &c., Brook v..... 863
Yancey, &c., Roberts v 42
York, Ass'ee v. Ferrell, &c..... 207
Young, Runner v 828
Yowell's Adm'r, &c., Walker, &c. v..... 829
Zell, Meyer, &c. v..... 816
Zinn, &c., Levis & Broxholm v .. 867

Digitized by Google

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. JULY 1, 1892. No. 1

KENTUCKY COURT OF APPEALS.

THE NORTHERN BANK OF KY. AND OTHERS V. HUNT'S HEIRS, &C.

(*Filed March* 24, 1892.)

1. *A warning order* is not that character of "process" embraced by section 5, article 4 of Constitution of 1849, which requires the style of all process to be "The Commonwealth of Kentucky."

2. *A warning order* may be made by the court on its order book, and, when entered there, is as effectual as if made by the clerk.

3. *Mode of issuing attachments—Conclusiveness of long-continued usage*—Where a particular manner of issuing attachments or other process has been for many years sanctioned by the courts, and title to real and personal property for many years has passed under judicial sales, based on such attachments, this court will regard the practice followed for so many years as the proper one and the question as settled.

4. *Orders of attachment endorsed on a summons* are to be regarded as a part of the summons, and since the summons runs in the name of "The Commonwealth of Kentucky," so does the order of attachment, although the summons and the attachment are each signed by the clerk issuing them and are on opposite sides of a paper.

C. B. Seymour, Brown, Humphrey & Davie and James S. Pirtle for appellants.

H. S. Barker and A. Duvall for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

In the year 1861 Thomas H. Hunt and Richard Curd were merchants in the city of Louisville, under the firm name of Thomas H. Hunt & Co. The partnership had been formed prior to that time. In the conduct of their business they drew bills of exchange on

Digitized by Google

planters in the Southern States that were accepted and then discounted by the firm with the Northern Bank of Kentucky.

The bills were presented at maturity and protested for non-payment.

Before the maturity of the paper Thomas H. Hunt, one of the members of the firm, went into the Confederate army and when the war terminated took up his residence in New Orleans, where he lived until his death. The other partner, Richard Curd, left the State and made his domicile in Liverpool, England, where he lived until his death.

After the paper matured the bank proceeded to make the firm liable as indorsers of the paper by a proceeding in the Louisville Chancery Court, obtaining attachments that were levied on the real estate in controversy and sold as the property of the firm in satisfaction of these debts. The bank purchased the property in the year 1863 at the sale ordered by the court by virtue of the attachments. The sale was confirmed and a deed made divesting the partners of all title if the sale was valid.

In the year 1883 Thomas H. Hunt instituted the present action in the court below in which it is contended that the attachment was void and, therefore, the sale under it passed no title. Hunt having died the action was revived in the name of his heirs and Curd being dead his heirs were also made parties.

The title to the real estate levied on was in Richard Curd, as appeared of record, but the facts show that it was partnership property, purchased with partnership means and for partnership purposes. The bank sold this realty after its purchase to its co-appellants or their vendors, and they, relying on the bank's warranty of title, brought the latter before the court in order that the latter might be held responsible on its warranty in the event the title proved defective.

It is plain that neither the heirs nor devisees of Hunt & Curd would have any interest in this realty until the payment of the debts due by the firm if no proceeding had been instituted by the bank. The title would pass to them at law, subject to the lien of the creditors through the partners for the payment of the partnership debts. No innocent purchaser has intervened and the only question presented or necessary to be considered is, was the attachment valid? The appellees insist that the attachments were void. There were in fact two attachments, there being two suits, one of the actions against T. H. Hunt and R. A. Curd and the other against Thomas H. Hunt & Co. The summons or process in each case was in the usual form, signed by the clerk and upon each process was indorsed the order of attachment. Warning orders were properly made, but no personal service had as both of the partners were then out of the State.

The process in each case commanding the parties to appear and answer is in the name of the *Commonwealth of Kentucky*, but the order of attachment indorsed on the back of the summons, unless it relates to the summons and is a part of it, does not run in the name of the *Commonwealth of Kentucky*, but reads "the marshal is directed to attach and safely keep the property of the defendant, Thomas H. Hunt & Co., not exempt from execution, sufficient to satisfy plaintiff's claim, amounting," &c.

The summons upon which this attachment is indorsed reads: "The Commonwealth of Kentucky, to the marshal of the Louisville Chancery Court, greeting: We command you to summon Thos. H. Hunt and R. A. Curd to answer a petition exhibited against

Digitized by Google

them in our Louisville Chancery Court by the Northern Bank of Kentucky, 17,954, and warn them," &c.

The proper affidavits were made and bonds executed in obtaining the attachments, warning orders made on the records of the court, attorneys appointed to correspond and report filed, &c.

The proceedings were all regular and we perceive no reason why the firm was not divested of all title—it was the property of the firm that was sold and for a firm indebtedness.

It appears from the pleadings and the testimony in the case that the manner of issuing the attachments in this case was in pursuance of a practice sanctioned by the Louisville Chancery Court at the time and for years prior to the date at which this original process issued, and if this proceeding is now to be regarded as void and the indorsement on the summons as forming no part of the writ, the title to all property, real and personal, acquired under such sales would be questioned, and the mischief resulting from such a precedent could not well be estimated. Nor would such a decision affect alone the proceedings in the Louisville Chancery Court as we are aware that a like practice was followed in many of the judicial districts of the State, and when followed for so long a time and recognized by the profession as the proper mode of proceeding this court and every other should regard the question as closed.

The construction given this mode of proceeding makes the indorsement on the summons a part of it, and as the summons runs in the name of the Commonwealth so does the order of attachment. If the attachment had followed the summons with but the one signature of the clerk, it is then evident that no objection could be made to it; but as the clerk has affixed his signature first to the summons and then to the order of attachment it is contended that the one is divorced from the other and for that reason the attachment is void. It is not only reasonable but a fair interpretation of the Code under which the proceedings were conducted, holding that the entire summons must be regarded as one, that which appears on its face as well as the indorsement upon it.

In the case of the United States v. Bank of North Carolina, 6 Peters, 29, in discussing a question somewhat similar to the one before us, the court, in alluding to the interpretation given the terms of an act, said: "A practice so long and so general would itself provide strong grounds for a liberal construction and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if susceptible of some doubt, so long an acquiescence in it would justify in yielding to it as a safe and reasonable exposition."

The case of Yeager v. Groves, 78 Ky., 278, is not decisive of this case. There it was insisted the attachment was indorsed on the summons but this court responded by saying that fact did not appear from the record, but an attachment alone signed by the clerk without any command from the sovereign, and for that reason the attachment was held to be void. The language of the opinion may have authorized the inference that if the indorsement had appeared on the summons the attachment would, nevertheless, have been held invalid, still the question was reserved and we have no hesitation in adjudging that the summons, with the indorsement upon it, should be regarded as the command of the sovereign to summon the defendants and to attach their estate.

In construing any paper with a view of ascertaining its meaning the whole must be considered, and whether written on the one side or

Digitized by Google

on both, if pertaining to the same matter, it must be regarded as one instrument, and the fact that the obligation may bind one party to perform more than one act in consideration of what has been done by the other party can make no difference, it is still but one agreement. In commercial paper that which is on the back as well as the face of the paper must be regarded as a part of it, and so of all contracts where the indorsement pertains to the same matter and is properly indorsed.

In Jones v. Overstreet, 4 Monroe, 547, this court said: "It may be stated as an axiom in the municipal law of our country that a memorandum at the foot or on the back of a deed, bond, judgment or execution, if made by competent authority, may enlarge, restrain, alter and qualify the signification and effect of the body of the writing. A memorandum at the foot of a judgment that it is to be discharged by a smaller sum or to have a credit, one indorsement of a deed or bond, varying or qualifying the terms in favor of the one party or the other (if properly evidenced), an indorsement on an execution that no security of any kind is to be taken, &c., are all of legal efficiency."

In Nichols v. Taylor, 6 Monroe, 326, an execution was issued by the justice on a replevin bond and was indorsed "no security can be taken. The justice signed the indorsement but failed to sign the execution proper. This court held that it would have been more accurate to have signed the execution in the usual way, but that it had been often held that indorsements, when made by the officer issuing the execution, form a part of it, and as the name of the justice immediately followed the indorsement it must, to every essential purpose, be understood to be a signing by him and giving to the execution the same force and effect that the most formal signing could do."

As [illegible] by counsel for the appellants, if the clerk had written the entire summons and attachments, beginning in the name of the Commonwealth, commanding the officer to perform the two acts on the same side of the paper and then affixed his signature but once, could it be contended that the command to summon and to attach only applied to summoning the parties and not to the attachment? We think not, in fact the rule is both proper and reasonable, and this court would not think of disturbing the title to property acquired time after time under this practice upon such a technical ground.

The fact that one of the summons is against Thomas H. Hunt & Co. can make no difference. Thomas H. Hunt was a defendant in the petition and the summons was not void on that ground.

The Code of Practice of 1854 authorized the court to have the warning order entered. This was done and signed by the chancellor. Newcomb v. Newcomb, 13 Bush, —.

Nor are we to be understood as deciding that an order of warning should run in the name of the Commonwealth, but, on the contrary, it is not that character of process embraced by section 5 of article 4 of the State Constitution under which the style of all process shall be the *Commonwealth of Kentucky*. It is more in the nature of a rule. The proceeding is itself *ex parte* and the clerk in his ministerial capacity may hear proof as to the non-residence of the defendant and then make an order of warning, and while there is no provision in the present Code empowering the court to make the warning order it necessarily follows that, having jurisdiction of the subject-matter and control of the clerk in the discharge of his duties, the latter may be directed to enter an order of warning on the order

Digitized by Google

book, and when made it becomes as effectual as if made by the clerk in vacation.

There is no command to any officer to execute this order, but it stands executed where an attorney is appointed to correspond and a judgment *in rem* will be rendered, the facts authorizing it, if the defendant fails to answer within the time prescribed by the Code. A process is a writ or summons issued in the course of judicial proceedings, and the warning to the non-resident is simply on order made by the clerk in vacation or during the term of the court, and is not deemed a process in the meaning of the Code or of the constitutional provision referred to.

The court erred in holding the attachment to be invalid, and the judgment is reversed, with directions to dismiss the petition.

McCRAE, &C. V. GUNTER'S EX'ORS, &C.

(*Filed March* 24, 1892—*Not to be reported.*)

1. *Recovery of usury*—The surety on a note, which was secured by a mortgage, at the request of the principal paid it, with its accrued usurious interest, and took a mortgage from the principal to indemnify him. In a suit by the surety to foreclose the mortgage, his debt will not, at the instance of junior mortgagees, be purged of the usury he paid to the bank, although the principal's right to recover such usury from the bank may be barred by limitation, and although the bank may have compelled the surety to pay the note to prevent the defense of usury being interposed against it.

2. *Same*—A debtor owed a bank a note and usurious interest. R. loaned the debtor money to pay the debt and interest and took a mortgage on the debtor's property to secure the loan. In a foreclosure of the m[illegible]'s debt will not, at the intervention of junior mortgagees, be purg[illegible] the usury paid the bank, although R. was interested in the bank, and the bank agreed with R. that if he needed the money they would take up the notes executed to him by the debtor.

3. *Pleadings—Interrogatories*—A party is not required to make any response to interrogatories embodied in his adversary's pleading, except where the interrogatories are appended to the pleading in the manner provided by the Code.

4. *Usury—Contract for indulgence on debt*—Certain purchase money notes, secured by a vendor's lien on land, being due, the obligors agreed to pay 10 per cent. interest thereon, if indulgence was granted them by the holder; the notes bore 6 per cent. on their face and a written contract at that time to pay 10 per cent. was lawful. The indulgence was granted and the extra 4 per cent. interest paid and the balance of the payments on the note entered as a credit thereon. *Held*—That the contract to pay 10 per cent. was valid, although there was no definite time for which the indulgence was to be granted; and after the execution of such contract by granting indulgence, the holder will not be charged with the additional 4 per cent. as usury.

5. *Interest for one year included in face of note*—The mere fact that one year's interest in a note bearing 10 per cent., at a time that rate was lawful, was included in the face of the note, and at the end of the year became a part of the interest-bearing principal, does not render the accrued interest usurious or compound.

6. *Interest—Repeal of statutes*—The repeal of the statute making 10 per cent. the lawful rate of interest in certain cases, did not reduce the rate of interest that debts previously incurred were drawing to 6 per cent.

Henry J. Stites and Jno. W. McPherson for appellants.

Petrie & Downer for appellees.

Digitized by Google

Appeal from Christian Circuit Court.

Opinion of the court by Judge Pryor.

John C. Whitlock, during his life and at the date of his death, owned a large quantity of real estate that was encumbered by mortgages and liens exceeding its value, and his entire estate not sufficient to discharge his indebtedness. He died in the month of November of the year 1886, and his widow, Maria Whitlock, administered upon his estate. Prior to his death actions had been instituted by his creditors, asserting their various liens, and this controversy, or one or more branches of it, consists in the attempt on the part of the junior mortgagees to have certain credits placed upon the claims of the senior mortgagees, and to purge those claims of usury.

The decedent had administered upon the estate of John McCrae, who died leaving children and whose estate passed into his hands, that was never accounted for, amounting to many thousand dollars. For the purpose of securing this estate he executed the junior mortgages upon his realty and they are resisting the claims of the prior mortgagees by seeking various legal and equitable set offs, and having failed below are now prosecuting this appeal.

This is a voluminous record and presents various branches, with no connection between them except the position of each mortgagee on the same realty and, therefore, each case will be separately considered.

The action from which all the questions originated was instituted by I. F. Foard in the Christian Circuit Court in the year 1886. As the surety of Whitlock he had paid to the Planters' Bank a note of $3,500 that was secured by two mortgages, one executed in the year 1880 and the other in the year 1885. Foard, at the instance of Whitlock, had assumed the payment of this note to the bank by the execution of his own note, and when he filed his petition to foreclose all the other mortgagees were made defendants, except the appellants, their mortgage having been executed after the *lis pendens* created by Foard's suit.

Whitlock, after these actions by the mortgagees to foreclose (the defendants having filed cross-petitions) had been instituted, obtained indulgence so as to give him an opportunity to sell his land at private sale, and no judgment was taken against him. He died before any sale was made or judgment rendered, and the action having been revived, the appellants intervened by filing their petition and were made parties.

The note executed to the Planters' Bank had upon it the names of Jenkins & Foard as sureties and was renewed from time to time, the rate of interest being in excess of that authorized by law. After several renewals the name of McPherson was added to the note as one of the sureties and there were several renewals, from time to time after his name was added to the paper; Foard being about to remove to Clarksville and the first mortgage being regarded as not sufficient indemnity by reason of prior liens on the property, Whitlock agreed to give this second mortgage, executed in the year 1885. Foard agreed with Whitlock to pay off the note to the bank upon which he was surety, and this he did by executing his own note and taking up the original note of Whitlock to the bank and finally paid off his note to the bank, about which there is no dispute.

The only testimony in the case on this question is that of Foard, who swears that he never received a cent of money from Whitlock and that the arrangement with the bank and Whitlock was a *bona*

Digitized by Google

fide transaction, and the bank was in no manner interested in the controversy.

Whitlock lived more than six months after this suit by Foard had been instituted and set up no defense to the action, nor has his administratrix sought to recover this usury from the bank, but the junior mortgagees, who are the appellants, are seeking to make Foard responsible for usury that he paid at the instance of his principal, and when the administratrix of Whitlock or those paying the usury had a clear remedy against the bank; and if barred by the statute it is their fault and not that of the surety who derived no benefit whatever from the transaction. It is said, however, that the other sureties knew nothing of this arrangement with Foard by which he was to pay this debt off, and had executed as an indemnity that second mortgage; that the bank, when it obtained McPherson's name to the paper, was doing so with a view of merging the original debt so as to avoid the defense of usury.

In answer to this it is said that Foard was the only responsible party on the paper and that it was self-preservation that prompted him to resort to this additional security. The bank may have anticipated that such a defense as usury would be made and to prevent it may have concluded to compel Foard to take up this paper, but if such was the fact it will not authorize the presumption that the debt was at last owing the bank and that Foard was the mere nominal debtor on his paper, but was in fact liable by reason of the original obligation.

In order to arrive at such a conclusion the chancellor must assume that that the history of this transaction as given by both Trice and Foard is false, and they have each perjured themselves in order to save the amount of usury contained in the original transaction.

It is admitted that usury was paid. There is no evasion in that particular, but the effort is to make the surety responsible for the usury upon a speculative supposition that the transaction might have occured in a different way than that sworn to by the defendants. We perceive no circumstance authorizing such a conclusion, and if a presumption has to be indulged on the facts of this case it should be in favor of the surety who has received no benefit whatever from the transaction.

The judgment as to Foard was proper and the recovery being barred by limitation as to the bank, affords no reason for making him responsible.

As to the claim against Rodman and Trice we find no proof whatever to sustain the claim of the appellants. That Rodman had money to loan and did in fact loan to Whitlock on the 13th of June, in the year 1885, the sum of $12,000, evidenced by these promissory notes, and to secure which he executed to Rodman a mortgage on his Newstead farm. The admistratrix of Whitlock is asserting no claim in this case, but the appellants, who are the junior mortgagees, are insisting that there is usury in the Rodman debt, and that it is really a debt owing by Whitlock's estate to Trice & Co. and not to Rodman.

Now if this claim of the appellants is sustained by the proof the debt should be purged of usury. It appears that the debt had been owing Trice & Company or the bank for near five years and that they induced Rodman to pay the debt. The bank, or Trice & Co., loaned this money to Whitlock to enable him to pay a debt to one Gunter of $12,000, upon which he was paying Gunter interest at the rate of ten per cent.

The bank took an absolute deed to the land to secure the payment

Digitized by Google

of the money, but gave a writing to the effect that it was intended as a mortgage, and that it was intended as a mortgage is conceded by all parties.

Rodman and Trice both swear that it was Rodman's money. The latter swearing that he loaned every dollar to Whitlock the notes represent; that the notes are his and no one else has any interest in them. Now if Rodman did advance this money out of his own means and Trice has no interest in them, in what way can he be made liable? The party receiving the usury is alone responsible, but the endeavor is to make third parties liable, for the reason, doubtless, that time bars the recovery as against the original creditors. It is argued, however, that Rodman was interested in the bank and that Trice agreed with him when he loaned this money to Whitlock that if he should thereafter need the money he would take in the notes. We do not see how this affects the statements of both Trice and Rodman, unless such circumstances are deemed sufficient to authorize this court to say *they* have sworn falsely, and such facts afford no foundation for this conclusion. The trouble in this case is, as in the case of Foard, time has barred the recovery as against those who received the usury, and others are sought to be made liable.

The decedent, in his life-time, and his administratrix after him, might have recovered from holders of these original claims, but we see no reason for questioning the veracity of these litigants by reason of any fact or circumstance relied on by the appellants for disregarding their statements.

In the reply of the appellants to the answers of Rodman and Trice they are called on to state if there was not a writing between them in regard to this matter. To this reply no rejoinder was made and it is insisted that the pleading must be taken as confessed.

There is no rule of pleading that would require any response to such an interrogatory. The appellees had made full answers to the petition of appellants, and if they proposed to make them witnesses it could be done by examining them in open court or taking their depositions, or by appending interrogations to the reply as provided by the Code. The litigant is not bound to answer these interrogatories embodied in the petition as was held by this court in Bennett v. Miller, 18 B. M., 68. Nor can the creditor recover usury of Trice, because the administrator must be the party plaintiff. Trice is presenting no claim against the estate, and if the usury was not bound the real plaintiff should be the personal representative of Whitlock and not his creditor.

We will next consider the claim of the appellants against Thomas M. Gunter or his estate. The decedent owed Gunter three large claims, one was a lien on land for the purchase money, and the remaining debts secured by mortgages.

A man by the name of Lovian owed Gunter a large sum secured by mortgage. The mortgage was foreclosed and the land sold and purchased by one Carter, with Whitlock & Foard his sureties on the sale bonds. After the sale, by some arrangement between the parties, Whitlock became the sole owner or purchaser and assumed to pay the purchase money. The purchase money notes were bearing 6 per cent. interest.

In June, 1875, the parties, Carter and Whitlock, wanting indulgence on the purchase money notes, entered into a written agreement by which, in consideration of this indulgence, they were to pay to Gunter 10 per cent. interest from that date. After Whitlock had become the owner he made payments on this land, and this

Digitized by Google

extra 4 per cent. not being a lien on the land it was agreed that the payments should first discharge the 4 per cent. and then apply the balance as a credit on the purchase money notes. This agreement is fully established and the payments applied as agreed on. It is said, however, that as the writing was for no definite time as to indulgence it is void or without consideration.

No time for extension was mentioned in the writing but the indulgence was given and payments made under the agreement and, therefore, it was proper to apply the payments in the manner agreed on. The writing was executed when 10 per cent. was lawful and the contract certainly binding after indulgence had been given and payments made by virtue of it.

Another claim of Gunter against Whitlock is evidenced by note for $13,200, payable twelve months after date, with interest at the rate of 10 per cent. until paid. The note is dated in June, 1875, when 10 per cent. was lawful interest and embodied in the writing. The interest for twelve months was added to, and embraced in, the note, and it is plain that if not then paid the interest became principal and such was the intention of the parties. It was not compounding the interest because the parties, at the expiration of the year, made it a part of the principal, bearing interest from that date. It is insisted, however, that the repeal of the 10 per cent. law remanded the parties back to the legal rate of interest as it existed after the repeal.

We have been referred to no authority by counsel on this legal proposition and think it manifest that if such a result had been sanctioned by direct legislation it would have been in violation of both the State and Federal Constitutions.

The next question arises from a note of $3,918.75 executed by Whitlock to Gunter. The execution of the note is not denied, but it is contended that no trace can be found as to the disposition Whitlock made of the money, and it appearing from the memorandum book of Gunter that about that time he loaned Whitlock $3,000, the note in controversy should be reduced to that sum. This evidence will not authorize such a deduction. Whitlock was a man of intelligence and the note being presented, with his signature to it, leaves no room to question the liability upon the facts offered by the defense.

In regard to the note for $187.30 the whole matter was adjusted during the life of Whitlock. The claim is not presented and no defense made by Whitlock during his life, when the matter was litigated and determined, and now it is apparent these mortgagees have no right to open up that litigation that the claim may be purged of usury.

As to the payment of $600 by Howell to Gunter for Whitlock and for which it is contended no credit was ever given, we have this to say: The claim originated before Whitlock became heavily involved in debt and before this large indebtedness to Gunter existed, and with the many subsequent transactions between Whitlock and Gunter, both of whom are now dead, and the weight of debt upon Whitlock, with efforts to pay his creditors and relieve himself of pecuniary embarrassment, we think it evident this money was accounted for.

The chancellor's judgment in this case we must approve, and in its careful consideration the fact is developed that those liable for usury have been released by lapse of time and others sought to be made liable solely by reason of their business intercourse with the original parties to the transactions.

Digitized by Google

Whitlock, as the proof shows, was a liberal and just man, but a bad purchaser, and his readiness to pay exorbitant interest with the hope of retaining his losses resulted in his financial wreck.

Some other matters of minor importance, involving questions of fact alone, we have not considered. The chancellor knew the parties, examined no doubt the entire record, as we have attempted to do, disposing of such questions as were necessary to be considered.

Judgment affirmed.

ANGEL V. COMMONWEALTH.

(*Filed March* 26, 1892—*Not to be reported.*)

1. *Criminal law—Instructions*—On the trial of appellant for malicious shooting and wounding, the trial court properly refused to give any instruction concerning shooting in sudden heat and passion, because the evidence did not in any degree conduce to show that the shooting was so done. Nor was there any evidence to show that accused was acting as a special bailiff at the time of the shooting.

2. *Same—Indictments*—It is well settled that an indictment may in one count charge that two persons did such shooting, and then in separate counts that each of them committed the offense, and that the other aided and abetted.

J. J. C. Back for appellant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was tried and convicted of the crime of malicious shooting and wounding Wm. Cornett, and his punishment was fixed at confinement in the penitentiary for the term of three years. The uncontradicted evidence is, the appellant pursued Wm. Cornett, armed with a shot-gun and shot him with it; that Cornett tried to get out of the appellant's way and was begging the appellant not to shoot him at the time he was shot; that he was not then making, nor had he at any time theretofore made, any hostile demonstrations towards the appellant; that three days before the shooting the appellant pointed his gun at Cornett.

The only excuse that appellant offered was, that some one had told him that Cornett had obtained property by false pretenses, and a justice of the peace had appointed him special bailiff to arrest Cornett, and had placed a warrant for his arrest in his hands, which he had lost.

But the proof is uncontradicted that Cornett was expelled by the direction of the appellant from a trading boat and shot without any excuse or cause, and without as much as informing him that he had a warrant for his arrest, and he, at the time, was begging for his life. The court did right in disregarding the evidence about the warrant, &c. The court also did right in not instructing the jury as to sudden heat and passion, because there was no evidence before the jury from which they would have been authorized to believe the shooting was done in sudden heat and passion.

The indictment charges that the appellant and two others did the

Digitized by Google

shooting, and then, in separate counts, it charges that each one of them did the shooting, and in still other counts it charges each aided and abetted the other. It has been often decided by this court that such practice is allowable.

The judgment is affirmed.

SHACKELFORD V. HAMILTON.

(*Filed March* 26, 1892.)

Breach of contract of marriage—In an action by a woman to recover damages for a breach of contract to marry, the answer presents a good defense, which avers that after the promise and before the breach of the contract the defendant discovered that he was afflicted with a loathsome and contagious disease and was, therefore, incapable of marriage, it appearing from the averments that the defendant made the promise without any knowledge that he was afflicted with the disease and did not contract it after the promise.

Wm. Lindsay, Wadsworth & Son and Cochran & Son for appellant.

E. L. Worthington, L. W. Robertson, M. C. Hutchins, G. S. Wall and Emory Whitaker for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

Lena Hamilton, the plaintiff below and the appellee in this court, instituted the present action in the Mason Circuit, in which she seeks to recover damages for the violation of the promise on the part of the appellant to marry her, in pursuance of an agreement to that effect, entered into in the month of December of the year 1887, by the terms of which they were to marry in the fall of 1888; that subsequently, and by mutual consent, the marriage was postponed until the spring of 1889. No day was designated for the consummation of the contract, but it is alleged that in the month of April, 1889, the defendant, against the consent of the plaintiff, announced to her that he would not perform his contract at any time or place; that the plaintiff was willing and ready to perform her contract at any time or place the defendant might designate, and offered to do so, of which fact the defendant had notice; that he failed and refused to execute his contract of marriage with her, and still refuses.

On the 19th of April, 1889, the plaintiff had served on the defendant the following notice:

"*Mr. James Shackelford:*

"You are hereby notified that I am ready and willing to perform our contract of marriage, and to become your wife at any time and place you may designate, and am now ready and propose to fix a time and place at which our engagement of marriage may be consummated. Very respectfully,

"LENA HAMILTON."

An answer was filed by the defendant, admitting the existence of the marriage contract and his failure to consummate it, and presents in his answer the following defense, to which a demurrer was sustained, and the question here is: Was that defense a bar to the recovery, as on the demurrer the facts alleged stand admitted?

Digitized by Google

The defendant says that at the time he made the contract to marry the plaintiff he believed himself to be in good and sound health and knew of no impediment to its consummation; that long prior to any contract of marriage with the plaintiff he contracted a loathsome disease, called syphilis, and was treated for it by skilled physicians until he was pronounced cured and free from the malady; that this was long before he made the acquaintance of plaintiff; that he consulted two reputable physicians, and one of whom made a thorough examination of his person, and advised him there was not the slightest evidence of the existence of the disease, and this was long before he thought of marrying the plaintiff or any one else; that his regular physician, who had treated his disease, advised him that he was cured and in a fit state to marry and could safely do so; that after this time, and with the belief in good faith that the malady no longer existed, he made the contract with the plaintiff, induced by the love and affection he had for her. He says that after the engagement to marry, and without any fault on his part, symptoms of the disease again appeared, and are now upon him, and he is advised by his physicians that he ought not to marry; that prior to the bringing of this action he made known to the plaintiff the grounds of his refusal, &c.

After sustaining the demurrer to the answer the court below permitted testimony of defendant's condition to go before the jury in mitigation of damages, and the facts alleged in his answer are all sustained by the testimony of skilled physicians, who treated him, and that good faith prompted the conduct of the defendant in refusing to marry the plaintiff. He continued to visit the plaintiff regularly, with no evidence of any diminished affection, until the return of the symptoms of this loathsome disease, that one of the physicians states is in its worst form. When the engagement was broken he said to the plaintiff that he could make no explanation of his course except to say to her, "you would not want to marry a man who would be sure death to you."

After the notice was served on him of the readiness of the appellee to fulfill her engagement, and before the action was instituted, he wrote to the plaintiff, as follows: "I engaged in good faith to marry you, and I am surely the party most aggrieved by my inability to do so. The condition of affairs has caused me more suffering than you can possibly and, doubtless, more than you have felt, but I am compelled, as an honorable man, to save you from that fate that would await you as my wife. You can but respect me the more when you know all. I can not tell you more, but I had a talk with your lawyer, Mr. Hutchins, and I refer you to him, &c. I believed myself able to marry you, but recent developments have convinced me of my mistake, and it would be a crime were I to do so. Think of me and my misfortune as kindly as you can, &c.

"Respectfully,

"JAMES SHACKELFORD."

We can well see how such a letter might be penned with a view of escaping responsibility in the way of damages, instead of being prompted by an honest conviction of right on the part of the defendant, but when his physicians testify as to facts, all of which are uncontradicted, that leave no doubt as to his good faith and of his belief that he was permanently cured long prior to his engagement with the plaintiff, the sole question arises as to the sufficiency of the answer, and we have alluded to the facts only because they stand uncontradicted and were offered in mitigation.

The court below entertaining the opinion that as the defendant

Digitized by Google

had entered into this marriage contract he is bound for its breach, although it might have been the duty of the appellant, under the circumstances, to decline to execute it, sustained the demurrer to the defense; that the contract was unconditional and the defendant being able at the time the promise was made to perform the contract, he must either execute it or become responsible in damages for the breach.

If such a contract as that of marriage is to be treated in the light of a mere bargain and exchange of chattels between parties competent to contract, then it seems to us there would be but little difficulty in sustaining the action of the court below; but if the agreement when entered into is to be treated as creating a status that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agreement, it must follow that the defense interposed to the appellee's claim for damages was, in law as well as morals, sufficient to prevent the recovery.

Where the marriage contract is consummated, the parties taking each other for better, for worse; for richer, for poorer, and agreeing to cherish each other in sickness and in health, the fact that the social standing of the one party or the other, or their pecuniary condition was not as represented, will afford no ground for relief; still, where there is a mere agreement to marry, there may be such a condition of the one party or the other as to health or other bodily infirmity, arising subsequent to the agreement, as would authorize either party to decline to enter into the marriage relation, and to hold otherwise would be to place such a contract upon the same footing with sales of mere personal chattels.

It is said by Mr. Bishop, in his work on Marriage and Divorce, that "one after marriage can not complain of an impediment known to him before; but if he were ignorant of the existence of the defect or of its incurable nature, though in himself he may take advantage of it by writ of nullity, the marriage was a mistake, the ends intended by it can not be answered." 2 Bishop, 582.

The text-books establish the doctrine that "without sexual intercourse the ends of marriage, the procreation of children and the pleasures and enjoyments of matrimony can not be attained."

"The first cause and reason of matrimony," says Agliffe, "ought to be the design of having offspring, so the second ought to be the avoiding of fornication; and the law recognizes these two as its principal ends, namely: A lawful indulgence of the passions to prevent licientiousness and the procreation of children, according to the evident design of Divine Providence." 1 Bishop Mar. and Div., 321.

It is not pretended, nor has it been so adjudged in any court, that a mere temporary disease, or such a change in the physical condition of a party to a marriage contract, after it has been entered into and without his fault, as would render him less capable of discharging duties growing out of the marital relation would be sufficient to justify its breaking; but where the party is afflicted with bodily disease to such an extent as is dangerous to the lives of those with whom he comes in contact, and such as must, if he should marry, necessarily be communicated to his wife by sexual intercourse, and through her to affect their offspring with the poison, connected with the fact that he was ignorant of the disease being upon him at the time he contracts to marry, he will be excused for the non-performance of his undertaking.

While the contract to marry is silent as to any condition, it must

Digitized by Google

be implied that any subsequent change in the physical or mental condition of either party without fault, so as to render it impossible, in the nature of things, to accomplish the objects for which the marriage relation is brought about, will release the parties from the agreement.

Impotency, insanity or such a diseased condition of the body as would affect the offspring and endanger the life of the mother, if the contract was carried out, would certainly be within this rule. Any other doctrine would require the same construction to be given the agreement to marry that is given to contracts for the sale and delivery of personal property, where the party can recover damages for the breach, although it is impossible to perform it; in other words, it is urged that the woman must have either the husband or damages in his stead, if he is able to have the marriage ceremony performed.

This is also the objection to the majority opinions rendered in the court of Queen's Bench, in the case of Hall v. Wright, 96 Eng. C. L., 745. We concur with the minority opinions in that case, that the contract of marriage is subject to implied conditions peculiar to itself. In that case the defense was, that after the promise and before the breach the defendant was afflicted with bleeding from the lungs and, by reason of the disease, became incapable of marriage without great danger to his life, and, therefore, unfit for the married state of which the plaintiff had notice.

After reviewing the authorities upon the question, Esle, justice, said: "The principle deduced from the cases seems to be, that a contract to marry is assumed in law to be made for the purpose of mutual comfort and is avoided if, by the act of God or the opposite party, the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract."

The majority opinion was rendered on the idea that the disease was not such a state of health as made it improper for the defendant to marry, and, therefore, not impossible of performance; and if a case like the one being considered had been presented, we doubt if any difference of opinion would have been expressed.

Pollock and other text writers on Contracts, in alluding to this opinion, say that it is so much against the tendency of the later cases that it is now of little or no authority beyond the point decided, but if that opinion had been *unanimous*, although entitled to great weight, we would not be inclined to follow its reasoning or concur in the conclusion reached.

The only American case we have found on this question is reported in 86 N. C., 91, Allen v. Baker, the opinion delivered by Buffin, justice. In that case the defendant refused to comply with his contract, because he was afflicted with a disease similar to the one this defendant had. The disease was contracted before the contract was entered into, but the defendant had been advised, and in fact believed, that it could be cured in time to enable him to fullfill his engagement. Acting in good faith, and from a conscientious conviction that his disease was incurable, he refused to comply with his agreement, and the court in that case said: "We can not understand how one can be liable for not fullfilling a contract, when the very performance of it would in itself amount to a great crime, not only against the individual but against society itself."

The present case is much stronger for the defense than the case cited—in the one the defendant knew the disease was upon him when he made the contract, but was advised that he would be well

Digitized by Google

in time to consummate it; while in this case the defendant believed he was well at the date of the contract, and had been so advised by his physicians long before the contract was entered into.

While it is not necessary that this court should sanction the ruling of the court upon the facts in Allen v. Baker, to adjudge that it was the duty of the defendant to marry the plaintiff, under the circumstances, and avail himself of his conjugal rights that must necessarily communicate this loathsome disease to his wife and to their offspring, or to inflict upon him punishment, by way of damages, for not executing the contract, would, as said in Allen v. Basler, be compelling him to do that which is against all law, human and divine.

It is impossible for this defendant to fullfill his contract. His disease renders him incapable of marriage without actual danger to the life of the woman he marries, by communicating to her, and through her to their offspring, a loathsome disease that is now, from the testimony in this case, gradually destroying this unfortunate man. He was guilty of an unwise wrong in contracting the disease, but at that time was under no obligation to the appellee, and it may well be asked what obligation now rests upon him? If he had complied with his agreement, and executed the contract by an actual marriage with the plaintiff on a designated day as required by her notice, would he not have inflicted upon the plaintiff an injury that no amount in damages could have repaired?

The appellant, in his interview with the appellee, made manifest to her that her life would be made miserable if the contract was carried out. He then gave to her counsel the real facts as to his condition, and referred the plaintiff to him. That the plaintiff had notice of his condition before suit was brought is manifest. His obligation to the plaintiff, by reason of the agreement with her, was to abandon at once all idea of carrying it into execution. No greater crime in law or morals could have been committed by the appellant than a performance of his agreement. The purity of our social system, the interests of the public in preserving secure the marriage relation, the protection of those whose existence may spring from such an unholy alliance, as well as the future welfare and happiness of the parties themselves, require that such a construction should be given this class of contracts, and if there was no precedent for the recognition of the doctrine announced, we would not hesitate to make one.

In our opinion the answer and the amendment presented a valid defense. The demurrer, therefore, should have been overruled.

The judgment is reversed and remanded, with directions to award a new trial and for proceedings consistent with this opinion.

KENDALL V. COMMONWEALTH.

(*Filed March* 31, 1892—*Not to be reported.*)

1. *Continuance—Diligence*—An affidavit for a continuance must not only show that a *subpœna* for the absent witnesses was sued out, &c., but *when* it was so sued out and placed in the hands of an officer; otherwise it does not show proper diligence.

2. *Same—Cumulative evidence*—Where proper diligence to secure the attendance of the absent witnesses is not shown, and their evidence was merely cumulative, this court, on appeal, will not decide whether the trial court should have required the Commonwealth to admit the truth of the state-

Digitized by Google

ments of the affidavit or else grant a continuance, instead of merely allowing its statements to be read as the evidence of the absent witnesses.

3. *Appeals—Instructions*—The meaning of particular words in the instruction relating to murder will not be determined on appeal when the accused was found guilty of only manslaughter by the jury.

4. *Evidence—Contradiction of accused*—The father of the deceased testified for the Commonwealth that he went to his son immediately after the killing and carried him away without saying a word. The accused in his testimony stated that the father made a certain statement at that time. The father was afterwards recalled and, by way of rebuttal, denied the statement of the accused. *Held*—That it was not error to permit the father to testify in rebuttal.

5. *Grand jury—Qualification of officer summoning*—Immediately after a grand jury had been empanelled, sworn and charged, it was learned that the sheriff, who summoned them, was not sworn before they were empanelled, &c.; thereupon the oath was administered to him, he resummoned the same grand jury and they were admonished by the court to remember the charge that had been given them. *Held*—The grand jury was a legal one and there was no ground for quashing an indictment found by them.

W. R. Haynes, W. A. Barry, H. T. Kendall and Jas. Montgomery for appellant.

Wm. J. Hendrick for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Holt.

The affidavit for a continuance does not show proper diligence. It says that a *subpœna* for the witnesses named in it was sued out and placed in the hands of the proper officer, but it does not say when this was done. It may have been but a few moments before the case was called for trial.

In addition the testimony, so far as competent, was merely cumulative, or not calculated to affect the result.

Under these circumstances we are not called upon to determine whether the court should have required an admission of its truth from the attorney for the State, or else have granted a continuance, instead of merely allowing the statements of the affidavit to be read to the jury as the testimony of the absent witnesses.

The jury were properly instructed as to the law of the murder, manslaughter, self-defense and reasonable doubt.

It certainly was not error to tell them that the accused could not be excused for the killing upon the ground merely that the deceased was passing over the appellant's premises or moving wood out of the passway for such purpose, contrary to his order and at a time when the accused had no reasonable grounds for believing he was in any danger from the deceased.

It is needless to consider the effect of the use of the word "aforethought" in the instruction as to murder, and as defined in another instruction, since the accused was only convicted of manslaughter.

The instructions asked by him, so far as they embrace the law of the case, were contained in those already given by the court.

The evidence shows that while it was probably a killing in sudden passion, yet it was without sufficient excuse.

The father of the deceased, when first introduced for the State, testified that when his son was shot he, being only a few steps away, went immediately to him and carried him away without saying a word.

Digitized by Google

The accused afterward testified that the father, at that time, said: "My poor boy! I knew it would come to this."

The father was afterward called by the State and by way of rebuttal allowed, over the appellant's objection, to state that he never said it. It is urged that this was error because he had stated upon his first examination that he said nothing.

After the accused had, in testifying for himself, detailed certain language and thus particularized it, it was not improper, however, to allow the recall of the witness, and the inquiry to be made, if he at that time made use of such an expression. If he did it was a part of the *res gestæ* and his attention was thereby particularly called to it and a fair opportunity given him to say whether it was true. Even if this were not so an inspection of the entire record shows plainly that the rejection of the testimony upon the recall of the witness would not have changed the result.

A motion was made to quash the indictment because it was not found by a legal grand jury. It appears the sheriff, who summoned them, was not sworn before they were impaneled, sworn and charged. This being at once discovered he was then sworn, and he then resummoned the same persons as the grand jury, and they were then admonished by the court to remember the charge that had been given them.

This cured the previous omission, even admitting that the question could be raised upon appeal.

Section 281 of the Criminal Code provides that the decisions of the trial court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception, and they can not, therefore, be questioned upon appeal.

This provision renders it unnecessary to consider several other complaints of the appellant.

No error appears to authorize a reversal of the judgment, and it is, therefore, affirmed.

CITIZENS NATIONAL BANK OF LOUISVILLE V. BOSWELL'S ADM'R, &C.

(*Filed March* 31, 1892.)

1. *Parties to action for settlement of testator's estate*—A bank in which a testator owned stock is not a necessary party to an action by an executor for a construction of the testator's will and distribution of his estate, although the stock in said will was bequeathed in a certain manner.

2. *Settlement of decedent's estate—Jurisdiction*—The court of the county in which the testator's executor qualified, acquires no such jurisdiction over such bank, which is not a citizen of said county, nor summoned therein, as will authorize it to order the bank to transfer the stock to a certain devisee of testator, although a suit to settle testator's estate and construe his will is pending in such court.

3. *The cause of action is transitory* which the executor has against the bank, to compel it to transfer the stock as directed by the will.

W. O. Harris for appellant.

J. D. Hunt for appellee.

Appeal from Fayette Court of Common Pleas.

Digitized by Google

Opinion of the court by Judge Bennett.

The appellee, as administrator with the will annexed of W. D. Boswell, brought suit in the Fayette Circuit Court for the purpose of having the will of W. D. Boswell construed, and for a settlement of the estate.

All the devisees and parties in interest were made parties to the suit. The court, on a final hearing, construed the will and held that Mrs. Graham, daughter of the testator, took the estate willed to her for life, remainder to her children living at the time of her death, and that the estate, thus willed, was for her sole and separate use, and that she was entitled to the exclusive control and management of the estate, and that she was entitled to dispose of any part of it absolutely, if she wished.

The court also directed that the estate be divided among the devisees, and that the administrator should cause to be transferred to Mrs. Graham as a part of her share under the will twenty-three shares of the capital stock that W. D. Boswell owned in the appellant's bank, the certificates of which should be made to her as trustee, with power of sale and transfer. The appellant, upon being called upon to transfer the stock, pursuant to the judgment, refused to transfer it with power of sale and transfer, but it was willing to transfer it as trustee. Thereupon the appellee filed an amended petition, bringing the appellant before the court for the first time, and asking that it be compelled to execute the court's judgment in regard to the transfer of the stock.

The appellant, not a citizen of Fayette county, but of Louisville, and being summoned in Jefferson county, appeared in the Fayette Circuit Court and, among other things, objected to the jurisdiction of the court, but the court deeming it had jurisdiction of the appellant adjudged that it should transfer the stock in accordance with the court's former judgment. If the court had not jurisdiction of the appellant, it is needless to notice the other defenses made by it.

The provisions of the Civil Code upon the subject of jurisdiction are as follows:

Section 428. "1. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate."

2. "The representatives of the decedent and all persons having a lien upon, or interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

Section 65. "An action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified."

Section 66. "An action for the distribution of the estate of a deceased person, or for its partition among his heirs, or for the sale, for the payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative was qualified."

Sections 428 and 65 relate to actions for the settlement of the estates of deceased persons. Section 428 provides that the representatives of the deceased person, and all persons having a lien upon his estate, or other interest therein, and his creditors, so far as known, must be made parties to the action as plaintiffs or defendants. And section 65 provides that such action must be brought in the county in which the decedent's personal representative qualified. Under section 428

Digitized by Google

none but the persons therein named are necessary parties, plaintiffs or defendants, to the action. And the appellant was neither a personal representative nor lien holder upon nor interested in the property left by the decedent, nor a creditor of his estate. Hence, the appellant was not a necessary party to the action. Section 66 relates to an action for the distribution of an estate of a deceased person, or for its partition, &c., which must be brought in the county in which the personal representative qualified.

In such action no person, other than the parties named in section 428, is a necessary party. And as the appellant was not interested in the distribution of the estate, or its partition, or as creditor, it was not a necessary party to the action for the purpose mentioned in that section.

To allow the representative of such estate to make debtors of it, or persons who are liable to it in some way, parties to such action, and obtain judgment against them, would be to give the circuit court of the county in which the personal representative qualified jurisdiction of all the debtors of the estate, or other persons supposed to be liable to it, notwithstanding the fact that they might reside in every county in the State, and compel them to attend court in a distant county to look after their rights, and to litigate differences in reference to the same.

It seems that the local jurisdiction given by the sections, *supra*, and the other sections of said article, should be confined to the parties and causes enumerated in said sections. And to allow the local jurisdiction to extend to the appellant would violate sections 78 and 79 of the same article in reference to transitory actions. The action against the appellant is transitory, and it is not localized to a particular county by reason of the fact that the representative of a dedecent's estate qualifies and brings his action in that county to settle the estate. Only the parties named in sections 428, &c., are subject to the local jurisdiction; and the appellant, not being one of those persons, sections 78 and 79 regulate the jurisdiction of the court as to it.

The judgment is reversed, &c.

L. & N. R. R. Co. v. Ricketts.

(*Filed April* 9, 1892.)

Railroads—Injury to passengers—Contributory neglect—A passenger on appellee's train, on arriving at his destination, instead of alighting from the car on the side of the track where there was a safe and well lighted platform for the use of passengers, stepped off on the other side which was dark and stumbled against an obstruction and fell, with one hand under the car, and was thereby injured. The train stopped at the station four minutes, and appellee well knew the location of the depot and platform. *Held*—That the appellant is not liable for the injury that resulted to appellee, it having performed its duty by furnishing a "safe and commodious platform," and by stopping at the station a reasonable time.

W. J. Lisle, H. W. Bruce and Wm. Lindsay for appellant.

Jas. D. Fogle, Sam J. Avritt and Mr. Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

Digitized by Google

The appellee was a passenger on the appellant's passenger train from Louisville, Ky., to Lebanon, Ky. The train arrived at Lebanon about 11 o'clock at night. The platform of the depot at Lebanon is on the left hand side of the track. There was, at one time, an old platform on the right hand side of the track at said depot, which was removed by the appellant about a year before the happening of the accident complained of, and the place was leveled off and cinders placed upon it.

The appellee, before the old platform was removed, had gotten on and off the train on the right hand side. On the occasion of the accident the appellee knew that the platform at the depot was on the left hand side of the track.

And the platform, including the usual passengerway to and from it, was well lighted by lights from the depot building and by the light from two street lamp posts, all of which the appellee was bound to know and could see for himself. The appellee's traveling companion, Mr. Gibson, got off the train at the depot, on the passenger platform, on the left hand side of the train, and went on his way, but the appellee got off on the right hand side where there was no platform and no lights.

He preferred to get off on the right hand side because it saved about eight feet distance, and his having to walk around the locomotive, or waiting until the train moved on. When he alighted from the railroad coach, it being dark, he walked on the *cinders* along with the moving train and close to it in order to see. And while thus walking he stumbled over a water box and fell, and in the fall he threw out his hands and arms and one of the wheels of the cars ran over it and the arm had to be amputated.

As said, the appellee knew that the passenger platform was on the left hand side and lighted. He also knew that there was no passenger platform on the right hand side, and that the right hand side was not lighted. It appears, however, that the appellee, who was familiar with the grounds, and others, who were familiar with it, had, sometimes, as a matter of convenience to themselves, gotten on and off the train on the right hand side. It also appears that the train stopped at the depot at least four minutes.

The court, upon the foregoing facts, at the instance of the appellee, instructed the jury in substance, as follows: That the appellant was bound to keep in a safe condition and lighted in the night all portions of their platform and approaches thereto which the public do, or would, naturally visit, and all portions of their station grounds reasonably near to the platforms, where passengers leaving the cars, or those who have purchased tickets, with a view to take passage on their cars, would naturally or ordinarily be likely to go, &c.; that it was the duty of the appellant, in stopping at stations, to give passengers a reasonable time to safely get on and off said trains and out of the way of danger before starting said trains, &c. The first of the foregoing instructions are taken verbatim from 2 Wood on Railroad Law, sections 310, 1166. But the same author, in speaking of the duty of the company in reference to its passenger depots and platforms, explains the rule thus given as follows: "But where 'the company' has a platform and other facilities for entering and loading the cars with safety on the depot side of the track, the failure to have the opposite likewise prepared as a place for entering and leaving the cars can not be regarded as negligence. It may select and adhere to such arrangement of its depots and platforms as it may see fit, if those made are safe and commodious."

The foregoing rule is so well and uniformly sustained by the au-

Digitized by Google

thorities, and is so full of practical wisdom, doing iron-handed justice, both to the company and passenger, we do not hesitate to adopt it.

Here the company's platform was on the left hand side of the track, and it was "safe and commodious" and well lighted, and the appellee, by the use of ordinary prudence, could have left the cars and depot grounds with reasonable safety had he taken the platform side, but he prefered to leave the cars by the right hand side of the track, where there was no platform and no lights, and the company not being bound to erect a platform on that side and keep it lighted in the night time, having erected a safe and commodious platform on the other side, which was well ligted, his thus leaving the cars was at his own risk and peril. His having theretofore entered and left the cars by the right hand side, and others having done the same thing, can not have the effect, under the circumstances of the case, to make it the duty of the company to have that side lighted, &c., because the appellee knew and could see that the left hand side was a safe and commodious way and designated by the company for the passengers to leave the cars, and not the right hand side. Hence, he took the right hand side at his peril.

As said, the train stopped at least four minutes, which was ample time in which to leave the car and get out of the way of the train had the appellee gotten off on the platform side and not on the dark side where his exit was retarded by being compelled to find his way in the dark, which caused the injury complained of, for which, as said, the company is not responsible.

The judgment is reversed, and the cause is remanded, with directions for further proceedings consistent with this opinion.

LOUISVILLE UDERWRITERS V. PENCE.

(*Filed April* 2, 1892.)

1. *Pleading—Amendments*—In an action on a policy of marine insurance the defendant ought not to be permitted to file, after the close of plaintiff's evidence, an amended answer averring that the policy had been cancelled before the loss at the request of the assured, where such defense, if it existed, had been known to defendant for two years and never previously pleaded, and where all the evidence of plaintiff showed the averment to be untrue.

2. *Marine insurance—Forfeiture of policy by non-payment of premium note*—A policy of marine insurance, which provides that it shall become void in case the premium note be not paid within fifteen days after maturity and demand, is not rendered void by the mere non-payment of such note within fifteen days after maturity and demand; it is merely voidable at the option of the company, and it can not wait until after a loss to exercise its option to treat the policy as absolutely void.

3. *Marine insurance—Perils insured against—Negligence of master*—Where the policy insures against the "*unavoidable* perils of sea or river," and a loss occurs through one of the ordinary perils of river, the company is liable, even though the want of judgment or skill of the master of the vessel may have contributed in some degree to the loss, if the master's conduct was not induced by fraud or design.

4. *Same—General average*—In this case the cargo was at no time in any peril, and all expenses incurred were for the benefit of the vessel; therefore, the doctrine of general average can not be applied.

5. *Same—Abandonment—Total constructive loss*—The master of the vessel,

Digitized by Google

after it was in peril, sent notice to the company of his purpose to abandon it for a total constructive loss, but retained possession of it, had it repaired and was in possession at the time of the trial. The vessel was insured for $4,000, and the master expended about $3,300 in repairs. *Held*—That the vessel was never actually abandoned by the master and he can not recover as for a total constructive loss.

Marshall & Lochre, Lincoln, Stephens & Lincoln and Brown, Humphrey & Davie for appellant.

B. F. Buckner, E. F. Trabue and Jno. L. Scott for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

This is an action upon a marine policy of insurance.

The appellant, the Louisville Underwriters, issued it to the appellee, S. V. Pence, on November 26, 1885, insuring his steamboat, the Hibernia, valued at $6,000, in the sum of $4,000 for one year. The first premium note of $120 matured on February 26, 1886, and was unpaid when, on April 14, 1886, the boat was stranded upon the Kentucky river.

It was returning to Louisville from a trip up the river with a cargo worth perhaps $9,000. Owing to a rise the river was out of its banks. The boat, upon a third effort, made a landing upon or beyond the top of the river bank to take on some freight, but stuck there. The river was falling rapidly and in a few hours the greater portion of the boat was high and dry upon the bank, while the other part was in the water. The entire cargo was removed within a few hours after the boat grounded, but it thus remained for over fifty days, although much labor was being constantly expended in the effort to get it into the river.

It did not break in two, but its timbers were bent and strained, many of them in fact broken, and when at last released it had, in its leaky condition, to be towed by other boats to a place for repairs. All this, aside from the removal of the cargo, involved an expense of about $3,300.

There is evidence tending to show that within a few hours after the boat stranded the owner, who was also at the time in charge of it as master, sent a man to the appellant's home office with the word and perhaps a letter to the effect that it was stranded and the appellant could take charge of it.

The evidence clearly shows, however, that, notwithstanding this notice, the appellee retained control of the boat, and, after having it repaired, claimed, controlled and used it as his own and, so far as appears, has done so ever since, at least he was so doing when this action was tried below in March, 1888.

It was brought for a total constructive loss and a verdict obtained for the full amount of the insurance.

The policy provides: "The perils which this company hereby assumes under this policy are the unavoidable dangers of the rivers. * * This policy shall become void * * * in case the note or other obligation given for the premium herefor be not paid within fifteen days after maturity and demand, and remain void during the time the same shall be overdue and unpaid. * * This company shall be free from all claims for loss or damage arising from or caused by * * barratry. * * There shall be no abandonment, as for a total loss, on account of said vessel grounding or being otherwise detained, or in consequence of any loss

Digitized by Google

or damage unless the injury sustained, exclusive of any general average claim, be equivalent to fifty per centum of the agreed value of this policy. * * This insurance may be terminated at any time at the request of the insured, in which case the company may retain the customary short rates and the deduction shall only be made on the whole months of unexpired time. The insurance may also at any time be terminated at the option of the company on giving five days' notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of this policy."

The company claims the policy was cancelled at the request of the assured prior to the accident. This, however, was not pleaded. At the close of the testimony the appellant proposed to do so by an amended answer, then tendered. It was properly rejected. While there was some evidence to this effect yet the decided weight of the testimony was otherwise. The action had been pending nearly two years and, if true, it must have been known to the company when it filed its answer.

Its defenses are that the policy was not in force at the time of the accident, because the first premium note was then overdue more than fifteen days and its payment had been demanded; that the accident was the result of the negligence of the master of the boat and it was a case for general average, requiring the cargo to contribute ratably to the expense or loss, whereby the underwriter would be relieved to a certain extent.

The non-payment of the premium note for fifteen days did not, *ipso facto*, render the policy void. It rested with the company whether it would so treat it. It was voidable at its option. It could elect to consider the policy in force, notwithstanding the default in payment.

If this were not so then a party desiring to annul a contract would only need to make default to accomplish his purpose, although the other party, and who would not be in fault, might elect to continue it.

In Stevenson v. Phoenix Insurance Company, 83 Ky., 7, where a policy provided if the assured should thereafter take out other insurance upon the property insured it should be void, it was held that a breach of the condition made it voidable only at the election of the insurer.

Whether the appellant had waived the payment of the premium note and the consequent forfeiture of the policy was submitted to the jury by proper instructions.

It is settled that where a policy insures against the perils of the sea or river the mere neglect of those in charge of the vessel will not free the insurer of liability.

The fact that the want of judgment or skill of the master in charge may have contributed to the loss will not preclude a recovery of the underwriter.

This is settled law in both England and this country.

If the proximate cause of the loss be a peril insured against, then it is covered by the policy, although it may have been occasioned remotely by the negligence of the master. His misconduct, unless tainted by design or fraud, will not defeat a recovery.

It was held in Insurance Company v. Sherwood, 14 Howard, 331, if the loss be occasioned by a peril of the sea the insurer is liable under a policy against the usual perils of the sea, although the master of the vessel did not use due care to avoid the peril.

If the peril was the operative cause of the loss the inquiry goes no

Digitized by Google

further, the cause of the peril will not be sought. Orient Insurance Company v. Adams, 123 U. S., 67.

In the case now before us there is no evidence showing any fraudulent conduct upon the part of the master of the boat, and even if the landing was careless or ill advised yet it can not defeat a recovery.

It is said, however, the policy in this case only insures against such dangers as are "*unavoidable*," and that this word is not to be found in the policies which were under consideration in the cases above cited.

It does not refer, however, to the duties of those in charge of the boat, but to such perils as are incident to navigation, and from their nature inseparable from it. It relates to the perils embraced by the policy and not to the skill or care to be exercised by the master of the boat. If this were not so there would have been no need of the policy providing that the insurer should not be liable in case of barratry.

If the company was not to be liable in any case where the loss might be avoided by skill and care upon the part of the master, certainly a further provision against loss, arising from fraud or evil design upon his part, was unnecessary, and the policy is to be construed most strongly against the insurer.

The use of this word in the policy did not, therefore, render the rule referred to inapplicable to this case and the jury were, in this respect, also properly instructed.

This case is not one for general average.

It has been defined to be "a loss arising out of extraordinary sacrifices made or extraordinary expenses incurred for the joint benefit of the ship and cargo."

It is founded upon the plainest principles of common justice. So much so that it was in force at least in a crude form, at an early day among commercial nations. The ancient Rhodian law furnished an example which was adopted by the Romans

The rule is that where there is a common danger to the vessel and the cargo, every thing which is saved by one continued, unremitted effort shall pay the expense in proportion to its value. For this purpose the ship is in lien to the cargo and the cargo to the ship. If the expense be incurred for the joint benefit, in case of a common peril and where there is imminent danger of all being lost, it is but natural justice and equitable that whatever is saved by the sacrifice shall contribute according to its value to the loss. "What is given for the general benefit of all shall be made good by the contribution of all."

So far has this rule been carried in this country that a portion of a cargo, saved with but little trouble but constituting by far the greater portion in value of the property in peril, has been compelled to contribute to the entire expense in proportion to its value. Thus, in Bevan v. Bank of the United States, 4 Wharton, 301, there was a large amount of specie on board. It was first taken off and, owing to its nature, with but little trouble; but it was required to contribute to the entire expense by way of general average. This case has, however, owing to its particular facts, been doubted by high authority. McAndrews v. Thatcher, 3 Wall., 347.

The principle, however, is fully recognized and well settled. It is not applicable, however, to this case, because it is evident the expenses involved were not incurred for the common benefit of the boat and the cargo. Expenses incurred for a separate interest,

Digitized by Google

the other interests not being involved in the danger, are chargeable to that interest.

Here it is evident the cargo was taken off to lighten the boat and not because the cargo was in danger.

No common danger existing, no common benefit to be secured, the lower court properly disregarded the question of general average. Firemans' Ins. Company v. Fitzhugh, &c., 4 B. M. 161.

This singular state of case is, however, presented. The appellant, Pence, incurred but about $3,300 in saving and repairing the boat. He has, upon the ground of a total constructive loss, recovered a judgment for $4,000, the full amount of the insurance, and has also kept the boat. If the verdict is to stand he is made more than whole and yet the contract of insurance is one of indemnity merely.

It is true there may be an abandonment of the vessel and a claim for the full amount of insurance upon the ground of a total constructive loss.

The fact that it does not ultimately prove an absolute or total loss will not defeat the claim.

The right to abandon as for a total loss depends upon the probabilities when the right is exercised that it will prove such and is not affected by the fact that the vessel is subsequently saved and the damage less than was expected.

It was held in the Orient Insurance Company v. Adams, above cited, that the abandonment of a vessel for a total loss, made in good faith when it was, in reasonable probability, impracticable to recover and repair it, and when the damage from the perils insured against amounted in like probability to more than fifty per cent. of the value, was a valid one within the terms of a policy providing that there should be no abandonment as for a total loss, unless the injury sustained was equivalent to fifty per cent. of the agreed value of the vessel, although by a change of circumstances it afterward became practicable to float off the vessel and the loss was thereby reduced to less than fifty per cent. of that value.

If in all probability the expenditures that must be incurred to deliver the vessel from peril will be more than half her value, and if her peril be such that a considerate owner, if uninsured, would not attempt to save her because of such great expense, then the abandonment would be valid.

Says Kent: "The right of abandonment does not depend upon the certainty but on the high probability of a total loss, either of the property or of the voyage or both. The insured is to act, not upon certainties but upon probabilities, and if the facts present a case of extreme hazard and of probable expense, exceeding half the value of the ship, the insured may abandon though it should happen that she was afterward "recovered at a less expense." 3 Kent Com., 321.

An abandonment is, however, a surrender of the right of property. It is a giving up; a total desertion of claim. It includes not only the intention to abandon but a relinquishment of all right to the property.

There must be a concurrence of the intention and the actual relinquishment of all right so that the insurer may appropriate the property.

When abandoned it is as much his as if it had been the subject of a bill of sale. It is true it is said it is affected by an unconditional notice to the underwriter, given within a reasonable time after the assured knows of the loss, but even if the latter gives such notice, and yet all the time continues to hold, claim, use and control the

Digitized by Google

property as his own, and in denial of the right of the insurer, it would not be a valid abandonment.

In such a case there would, notwithstanding the notice, be no cession to the underwriter of the ownership. We do not mean, of course, that the owner must take the property and deliver it to the insurer.

This would be impracticable. But although the owner may give notice of an intention to abandon, yet if he, all the time, continues to hold against the right of the insurer and claim and use the property as his own, then there is in fact no abandonment and the owner can only recover upon the policy what may in fact be his loss.

It is said if the conduct of the appellee, in continuing to use and claim the boat, operated as a waiver of the abandonment, yet it is not pleaded.

Conceding that he gave the notice as is claimed of the intention to abandon, yet he in fact never did so. There never was any abandonment.

It can not reasonably be said that by the mere notice the rights of the parties became fixed when the appellant continued to use and claim the boat. This would sacrifice substance to form. If there had been a valid abandonment those rights would have become fixed, but the appellant's own testimony shows there was none. The appellee never held the boat at any time for the appellant.

It results that the case is one of partial and not total loss. The criterion of any recovery is the sum which the appellant necessarily paid out and expended for the relief and repair of his boat, and the only error of the lower court consisted in instructing the jury upon the hypothesis of an abandonment for a constructive total loss.

Wherefore, the judgment is reversed, and cause remanded for another trial in conformity to this opinion.

PERRIN, COM'R, &C. V. LEBUS, GD'N, &C.

PERRIN V. SAME.

(*Filed April* 9, 1892—*Not to be reported.*)

1. *Commissioner—Failure to pay over money—Interest*—The commissioner of a court who, having sold the land of infants and collected the purchase money by order of court, fails to pay the same over to the beneficiaries, but uses it for his own profit, should be charged with interest on the amount received until he pays over the same.

2. *Same—Joint and several bonds—Actions*—Such commissioner having been ordered, by rule, to pay the money due into court, for the purpose of obtaining delay and by consent of all parties, executed in open court a bond with surety, obligating himself to pay the principal due with interest. *Held*—That while the bond is not such as the statute authorizes, it is a good common law bond and both the obligors are liable thereon, and although it is joint and several, the commissioner and his surety may be joined in one action in which attachments are sued out against each.

J. T. Simon and J. Irvine Blanton for appellants.

A. H. Ward and G. C. Lockhart for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Pryor.

Digitized by Google

These two cases will be considered together. A. Perrin, as master commissioner of the Harrison Chancery Court, was directed to sell certain land, and collect the money, that belonged to the widow of Napoleon Denbin. Some of the land was sold as far back as the years 1873 or 1874, and the whole land sold brought a large sum of money. Collections were made by the commissioner of the purchase money, from time to time, and some of it paid over to the guardian of the infants, but much of it retained by the commissioner, used for his own purposes and has never been accounted for.

The guardian and the commissioner, regardless of the rights of the infants, made no effort to make any final distribution of this fund, until the commissioner was compelled by rules of court, some made ten and others made twelve years after these sales, to report and pay over this sale money that he, as commissioner, had long since collected.

On the 14th of May, 1886, the commissioner, A. Perrin, having been required to pay the money over by an order of court, and being desirous of postponing the enforcement of the rule and to obtain delay in order that he might raise the money, came into court and executed bond, with George Perrin as surety, stipulating that, in consideration of the fact *that he, the commissioner, had made this money profitable to himself*, and being desirous of delaying its payment until he could arrange to do so, agreed to and with the parties in interest, the guardian, &c.; that he., the commissioner, would account for the money, with its interest, from the time he received it, and also account for any other moneys he might collect, with its interest, the proceeds of this sale.

The bond was signed, delivered and accepted by the court, and the parties and the proceedings delayed. The commissioner, however, failed to pay; made other collections, and a rule was issued against him to bring the money into court, and, failing to do so, the amount due by him was ascertained, and execution issued thereon and was returned *no property found.*

A. Perrin has brought this record to this court, insisting that he was improperly charged with interest; was refused proper credits, and that the action was improperly brought. We think the commissioner, using this money, ought to have been compelled to pay the interest, and that his allowance, to which there was no exception, was greatly in excess of what he was entitled to under the circumstances, and sufficient to cover all claims for services. He had kept this money for years, used it as his own and there is no reason why he should not pay interest upon it. Some other questions raised in this case, to which the surety, George Perrin, was not a party, will be considered on the appeal of George Perrin.

The judgment on the appeal of A. Perrin is affirmed.

On the appeal of George Perrin he insists that the action on this bond to pay over the money should have been separate and not joint, and for that reason no judgment should have been rendered. The bond is joint and several, and if the view of the appellant is correct, all of the parties had an interest. There was no demurrer, general or special, and the only objection made, necessary to be considered on pleadings, was the refusal of the court to require the plaintiffs to elect which cause of action they would prosecute.

There was but one cause of action, and that was on the bond, and the averments as to the return of no property as against A. Penn, and the facts stated, necessary to the issuing of an attachment in aid of the action or the recovery, if any, was a part of, and

Digitized by Google

not, an independent action, and the motion requiring the party to elect was, therefore, properly overruled.

It is also insisted on both appeals that the bond is invalid, because a commissioner is required to pay interest only from the time a demand is made; and the terms of this bond being required under compulsion, and, unlike the ordinary obligation required by law of a commissioner, is invalid.

The bond is not such a bond as is required by the statutes to be executed by the commissioner, but it is, nevertheless, good as a common law obligation, although executed in open court.

The money of the infants being in the custody of the court, although held by its commissioner, was in danger of being lost, and the chancellor had the right to require the commissioner to indemnify the parties entitled to this fund. He could have compelled the commissioner, by rule, to bring the money into court; and, upon his failure, issue an execution on the rule, seizing his estate; but where the commissioner offers that indemnity that is accepted by the chancellor and the parties, in the form of a bond that embraces the supposed loss, there is no reason why it is not good.

The commissioner used this money and the surety was informed of it by the very terms of the bond, and that the delay was a part of the consideration for the execution. There is no law prohibiting the execution of such a bond, and, in fact, it was the duty of the chancellor to secure this fund if he could do so, or the interest that had accrued, even by accepting the surety on the original bond.

There are some technical objections to the attachment, based on the ground of a want of property by George Perrin, subject to execution to pay the debt. The grounds are unavailing, and there is an abundance of testimony on the face of the papers, showing that A. Perrin had nothing; and the proof shows that George Perrin had not property sufficient to pay the debt that could be reached by an execution.

The only objection, it seems to us, to this judgment against the surety is the large amount of interest charged against him. The case ought to have gone to the commissioner, and interest charged on each collection up to the date of the judgment.

The appellant, George Perrin, was not a party to the rule or proceedings in the original actions, and there is no reason why he should not be permitted to show that this interest had been compounded by making this judgment bear interest from May, 1886. The proper mode of calculating this interest is to take each item of collection, allowing the commissioner, of course, with what was paid out, and charge interest to the judgment, which will show, at that date, how much this surety should pay. The items are numerous, and this court is not disposed to make the calculation, but it is evident that the surety is made to pay too much.

The judgment is reversed as to George Perrin for this reason alone, and remanded, that a calculation may be made as herein directed. On the petition for rehearing the opinion is so modified as to read that the surety is not to be made liable for the money the commissioner never received.

(Modified opinion—*Filed June* 4, 1892.)

This case has been in court for many years, and nearly a quarter of a century has passed since the land was sold, belonging then to infants.

The modification of the opinion is asked to be explained by the

Digitized by Google

appellee. No other defense is to be interposed. The record as made up must control the settlement. The commissioner or the court will take the proof as it is, and determine how much money the appellants' principal obtained.

This must end the controversy, and is filed in addition to, or in explanation of, the modified opinion.

CITY OF NEWPORT V. BERRY.

(*Filed April* 9, 1892—*Not to be reported.*)

Authority of municipal corporation to levy a tax upon steam boat—The city of Newport, by its charter, has power to collect an annual *ad valorem* tax on the real, personal and mixed property within the limits of said city, which is subject to taxation under the laws of the State The ferry float and boats belonging to the appellee, who is a citizen of Newport, are used on the Ohio river between Newport and Cincinnati. Newport is the home port of the boats. *Held*—That the legal situs of the boats is Newport and that city may impose an *ad valorem* tax on them.

Crawford & Irwin for appellant.

Chas. J. Helm and A. Duvall for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Bennett.

This action involves the right of the appellant to levy and collect *ad valorem* taxes for the years 1885 and 1886 upon one ferry float, stationed at the appellant's wharf, and two steam ferry boats that plied the river between the city of Newport, the appellant, and the city of Cincinnati during said years.

The appellant claims the right to tax the appellee's float and boats under section 7 of its charter, which provides that the appellant shall "have power to cause to be annually collected and paid into the city treasury an *ad valorem* tax on the real, personal and mixed estate within the limits of said city, subject to taxation by the city under the laws of the State," &c.

It is perfectly plain that all property, real, personal and mixed, having a situs in said city and which is subject to taxation by the State, is subject to an *ad valorem* tax by the city, except such as is otherwise provided for by the charter. It is also clear that the appellee's float and boats are not the kind of property that is otherwise provided for by the charter. There is also no doubt that the float and boats are subject to *ad valorem* taxation by the State. Louisville & Evansville Mail Line Co. v. Barbour, 10 KY. LAW REP., 836, and City of Newport v. Ringo's ex'or, 10 KY. LAW REP., 1046.

So the question is, has the appellant the right to levy and collect an *ad valorem* tax upon said property?

The appellee contends that as the property is used and employed exclusively upon the Ohio river it is not subject to city taxation, and the Louisville Bridge Co., v. City of Louisville, 81 Ky., 189, is relied upon in support of that contention. But we do not see this case in that light. The question here is, is the situs of said property within the city of Newport? If it is it is subject to city taxation,

Digitized by Google

provided it is subject to taxation under the laws of the State, and there is no doubt that it is subject to such taxation.

It is admitted that the appellee is a citizen of the city of Newport and that the home port of said property is that city. Now such property, the ferry boats, is migratory, but for the purpose of taxation, &c., it must have an abiding place, and the law fixes that place at the home port, which is, in this case, the city of Newport. St. Louis v. The Ferry Company, 11 Wallace's Reports, 423; Wheeling, Parkersburg and Cincinnati Transportation Company v. City of Wheeling, 9 W. Va. Reports, 170.

We only decide that the property is subject to city *ad valorem* taxation. We presume that the assessor will assess it according to law.

The judgment is reversed.

McBURNIE v. SEMPLE, &c.

(*Filed April* 12, 1892—*Not to be reported.*)

1. *Dissolution of partnership—Chancellor's decree supported by evidence*—Although it appears that the appellees and appellant formed a partnership which was to continue for 3 years, yet the evidence shows, as the chancellor here found, that, by agreement, the partnership was subsequently dissolved, and the judgment below must be affirmed.

2. *Same—Costs*—As the appellant acted in good faith in contending that the partnership had not been dissolved, the lower court's action was proper in apportioning the costs of this litigation between the appellant and the appellees.

3. *Authority of court to direct receiver to loan money to attorney for one of the parties in interest*—The order of the chancellor directing the receiver to loan $25,000 of the partnership assets to appellant's attorney upon the execution of a proper bond by him, will not authorize a reversal of this case, no loss having accrued to any one by reason of this order.

E. E. McKay for appellant.

Dodd & Dodd and Robert J. Elliott for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellant and the appellees were partners in the business of manufacturing and selling plug and smoking tobacco. Their joint capital stock was $38,000, contributed by each in certain portions. The articles of co-partnership were in writing, which set forth that the partnership was to continue for three years from the 1st day of August, 1888, unless sooner dissolved by mutual agreement. The partners, the appellant and appellees, carried on the business under said written terms of co-partnership until the first of July, 1889, at which time the partners ascertained and agreed that the firm was doing and had been doing a losing business, and as is certainly agreed they agreed to stop manufacturing on the first of August, 1889, and discharge the hands, and thereafter each partner should try to find a purchaser for the factory and manufactory plant. It is also agreed that, pursuant to this agreement, the business was shut down and the employes were discharged on or about August 1st, 1889. And negotiations were begun, with some prospect of being consummated, for the sale of the factory and plant, but that sale was not consum-

Digitized by Google

mated. And the appellant considering that the partnership was not dissolved, except conditionally, which condition had not transpired but had failed or been abandoned, proposed to resume and did resume the business. The appellees instituted this action in equity for a dissolution and settlement of the partnership.

The appellees contend that by the agreement of July 1st the partnership business was to finally cease on the first of August and the partnership dissolved. The appellant contends that the agreement was not a dissolution of the partnership, except upon the condition that the firm sold the factory and plant, and if that condition failed the business was to be resumed, and the condition having failed the business was resumed.

The appellant's answer expresses his understanding of the agreement as follows: "It was agreed that they would stop the work and that the firm should be dissolved in case a purchaser, at an acceptable price for the business, could be found; and believing it possible for such purchaser to be found, work was temporarily suspended and the hands temporarily discharged, but as no suitable purchaser could be found the business was thereafter resumed."

Does the evidence as to the agreement sustain the appellant's understanding of it? Let us see. Mr. Semple says in his deposition, page 119, in speaking of the July agreement: "We agreed to shut up the concern, wind it up and not carry on the manufacturing business any longer." He also says, in substance, in another place, that there were no conditions about stopping the business; that the stopping was to be final.

Counsel for the appellant construes that Mr. Semple's answer, 109, qualifies the statements quoted and agrees with the appellant's understanding of the agreement. He says in said answer: "I did not say that the partnership should be dissolved, but that the business should be wound up and everybody discharged." He is then asked: "There was no special agreement that you should dissolve the partnership?" He answers: "If the business was wound up of course that ended the partnership."

The foregoing answers do not modify the meaning of the previous statements in reference to the agreement. The witness, in answer 109, only means that he did not use the word "dissolved," but the language he employs means that the business was to be wound up and the partnership then ended or dissolved.

Also Mr. Foree is clear and explicit to the effect that the partnership was to be stopped and wound up, &c., and that there were no conditions about it. See his deposition, pages 159, 160, 174.

The appellant's evidence, to the effect that the partnership was not to be dissolved except upon the condition that the factory, &c., were sold, stands alone as against his two partners. And, instead of the outside facts corroborating the appellant, we think they are consistent with appellees' conduct and understanding of the agreement. And the agreement as the appellees understand it, considering that the business was and had been a losing business nearly, if not quite, all the time, is rational and comports with sound business principles.

The chancellor, upon the evidence, dissolved the partnership and ordered a settlement of it. The chancellor also held that the employment of Bell, after the agreement of July 1st to make the trip as salesman of the firm, was not inconsistent with said agreement. The chancellor also held that said agreement of July 1st was not thereafter rescinded.

We think the evidence authorized the judgment of the chancellor

Digitized by Google

and the case must be affirmed on the appeal by the appellant, McBurnie.

The appellees urge by cross-appeal two grounds for reversal: First. The court erred in not taxing the appellees' costs against the appellant. But we think the court did right in not taxing the costs of the litigation against the appellant, but apportioning it between them. For it appears that the appellant was honest in his belief that the agreement of July 1st was only a conditional dissolution of the partnership and that the condition failing, the partnership was not dissolved. That being so the court did right in not taxing him with the whole costs. Second. The court, upon the motion of the appellant, McBurnie, ordered its receiver to loan the appellant's counsel $25,000 of the partnership funds in the hands of the receiver, and the attorney executed bond with surety, that was approved by the court, for the payment of that sum, and the appellees objected to the order.

Considering the fund was in court and bearing no interest we are not prepared to deny the power in general in the court, during the pending of the litigation, to loan the money out on safe security. But where the money is loaned at the time this was, at the instance of one of the parties, to his attorney, over the objections of the opposing party, the question would arise in case of loss, would not the party, at whose instance the money was loaned, be responsible for it? Was it not equivalent to a joint loan to himself? But as no loss has as yet occurred that question is not decided.

The judgment is affirmed on appeal and cross-appeal.

THE KENTON INS. CO., &C. V. THE FIRST NAT. BANK, &C.

(*Filed April* 14, 1892.)

1. *Interest on fund held by claimant pending litigation*—Certain banks and the appellant insurance company each claimed a superior lien on certain stock belonging to an assigned estate and held by the banks. An agreed order was entered, authorizing the sale of the stock and allowing the banks to hold the proceeds subject to the order of court on final determination of the contest. It was ultimately adjudged that the appellant held the superior lien on the stock, and the banks were ordered to pay the proceeds over to it. They contended that they should not be charged with interest on the fund held by them. *Held*—That they are chargeable with interest; their position not being that of a disinterested stakeholder, but of a claimant in possession asserting a right to property of another.

2. *Same—Estoppel—Right of appeal*—The insurance company having dismissed its appeal from the judgment below, which released the banks from the payment of interest. the representatives of the assignor (children of the assignee) have such interest in this litigation as authorizes the prosecution of the appeal by them. Nor are they estopped, by having consented to the agreed order, now to claim that the banks must be charged with interest.

Fisk & Fisk and A. C. Ellis for appellants.

O'Hara & Bryan for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

On the 15th day or August, 1883, V. Shinkle, of Covington, Ky.,

Digitized by Google

being insolvent, executed to R. T. Miller and W. M. Finley a general deed of assignment for the equal benefit of his creditors. The assignees at once qualified under the deed. At the time of the assignment V. Shinkle was owner of many shares of the capital stock of the Kenton Insurance Company. He was also indebted to that company in a large sum, to secure the payment of which he and Lydia A. Shinkle, his wife, executed a mortgage on her land. V. Shinkle was also indebted to the appellees, the banks, for borrowed money and had pledged to them as collateral security of said loans a portion of the certificates of the capital stock owned by him in the Kenton Insurance Company.

On the 7th day of September, 1883, the Kenton Insurance Company instituted an action in the Kenton Chancery Court against the heirs of Lydia A. Shinkle, she having theretofore died, seeking to enforce its mortgage lien upon said land and to sell it for the payment of its debt.

On the 5th of November, 1883, said company, by an amended petition, made the appellees parties to the action and asserted that, by the terms of its charter, it had a lien on the said stock of V. Shinkle to secure the payment of his debt to it, which lien was superior to the lien of the appellees. The appellees joined issue as to the superiority of the said company's lien. And in view of that issue the court, on the 9th day of November, 1883, rendered the following judgment and order: "It is ordered by consent of all the parties that the stock in the Kenton Insurance Company owned by V. Shinkle and embraced in his deed of assignment to Finley and Miller and, including that which is held by the appellees, * * be sold by said assignees upon a credit of three months, taking bond with security from the purchasers, bearing 6 per cent. interest per annum from the day of sale until paid. * * * The bonds shall be made payable to the said banks, the appellees, and the assignees for the stock that they respectively hold, and they may collect said bonds when due and hold the proceeds subject to the order of this court."

The stock was sold and the bonds taken and delivered to the respective parties in interest pursuant to this order, and the appellees collected theirs at maturity. The assignee reported the sale to the next term of court, which was affirmed.

On the 29th day of October, 1885, the court adjudged that the appelleee, First National Bank, was entitled, out of the sale of said stock, to $6,196.66, that being the amount of its debt on V. Shinkle, and the appellee, the German National Bank, was entitled, out of said proceeds, to the sum of $8,420.33, that being the amount of V. Shinkle's indebtedness to it. The appellees had collected upon said bonds amounts in excess of the foregoing sums, which they paid to the master commissioner on the 17th day of November, 1885. As intimated the chancellor decided the issue as to the superiority of said lien in favor of the appellees, and they retained said sums of money in discharge of V. Shinkle's indebtedness to them. But the Kenton Insurance Company appealed from that judgment to this court, asserting its superiority of lien to said proceeds.

This court reversed the judgment of the lower court upon the ground that the lien of the Kenton Insurance Company, on said stock was superior to the respective liens of the appellees upon the same, and directed that the appellees be required by the lower court to pay the proceeds to the Kenton Insurance Company, to be applied to the payment of said mortgage debt, and, if any of the mortgage

Digitized by Google

debt remained unsatisfied after said payment, then the mortgaged land was to be sold to satisfy the same. 84 Ky., 436. The respective sums, less the interest thereon, retained by the appellees, per order of the lower court, were paid over to the Kenton Insurance Company, but said sums did not fully discharge the mortgage debt, and a portion of the mortgaged land was sold to satisfy the remainder of the debt.

The appellees, not having paid the interest on the sums that they paid to the Kenton Insurance Company, that company and the Shinkle children proceeded against them to recover said interest during the time that they had possession of the money, which proceeding they resisted on the ground that they were not bound to pay interest on said sum.

The chancellor decided that the appellees were not bound to pay the interest claimed, from that judgment the Kenton Insurance Company and the Shinkle children have appealed to this court. Since the appeal the Kenton Insurance Company has dismissed its appeal, and the appeal now stands in the name of the Shinkle children alone.

If the Kenton Insurance Company was entitled to said interest then the Shinkle children are likewise entitled to it, because their property was taken to pay the debt for which the interest was previously bound, consequently, they are entitled to be subrogated to the rights of the Kenton Insurance Company as to said interest. The question then is, should the appellees pay interest on said money during the time that they held and used it?

It is to be observed that the dispute between the appellees and the Kenton Insurance Company was as to which owned the superior lien upon said stock, and as the appellees had the possession of the stock they were permitted to receive and use its proceeds during the pendency of the litigation as to which owned the superior right to the proceeds.

But the appellees received and held the proceeds as their own, agreeing, however, to pay them over to the court's order if it was finally decided that the Kenton Insurance Company was entitled to them.

Now it turns out that the appellees' right to the money and its use was subject to the superior right of the Kenton Insurance Company. But as the appellees' retention of the money was, by the order of court, made lawful, should they, in such case, pay interest on the money during the time they held it?

It is well settled in this country that even if a person has the money of another person lawfully in his possession and uses it as he would his own, he is chargeable with interest for the use. He has used the property to which another was entitled, not as a gift of the use but as a matter of right, and by the broad principles of right he should pay interest for the use. He should not be allowed to profit by the use of another's property without paying him for that use.

But it is said as there is no proof that the appellees used the money no presumption arises that they did use it; therefore, they should not pay interest. It is undoubtedly true that where money is placed in the hands of a custodian, a mere stakeholder, by the chancellor to be held subject to the order of the court, no presumpton ordinarily arises that the custodian used the money; therefore, he is not chargeable with interest unless it appears that he did use the money, then, in that case, he must pay interest. But it seems to us clear that where a person is claiming the money as his own and is permitted to collect it and retain it as his own and is only required to hold it subject to the court's order, in case it turns out that the person is not

Digitized by Google

entitled to it, then the presumption arises that the person retained and used the money as his own and he is chargeable with interest. Such is the case here.

In the case of Scribner v. Webster, 9 Ohio State Reports, 452, it is said (quoting from Penn. reports) that a garnishee is not chargeable with interest upon his indebtedness to the defendant during the time that he was restrained from paying by force of the attachment. "The garnishee, however, is only there entitled to the benefit of the rule upon his standing as a mere stakeholder between the plaintiff and defendant, admitting his liability to pay to the party entitled to receive the money or at least not denying his liability to pay." The part quoted is approved as a correct rule. And a similar rule, it is said in that case, prevails in Maine, so, also, in Georgia and in Massachusetts.

As said the appellees did not stand in the attitude of indifferent custodians of the money under the order of the court, but they were claimants of the money, contesting the right of the Kenton Insurance Company to it. And the court, by consent, let them collect and retain the money subject to its order to pay it into court, if court adjudged that the money did not belong to them. That such is the meaning of the order there can be no doubt, and it follows, as it seems to us, as night the day, that the appellees did not collect and hold the money as indifferent stakeholders, ready and willing to pay the same to whom the court might direct, but they held it as claimants contending for it, agreeing to pay it to their antagonist only upon the condition that the court adjudged that it belonged to it and ordered them to pay it over. So the presumption clearly arises that they used the money as their own and not as mere stakeholders, and are chargeable with interest. American Leading Cases, by Hare and Wallace, 5 ed., 632.

It is also said that the appellants, the Shinkle children, are estopped to claim interest. We fail to see wherein they are estopped. The old record shows that they, by their answer, denied the right of the appellees to said stock as against the right of the Kenton Insurance Company, because, if the claim of that company to the stock prevailed, its demand against their real estate, that their mother had been induced to mortgage in her life-time, would be decreased in proportion to the value of the stock. And that company's superior right to the stock was finally sustained by this court. So, thus far, it is not inequitable for said appellants to assert their right to the interest. So, also, the consent judgment and order referred to does not estop said appellants from asserting right to the interest. They merely consented that the appellees should retain the possession and use of the money that they claimed as their own until the question as to the ownership could be decided by the court. If the appellants had not consented to the order would there be any doubt that the appellees would be chargeable whith interest? We think not. Then how can their consent to the order change their equitable right to interest on their money that the appellees have used?

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Digitized by Google

ROTHCHILD'S ADM'R, &C. v. KOHN BROS. & CO.

(*Filed April* 7, 1892.)

1. *Assignment for benefit of creditors—Fraud—Estoppel*—Creditors who claim and receive their *pro rata* of the funds in an assignee's hands in a suit by him to settle the estate, which had been assigned to him by the debtor for the benefit of creditors, are not thereby estopped to assert, in a suit subsequently instituted by them, that the purchaser of the estate from the assignee paid for it with the debtor's means, and in fact holds it for him; and where the estate so purchased consisted of merchandise, the creditor may subject it in the hands of such purchaser, although the original articles have been sold and others purchased to take their place.

2. *Same—Claimant's bond*—Certain creditors of the assignor having caused attachments to be levied on the goods in the purchaser's hands, he executed a claimant's bond therefor and reclaimed them. The goods were subsequently sold by a receiver of the court, and the proceeds distributed among certain creditors of the assignor, and the purchaser and his surety were also made liable for the amount of the claimant's bond. *Held*—That neither the purchaser nor his surety had any right to look to the goods for indemnity for their liability on the bond; the surety can look only to his principal.

3. *Lis pendens—When lien commences*—The mere bringing of a suit to subject property to a debt, where the plaintiff has no specific lien, will not, in the absence of any grounds authorizing the chancellor to subject it, create a *lis pendens* lien on the property.

But when the petition alleges a fraudulent transfer of the property, which is specifically described, and which is sought to be subjected to pay the transferror's debt, an equitable *lis pendens* lien is acquired. Such lien begins when the action is begun, and, under the Civil Code, the action is begun by the filing of the petition and the suing out of the summons.

Therefore, where an action that will create such lien is filed and a summons sued out before a mortgage on the same property is executed, the *lis pendens* lien will be superior to that created by the mortgage, although the summons was not served on the defendant until after the execution of such mortgage.

Sweeney, Ellis & Sweeney for appellants.

G. W. Williams & Son for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Holt.

June 29, 1882, M. Levy made an assignment for benefit of his creditors to one Baer.

The assigned property consisted of a stock of merchandise. After a small portion of it had been sold at retail by the assignee the balance was, as claimed, pretendingly purchased by Jacob Goldnamer as if for himself but in fact for Levy, and paid for by the latter. They are brothers-in-law. Levy thenceforth controlled and carried on the business but in the name of Goldnamer, who was merchandising about a hundred miles distant.

In April, 1883, J. M. Robinson & Co. and C. H. Bliss, having judgments against Levy and returns of *nulla bona*, instituted actions assailing the assignment and purchase by Goldnamer as fraudulent and averring that the purchase was merely colorable as to Goldnamer and in fact made for Levy, he furnishing the money to pay for the goods.

They sued out attachments under which a portion of them was seized and finally sold under a decree, directed to be entered by the

Digitized by Google

Superior Court, it holding that the purchase was fraudulent upon the part of Goldnamer and made in fact to Levy.

The goods so seized did not, however, sell for enough to pay the debts of these two attaching creditors, and the actions remained pending upon the docket.

Goldnamer brought an action for a new trial upon the ground that he had discovered these creditors had, in a suit by the assignee to settle the trust, received their *pro rata* of the trust estate, including what had been paid for the goods brought in his name, and this fact was attempted to be relied on as an estoppel of the claim that the assignment or purchase in Goldnamer's name was fraudulent.

A new trial was, however, refused and, upon appeal, the judgment was affirmed by the Superior Court.

January 12, 1888, Kohn Bros. & Co. and other creditors of Levy, having obtained judgments and returns of "no property," sued to subject the goods in store, which was still being conducted by him but in Goldnamer's name, claiming that the assignment and purchase by the latter in 1882 were fraudulent, really for Levy's benefit; that the latter had in fact paid for them and that all the stock then on hand in truth belonged to him. The summons was served on Levy on January 14, 1888, but not on Goldnamer until January 19, 1888. No attachment was sued out.

In November previous Wald & Co. had brought a similar suit upon a return of "no property." They sued out an attachment, but nothing was done under it. Levy and Goldnamer were, however, served with summons within a day or two after the filing of the petition.

They, as well as one other creditor, also sued out executions upon judgments in their favor, which were levied upon the goods.

Goldnamer, with Joseph Rothchild as his surety, executed claimant's bonds for them.

Notices were issued in January, but not executed until February, 1888, of motions upon these bonds, and at this stage these motions and all of the suits, including those of Robinson & Co. and Bliss, were, by consent, consolidated.

January 18, 1888, Goldnamer executed a mortgage upon the goods on hand to other creditors who, on March 10, 1888, tendered a petition in these causes, asserting the same, but it was rejected, and the court finally rendered a judgment, holding the obligors in the claimant's bonds liable for the debts as to which they had been executed, and the goods on hand having been sold by a receiver it ordered the remainder of the debts of Robinson & Co. and Bliss to be paid in full therefrom and the balance to be distributed *pra rata* to the other plaintiffs, not including the creditors who had obtained judgment upon the claimant bonds.

It would unnecessarily extend this opinion to detail the testimony in the case or to consider whether the assignee was a party to any fraudulent purpose.

It is sufficient to say that when all the circumstances proven are considered they are convincing to an unprejudiced mind of fraud upon the part of Levy, to which Goldnamer was a party, and that the Superior Court was right in its conclusion upon the appeal in the cases of Robinson & Co. and Bliss. Moreover the chancellor has, in all these cases, considered the testimony and so found, and his conclusion as to this question of fact is, in our opinion, abundantly supported by the testimony.

The fact that the plaintiffs claimed and received their *pro rata* of the fund in the hands of the assignee in the suit by him to settle

Digitized by Google

the trust does not estop them from seeking to subject the goods now on hand, although by reason of purchase and sale they are not the identical ones obtained from the assignee.

It is true that in the action by the assignee to settle the trust some of the creditors excepted to the commissioner's report upon the ground that the purchase by Goldnamer was a pretended and fraudulent one, but Goldnamer was not a party to that suit, and whether the purchase by him was merely colorable and in fact for Levy's benefit, which is the issue now made, could not have been determined in that action. The fact that the plaintiffs in these proceedings shared in the distribution of the trust fund, including what was paid for the goods purchased in Goldnamer's name, does not create any estoppel, because they are proceeding upon the ground that the money paid for them was that of Levy, that the goods, therefore, also belonged to him and that they have a right, therefore, to look to both for the payment of their debts. The idea is that the goods, when purchased, belonged to him, and that the business which had been conducted in Goldnamer's name, up to the time it was closed out by the appointment of the receiver in these actions, was in fact that of Levy, and that the goods on hand, although not the identical ones obtained from the assignee, belonged to Levy and were, therefore, liable for the debts of the plaintiffs. The question is not *res adjudicata*.

It is, however, said that Goldnamer and his surety in the claimant's bonds have been made liable thereon, and still the goods or the fund arising from their sale have, by the judgment, been given to the other plaintiffs. So far as the surety is concerned it is sufficient to say that in such a case he can only look to his principal for indemnity. No right of subrogation to any creditor's rights exists as to him, and Goldnamer will not, under the circumstances, be heard as to what equitable right, if any, the claimant of property, where he has been made liable and has thus satisfied the debt, has to look to the property for indemnity where other creditors of the debtor have intervened and acquired the right to look to the property for the satisfaction of their claims.

Goldnamer presents himself as a party to a fraud, and while he may now be liable for goods which have been purchased in his name to run the store, yet as he has allowed his name to be thus used in the carrying out of the fraudulent purpose, he must rely upon Levy paying for them and saving him harmless.

He can not, upon the idea that if he was not the real owner of the goods he at least held them in trust for Levy, be indemnified out of the proceeds because if he can in any view be regarded as a trustee he was a fraudulent one.

The only other question necessary to be considered is the refusal of the court to allow the mortgagees under the mortgage from Goldnamer, of January 18, 1888, to assert it. It may be said, if the goods were not his, then he had no right to mortgage them. But in response to this it can be properly said that this was a question upon which the mortgagees were entitled to be heard. If, however, the plaintiffs in these suits had, before the execution of the mortgage, acquired a *lis pendens* equitable lien upon the goods, then, as the fund realized from their sale did not satisfy the plaintiff's claims, this question need not be considered and the various other reasons given in argument why the petition of the mortgagees to be made parties was properly rejected need not be noticed.

The attachments originally sued out by Robinson & Co. and Bliss

Digitized by Google

were exhausted by the sale of the portion of the goods upon which they were levied.

The mere bringing of a suit to subject property to a debt, where the plaintiff has no specific lien, will not, in the absence of any grounds authorizing the chancellor to subject it, create a *lis pendens* lien.

But where it is claimed the property has been fraudulently transferred and it is specifically described in the petition as it is in this instance and the chancellor is asked to subject it, an equitable *lis pendens* lien is acquired. Northern Bank of Kentucky v. Drekebach, &c., 83 Ky., 154.

The doctrine of *lis pendens* applies both at law and in equity. But for it a court often could not execute its decrees. Alienation of the property during the pendency of the action would prevent its doing so. After a suit is begun it would be contrary to public policy to permit one, though not a party to it, to defeat any judgment by the acquisition of the property. If allowable litigation would be unavailing. The rule is based upon necessity, and liable to work such hardship that it would likely not be in force as to *bona fide* purchasers but for the publicity of judicial proceedings, which affords opportunity of getting information.

When, however, does this *lis pendens* begin?

Freeman on Judgments, section 195, says: "*Lis pendens*, except when some statute provides otherwise, begins from the service of the process or *subpœna* and not before."

This is the common law rule and in the absence of any statutory provision the commencement of the *lis pendens* is in general the service of the process.

A *lis pendens* is merely, however, as the term indicates, a pending suit, and section 39 of our Civil Code provides that an action is "commenced" by the filing of the petition and the suing out of the summons.

When this is done the action is, by our statute, begun. Hart, &c. v. Hayden, &c., 79 Ky., 346.

Whenever an action is "commenced" according to the statute it is certainly pending, a party may then, by diligence, inform himself that the property is in litigation, and it results that when this mortgage was executed all of the creditors to whom the judgment gives the proceeds of the goods had an equitable *lis pendens* lien upon them. Although the summons in the Kohn Bros. & Co. suit was not executed on Goldnamer until the day after the mortgage was executed, yet the action had, according to our statute, been pending for several days. So far as notice is concerned it did not matter to the mortgagees whether the *lis pendens* dated from the filing of the petition and the suing out of the summons or from its service. The service upon Goldnamer gave no actual notice to them.

It is sought by a cross-appeal to charge Goldnamer with the money realized by the sale of goods while the store was being conducted by Levy from 1882 to 1888, but the theory upon which the creditors proceed is that Levy in fact owned the store and that he, and not Goldnamer, got the proceeds.

The judgment is affirmed upon both the original and cross-appeals.

Digitized by Google

MULLINS V. BULLOCK, &C.

(*Filed March 26, 1892—Not to be reported.*)

1. *Executions—Appeals*—A constable, having levied an execution on certain tobacco as the property of T., the execution defendant, B., who claimed the tobacco, brought suit for it and obtained possession by an order of delivery. Judgment having been rendered, holding that B. was the owner, it is held that the constable has such special interest in the property as authorized him to appeal from that judgment.

2. *Same—Amount in controversy*—The amount of the execution debt was over $100 and the value of the tobacco $600. The judgment against the constable was for the tobacco and costs. *Held*—The Superior Court had jurisdiction of the appeal by the constable.

3. *Interlocutory orders*—An order suppressing a deposition is merely interlocutory, and when made at one term may, by order of court, be set aside at a subsequent term.

4. *Evidence—Parol proof concerning ownership acquired by written contract*—Where one acquires ownership of personal property by written contract he may, in an action in which the ownership is involved, testify that he is the owner of such property, although he does not produce the written contract or account for its absence.

Collins & Finley and J. T. Simon for appellant.

Leslie T. Applegate for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Holt.

An execution, which issued against Thomas C. Bullock and his son, George E. Bullock, on October 1, 1881, came to the hands of the appellant, Richard Mullins, as constable, and was, on October 19, 1881, levied by him upon a lot of tobacco as their property.

It was claimed by the appellees, John and Thomas J. Bullock, sons of Thomas C. Bullock, who brought this suit for it, and by suing out an order of delivery obtained possession.

The appellant denied their ownership, set up the levy of the execution upon the property by him, claimed it to be the property of the defendants in the execution, and that a good and solvent bond of indemnity had been executed to him by the plaintiff in the execution.

It was not executed, however, until sometime after the levy, and hence the officer was not protected by it from liability for damages for the seizure, if the property, in fact, belonged to the appellees. No question arises, however, in this respect, as the jury found no damages, but merely that the appellees were the owners of the tobacco, and they had theretofore obtained the possession of it through the order of delivery.

The Superior Court reversed the judgment, and an appeal having been granted by it to this court, the preliminary questions are, did an appeal lie to the Superior Court, and has the appellant, Mullins, such an interest in the property that he can contest the right of the appellees, and appeal from the judgment in their favor? It is said the only judgment against the appellant is for costs. It was, however, for the tobacco also.

The petition avers it was worth $600, and, beside asking judgment for the property, it asks for $100 in damages for its detention. Moreover, the execution debt, for which the levy was made, amounted to

Digitized by Google

over $100 at the date of the rendition of the judgment in this action. These facts authorized an appeal to the Superior Court.

It is urged that Mullins was a mere stakeholder; that he should not take sides in the contest, and that the plaintiff in the execution, and not the officer, was the interested party. The latter, however, has, by reason of the levy, such a special interest in the property as authorizes him to contest the claim of the appellees.

Some depositions, taken by the appellees, were suppressed by reason of a defective certificate by the officer before whom they had been taken. At a subsequent term leave was given him to amend it, and this having been done, at the next term the order suppressing the depositions was set aside.

This the court had the power to do, as the order suppressing them was merely interlocutory. If, for instance, a court at one term should refuse the filing of an amended petition, yet, at a subsequent term, it might amend its order and allow it to be filed.

The tobacco had been raised upon a part of some land rented of the owner by the father of the appellees. They were allowed to testify that they were the owners of the tobacco. It also appeared from their evidence they had a written contract with their father as to the raising of it, which was not produced, although called for by the appellant, nor did they account for its absence.

The appellant, therefore, moved to exclude all the evidence offered by the appellees touching their claim to the tobacco. This was refused, but the court held that the appellees could not rely upon the contract without producing it, or accounting for its absence, and excluded from the jury all evidence relative to it, and all the statements and conclusions of witnesses as to the ownership of the tobacco based upon it.

The appellant now contends that, owing to the evidence showing the existence of the written contract, it was error to permit the appellees to testify they were the owners of the tobacco, as the contract was the best evidence whether this was the fact, and contending that for this reason there was no evidence whatever of appellees' alleged ownership; he also moved the court to instruct the jury to find in his favor. We are unwilling to say that as to personal property a claimant can, in no case, testify that he is the owner. Ownership is not a technical word. Whether one be the owner of personal property is a mixed question of law and fact. Certainly if there be no written contract evidencing the ownership, one may testify to his claim and possession, and that he is the owner.

Where, in a contest with the vendor one claims to be the owner of personal property by purchase, and it appears the contract was in writing, it would, of course, be the best evidence of its terms, and, therefore, the party would have to produce it or account for its absence before he could offer other evidence relative to its character.

In this case the court excluded all evidence of ownership based upon the contract relative to the cultivation of the land, but allowed the appellees to testify they were the owners of the tobacco that had been raised upon it. There was testimony tending to show that they had raised, cut, housed and sold it as their own, and under these circumstances their evidence, that they were the owners of it, even if incompetent, was immaterial.

The jury were authorized to find in their favor upon the testimony tending to show that they had raised and claimed it as their own, and were in possession of it when it was seized under execution. The weight of the evidence, the one way or the other, was for the jury. They found for the appellees, and it is sufficient to say that

Digitized by Google

the finding is not so palpably against the weight of the testimony as to authorize a reversal.

Aside from the testimony of the appellees that they were the owners of the property, the ownership was shown by other circumstances which, in law, evidenced it sufficiently to support the verdict. Proof of possession of personal property is presumptive proof of ownership

It is urged that one of the appellees was under age; that, therefore, whatever interest he had, if any, in the tobacco, belonged to his father, with whom he was living. It is sufficient to say, so far as this action is concerned, that even if all this be so, yet as the other appellee owned an interest in it the officer had no right to take possession of the property, save to make an inventory of it, and the seizure and threatened sale of it by him authorized the replevin of it by at least the son who was of age.

Whether the interest of the one who was under age could be made liable for his father's debt can not be considered in this character of action.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

ROBERTS V. YANCEY, &C.

(*Filed May* 18, 1892.)

1. *Champerty—A contract between attorney and client* whereby the attorney takes from the client an assignment of a note, agreeing to prosecute an action upon it in his own name and at his own expense and to pay the client a certain part of the "amount collected," retaining the balance for his services, is champertous and, therefore, void.

2. *Same—Conclusiveness of judgment*—As such a contract extends to the collection of the judgment that may be recovered, in an action by the attorney to subject to the payment of a judgment which he has obtained under the contract, a fund held in trust for the judgment defendant, the trustee, not being a party to the action in which judgment was rendered, may plead that the contract was champertous, and especially where, as in this case, the fund sought to be subjected is held in trust not only for the judgment defendant, but for others who will be affected by a judgment subjecting the fund.

Lindsay & Botts for appellant.

E. E. Settle for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Presiding Judge Yost.

The demurrer to the amended answer of Richard H. Yancey, trustee, was overruled, whereupon, the appellant failing to plead further in issue thereto, his petition was dismissed and the case is now before us on the sufficiency of the defense relied upon in the pleading.

In 1889 Jesse Holbrook owned a note against Robert S. Yancey, which he assigned and transferred to the appellant, Roberts, a law-

Digitized by Google

yer, who neither paid nor agreed to pay any consideration for the note, but undertook and agreed to bring suit upon it in his own name, maintain the action, pay all costs and expenses thereby incurred, and, "if finally successful," to pay Holbrook one-half of the amount collected, and retain the balance for his services. He instituted his action in ordinary on the note, recovered a judgment, sued out an execution, which was returned no property found, and then brought this suit to enforce the satisfaction of the judgment, making the appellee, Richard H. Yancey, as trustee, a party defendant, and seeking to subject to the payment of his debt certain property held by the trustee under the will of Robert S. Yancey, father, in trust for the use of himself and his children.

The trustee answered, setting up the contract made between Holbrook and Roberts, and alleged that by reason thereof Roberts had no claim to the note or any right to prosecute the action in his own name.

The General Statutes, section 1, chapter 11, provides, that all contracts, made in consideration of services to be rendered in the prosecution or defense, in or out of court by any person not a party on record in such suit, whereby the thing in controversy, or any part of it, is to be received in payment for such services, shall be null and void.

The appellant contends that this contract did not come within the intent and meaning of the statute as, at the time it was made, no suit was pending, and Roberts was, therefore, not a "party on record in the suit." This construction would render the law inoperative and nugatory in a large majority of cases intended to be reached by it. Champerty is an agreement to prosecute an action at one's own risk and expense, and to take a part of the thing recovered in compensation. The law has always discouraged officious intermeddling in the litigation of others, and a contract made to encourage the bringing of an action is more mischievious than one to maintain and aid a party in the prosecution or defense of one already brought.

That this contract was made by, and with a lawyer, but adds to its champertous and illegal character. From the time of the statute of Westminster such agreements between attorney and client have been denounced as the worst species of maintenance, because they were made by men who, by their place and position, could do most mischief in perverting the law to an engine of oppression and suppressing justice and truth.

It has been held in this State that these contracts were equally forbidden and discountenanced by the law, whether they were made before or after the litigation began. Counsel argue that these decisions were rendered under an old statute which did not embrace the words "not a party on record in the suit," and hence were not applicable to this case. This may be true, but the provision in the Revised Statutes was identical with the one cited herein from the General Statutes, and under that law the case of Davis, &c. v. Sharon, 15 B. M., 64, was decided. Davis recovered judgment against Sharon. Randall & Company had a demand against Davis, and brought their suit to subject the Sharon judgment to its payment. Turner and Dunlap, lawyers, interpleaded and alleging that they had prosecuted the suit for Davis under a contract, by the terms of which they were to receive one-third of the judgment for their services, they claimed that part of the fund as theirs. This contract between Davis and his attorneys was made before the suit against Sharon was filed, and they were, of course, not "parties on the rec-

Digitized by Google

ord," but the court, finding the contract to be champertous, held that by it they acquired no right or title to the judgment.

Counsel further contends that this defense can not be pleaded against an unreversed judgment. The trustee was, however, neither a party nor privy to the first suit. He was trustee not only of the defendant in that action but of his children, and any subjection of the trust fund to the payment of the judgment affected Robert S. Yancey and his children alike. There was no attempt made in the first suit to reach the trust funds. That attempt was made for the first time in this action, and it seems to us his defense was good.

A contract affected with champerty or maintenance can not be enforced either at law or equity, nor can a party, whose claim to a fund arises from a champertous contract, secure its recovery in a court of justice.

The 8th section of the 11th chapter of the General Statute provides that neither party to any contract, made in violation of the provisions of that chapter, shall have any right of action or suit thereon. The appellant's champertous contract with Holbrook was a continuous contract. He was not only to procure a judgment, but was to prosecute it to a collection. He had neither right nor title to the note, and this being true the judgment could not better his title to that paper. His action to enforce its satisfaction was but carrying out his part of the contract, vicious from its inception, which he had made with Holbrook, and the trustee, in our opinion, had the right in behalf, certainly of Robert S. Yancey's children, if not in his behalf, to interpose the defense.

The judgment is affirmed.

HENDERSON BELT R. R. CO. V. DECHAMP AND OTHERS.

SAME V. SCHLAMP.

(Filed May 18, 1892.)

1. *Construction of contract—City ordinance treated as contract*—In construing a contract effect, if practicable, should be given to all the words used, but effect should never be given to words where the result would be to establish a right or fix a liability different from that recognized by the law of the land, unless the words show unmistakably that such was the purpose of the parties.

A city ordinance granting to a railroad company the right to the use of the streets of the city, for the construction and operation of its road, and providing that the company "will pay to any property owner all damages that may be recovered by such property owner, either against said railroad company or against the city, on account of the construction, location or operation of said road, or by reason of the filling, excavating or grading prescribed herein, and said company shall indemnify and save harmless said city from any liability, direct or remote," is to be regarded as a contract, binding the company to pay such damages as were recoverable by the law then in force, the purpose of the contract being to indemnify the city and not to make the company liable for remote, contingent or speculative damages.

2. *Evidence*—In an action against a railroad company to recover damages for injury to abutting property from the operation of the road, plaintiff affirming and defendant denying that his house was shaken and the walls cracked by the movement of passing trains, it was competent for plaintiff, as corroborative of his testimony, to prove by the owner that a house back of plaintiff's, and further from the railroad, was shaken by the movement of passing trains.

Digitized by Google

Yeaman & Lockett and H. F. Turner for appellant.

S. B. & R. D. Vance and James F. Clay for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barbour.

These are actions by lot owners to recover damages done to their property by the construction and operation of a railroad upon the street on which their lots abut. The elements of damages in such cases (*i. e.*, where the computation and operation is lawful) are clearly and unmistakably defined in the adjudged cases, and while it is conceded that the court's instruction authorized a recovery for injuries excluded by the law as elements of damages, it is insisted for the appellees that the railroad company, by its contract with the city council, made in consideration of the right granted to it to build its road on the street, assumed a greater liability, and conceded to persons and property owners greater rights than were recognized by the law.

The 3d section of the ordinance granting to the railroad company the right to use the street, which is the contract relied upon, provides that "said company shall pay to any person or property owner any and all damages such person or property owner may sustain" by reason of the construction, location or operation of said track or railroad, or by reason of the filling, grading or excavating of the work as prescribed or required herein. And said company will pay to any person or property owner any and all damages that may be recovered by such person or property owner, either against said railroad company or against the city of Henderson on account of the construction, location or operation of said road or track, or by reason of the filling, excavating or grading prescribed or required herein, and said company shall indemnify and save harmless in said city from any liability, direct or remote, it may incur by granting the right of way as herein specified, or by the construction or operation of said track." Other sections provide how the grade shall be made.

Conceding to the person or property owner, who is injured by the construction and operation of the road, the right to rely upon the contract, where the whole contract and the parties to it are considered, its purpose and meaning is plain. The city council was exercising a power granted to it—a power which should always be exercised with caution and never abused. The grading of the street for the road-bed was to be made in accordance with council's direction, and the evident purpose was to secure the city against damages occurring to individuals by any improper exercise of its power. The members of the council were the guardians of the city—the interest of the city and its people were, in a great measure, in their keeping. And we concede to them the right, and recognize it as their duty, in granting such privileges as are granted here to guard the interest of the citizen. But certainly it was no part of their duty to alter the established rules of law, and we can not assume that it was their intention to create rights in citizens and property owners and increase the liability of the company, to which they were granting a right, beyond that which the law imposed.

But it is insisted that the ordinance is the law—that it must be given the effect of a statute or constitution, and that it, in so far as these parties are concerned, repealed the law as embraced in the Constitution and statutes, and established a new rule as to their

Digitized by Google

rights and liabilities. This position can not be maintained. The ordinance can not, upon any rule of construction or interpretation known to us, be treated as a law. The ordinance was simply a proposition, which, upon acceptance by the company in a manner provided in it, become binding upon the city and upon the company.

A contract is an agreement. A law is independent of agreement, and is enforced without consent. Being a contract, effect is to be given to it according to the law at the time it was made. All contracts are to be construed with reference to the law of the place where they are made or are to be performed.

This we believe is the universal rule of construction. When the company obligated itself "to pay all damages such person or property owner may sustain, by reason of the construction, location or operation of said railroad, or by reason of the filling, grading or excavating prescribed herein," what damages could have been contemplated? Can it be that the company was expected to pay remote, contingent or speculative damages? Or was it intended that it should pay such damages as were recoverable by the law then in force? We think there can be but one answer to the question.

Suppose, as a condition upon which the right was granted, the council had required the company to execute a bond, with surety, covenanting to pay all damages persons or property owners might sustain, by reason of the construction, location or operation of the road, will it be claimed that the obligors would be liable for damages which the law said were not recoverable? Clearly not. The case supposed can not be distinguished from the one before us. But counsel argue that this construction gives no effect to the language of the contract securing damages to the persons and property owners, as they could recover the damages authorized by the law without such provision—the damages fixed in the adjudged cases growing out of the proper construction and operation of the road, as well as for extraordinary damages growing out of the improper construction and operation, and which are in excess of those allowed in the cases referred to. This is true.

If the evident purpose of the contract was to indemnify the city, "to save it harmless," the city, in the proper exercise of the power to grant the right of way to the R. R. Co. through its streets, could incur no liability. But a grant beyond its power might render the city liable in damages, and while it can not be assumed that the city intended to confer upon the company such a use of its streets as would unreasonably injure individuals or property, still in the event the exercise of the right conferred upon the company should unexpectedly prove unreasonably injurious to individuals or property the council desired to protect the city and save it harmless.

But take the contract as made for the benefit of the property owners, and conceding the general rule to be that in construing a contract, effect, if practicable, should be given to all the words used. Effect should never be given to words when the result would be to establish a right or fix a liability different from that recognized by the law of the land, unless the words show unmistakably that such was the purpose of the parties. The company might, by contract upon sufficient consideration, obligate itself to pay for injuries not recoverable under the law, but to do so the parties should, in unmistakable terms, contract with reference to that very matter. It results that the court erred in giving the instructions complained of and in refusing those asked for.

In the Schlamp case we can not see why, if his whole property was injured, he can not recover for the damages done to it as a

Digitized by Google

whole. The instruction, therefore, called for by the defendant, excluding from the consideration of the jury the value or damages to one of the lots, was properly refused.

The defendant should be allowed to show that the grade conformed to that furnished by the city council. Sheets' evidence was competent. Plaintiff affirmed and defendant denied that his house was shaken and the walls cracked by the movement of passing trains. As corroborative of plaintiff's testimony, it was competent for him to prove by Sheets, whose house was back of plaintiff's and further from the railroad, that the movement of the trains shook this house.

The jury had the right to infer from the situation of the houses, as related to the said road, that if the passing trains shook Sheets' house that they also shook plaintiff's house.

The case of the L. & N. R. R. Co. v. Ruthings, 9 KY. LAW REP., 814, is plainly distinguishable from this. There the facts rendered the evidence objected to, irrelevant and prejudicial.

The judgment in each case is reversed, and the cause remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

N. N. & M. V. Co. v. COMMONWEALTH.

Filed May 4, 1892. Appeal from Grayson Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Indictment—Dismissal and re-reference to grand jury*—Where an indictment for a misdemeanor is dismissed and the prosecution re-referred to the grand jury, the defendant, having been summoned to answer the charge, is before the court until the next grand jury acts or refuses to act, and if a new indictment, which shows that it is a continuation of the former prosecution is found, another summons is not necessary.

2. *Same—Limitation*—A new indictment found by a grand jury to which a prosecution has been re-referred, can not be regarded as a continuation of the former prosecution, so as to avoid the statute of limitation, unless it alleges the facts as to the former indictment, its dismissal, &c., and thus shows clearly upon its face that the prosecution was intended to be a continuous one.

3. *Same*—Ordinarily the offense must be laid in the indictment within the time fixed by the statute of limitation. Where, however, the statute does not impose an absolute bar the prosecution may lay the offense outside the statute and prove without averment that the defendant was within the exception. But wherever a statute exists limiting the prosecution within fixed periods the indictment should state the time correctly and then aver the exceptions.

G. W. Stone and P. H. Darby for appellant; W. J. Hendrick and J. C. Graham for appellee.

SYMSER, &c. v. SCHOOL.

SAME v. HENDRICKS.

Filed May 4, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, reversing.

Process on an amended pleading should be served when it presents a new cause of action distinct from the original and of which the defendant could not be apprised by an inspection of the original pleading.

Digitized by Google

In this case it was error to render judgment by default upon an amended cross-petition, as the only relief sought by the original cross-petition, upon which alone process was served, was the correction of certain deeds of partition, while the amended cross-petition asked judgment in the alternative for the alleged value of the property claimed by the cross-petition.

O'Neal, Phelps & Pryor for appellants; W. O. Harris for appellees.

MYALL v. JACKSON, &c.

Filed May 4, 1892. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Yost, dismissing.

Appellate jurisdiction—Amount in controversy—In this action by a creditor seeking to have a transfer made by an insolvent debtor, declared to operate as as assignment for the benefit of his creditors, the amount of the plaintiff's claim being less than $100 this court has no jurisdiction of an appeal from a judgment dismissing the petition. And even if the claims of all the creditors could be considered in determining the jurisdiction, still no appeal would lie as the debts mentioned in the petition do not amount in the aggregate to $100.

L. W. Galbreath for appellant; Geo. W. Adair for appellees.

ANDERSON v. SAMUELS.

Filed May 4, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Lien for grazing stock*—Persons feeding or grazing live stock for compensation have a lien on the stock therefor, although it is exempt from execution or distress.

2. *Error too small to authorize reversal*—As the amount in controversy, including costs and allowances, is $900, and the parties have already been put to great labor and expense in this litigation, and the issues are numerous and complex, an error of $12.65 is too trifling to authorize a reversal.

Geo. S. Fulton and J. W. Thomas for appellant; John S. Kelley for appellee.

TENNELLY v. ROSS.

Filed May 11, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Forcible detainer—Traverse*—When the traversor in a proceeding for forcible detainer has filed his traverse and executed bond within the time required, his right to a trial in the circuit court is secured; and the failure of the justice to file the papers in the office of the circuit court is not ground for dismissing the traverse, as the traversor should not suffer because of the neglect of the justice.

2. *Parol testimony to vary written contract*—Under a written lease for one year from March 1, 1889, with the privilege of two years, the rent for the first year due June 1, 1889, it was competent for the landlord to show by parol that the rent for the second year was to be paid in advance. From the fact that the rent for the first year was due June 1, it does not follow that the second year's rent was also to be paid on the 1st of June.

3. *Under a lease for one year with the privilege of two*, the rent for the second year to be paid in advance, the payment of the second year's rent in advance is a condition precedent to the tenant's right of election to retain the property for that year.

J. W. Thomas for appellant; John S. Kelley for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. JULY 15, 1892. No. 2

KENTUCKY COURT OF APPEALS.

RAINS v. KING, &c.

(*Filed April* 12, 1892—*Not to be reported.*)

Title—Date when title under patent begins—Where a treasury warrant was issued in February, 1834, under which a survey was made April 14, 1837, which survey was not returned to the register until December 6, 1846, and the patent was not issued until June, 1847, the title of one claiming thereunder begins to run December 6, 1846, the date the survey was returned to the register's office. Therefore, where there was another patent for the same lands issued in 1845, under surveys made after 1839, the title acquired under the 1845 patent must prevail.

Hill & Denham for appellant.

J. W. Alcorn for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The appellant, Rains, and the appellee, Dowell, entered into a contract by which the latter was to cut and prepare for market a lot of logs from land the former claimed to own, each to then have a half interest in them.

The appellee, King, claimed the land upon which forty-four of the logs were cut. He, by an arrangement with Dowell, got possession and sold them, giving the latter, however, one-half the proceeds.

The remaining logs, eight in number, were taken and sold at the same time, but Dowell received the proceeds, as they had been cut on land not claimed by King. Rains brought this action for the conversion of a half interest in the logs.

Digitized by Google

A verdict was returned against Dowell for one-half the value of the eight logs, and as to it there is no trouble. He did not answer. The jury found for King, however, and of this Rains now complains.

The issue is, to whom did the land belong from which the forty-four logs were taken? Each has a paper title, deducible from the State, and each also claims by possession.

April 14, 1837, a survey was made for King & Loughlin of one thousand acres under a treasury warrant dated in February, 1834. It was not returned to the register's office and registered, however, until December 6, 1846, and the patent thereon issued in June, 1847. The appellee, King, finally became the owner of this grant. He and his vendors have, for many years, lived upon a four hundred acre grant adjoining it, owned by them respectively, each of them claiming to the extent of both tracts. They have, during the time, exercised acts of ownership, as the planting of orchards and otherwise, over certain portions of the one thousand acre survey.

In 1839 one Ballinger, by arrangement with Jesse Bunch, who was then living upon and claiming it, had a fifty acre survey made under a county court warrant, each to have one-half the land. No patent having been obtained, Bunch caused it to be surveyed again in 1844, and a patent to be issued to himself July 3, 1845. He also procured from Ballinger an assignment of the certificate of survey that had been made in the name of the latter. Subsequently, he conveyed the land to one Nunn, and also assigned him the Ballinger certificate, and upon this Nunn procured a patent to himself, dated July 2, 1852. The Bunch patent was intended to merely cover the land that had been surveyed in the name of Ballinger. In point of fact the line upon one side extended further, but that is not material to this controversy, and it is plain the various owners have only claimed to the extent of the Ballinger survey or Nunn patent. The appellant, Rains, who is a remote vendee of Bunch, testifies that he claims only to that extent.

The Nunn patent and the one to King & Loughlin interfere. The lap is about thirty-five acres, and upon this land the forty-four logs were cut.

Bunch built the house in which he lived upon the fifty acre tract in 1837, but it was not within the interference. Part of the land he cleared was, however, within it, and it has been used by the respective owners ever since for cultivation or pasturage.

As already said, however, each party claims to have had the actual possession of the land in dispute. The jury were, in substance, instructed that if the Nunn patent lapped on the King & Loughlin survey then they could not find for Rains the half of the value of the logs, unless he had been in possession of the interference by occupancy and settlement for more than fifteen years next before they were cut. This was error. It assumed that the paper title of King was superior to that of Rains.

The contrary is true, and he was entitled to recover, unless there had been such a possession by King and those under whom he claims as to defeat his title. The reverse of the instruction should have been given. The court, in ignoring Rains' paper title, doubtless acted upon the belief that the survey by King & Loughlin in 1837 was an appropriation of the land and rendered the subsequent survey and patents to Bunch and Nunn void.

The act of 1835, relative to the appropriation of land under county court warrants, or, in other words, "internal improvement claims," as they are termed, does provide: "Any survey or patent made or

Digitized by Google

issued under this act, which interferes with any survey or patent heretofore made or issued, shall be null and void;" and the subsequent act of February 12, 1836, the operation of which seems, however, to have been limited to a time rendering it inapplicable to this case, in substance provides likewise. 3 Lough. Stat., 386-7.

While the treasury warrant of King issued in 1834, yet the survey was not made until 1837, and it is claimed the act of 1835 only declares such surveys and patents void as covered land previously appropriated by survey or patent. Whether so limited or not in its application we need not determine, because, when the land was surveyed to Ballinger in 1839, and patented to Bunch in July, 1845, it could not be regarded as appropriated under the survey for King & Loughlin, made in April, 1837, because it was not registered until December, 1846, or nearly ten years after it was made. Its operative force depends upon the law under which it was issued. If, by the terms of the statute, it was not in force when the Ballinger survey was made, and the Bunch patent issued, then the land had not been previously appropriated. In such case there was then no survey in force which prevented its appropriation by Ballinger and Bunch. The section of the statute of 1835, above cited, refers to cases of survey where previous surveys or patents are at the time in force.

Section 8 of the act of 1815, relative to the appropriation of lands under treasury warrant claims, provides: "Every plat and certificate of survey made under this law, together with the warrant upon which it was founded, shall be lodged in the register's office within one year from the date of making the survey; they shall remain in the same office for six months, after which time grants shall issue for the land in the usual form."

Section 9 says: "And to prevent any kind of doubts as to the kind of title derived under this act, be it further enacted that the actual survey shall be considered the commencement of the title, and when perfected by grant the title shall relate to the time of survey so as to be available in courts of law against an older grant founded upon a younger survey."

But section 11 qualifies this: "Should any plat and certificate of survey, obtained under this act, be not returned into the register's office within the period herein prescribed, such plat and certificate may, nevertheless, be registered, the register indorsing thereon received after the regular time; and in issuing grants on all such plats and certificates the register shall, after reciting the date of the survey, recite the date when the same was registered, to which latter time only this grant has relation; and the title conveyed by such grants shall, in contests with other claimants, be considered valid from the date of the registry only and not from the date of the survey, as is herein provided for those claims which are registered in due time."

The King & Loughlin survey and patent appear to have been subject to the provisions of this statute. We have been able to find no repeal or modification of it as to the respects in which it affects this case.

As the survey was not registered within a year no right could rest in King & Loughlin, save from the date of the registry. By the terms of the statute the grant only became effective from the time of the survey in case the plat, &c., were lodged with the register within a year from the making of it. Payne v. Riley, 4 Dana, 38; Pearls' heirs v. Davis, 4 Dana, 443.

When a year had elapsed without a return of the survey to the proper office the land could not be considered as appropriated as

Digitized by Google

against other parties. There was no survey then in force as to them, and as by the lapse of time this was true as to the King & Loughlin survey, when the Ballinger survey was made and patent issued to Bunch, it results that the appellant, Rains, has the superior paper title. Duff v. Morgan, 7 KY. LAW REP., 302.

For the error indicated, the judgment is reversed and cause remanded for another trial consistent with this opinion.

COVINGTON & CINCINNATI BRIDGE CO. V. THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO.

(*Filed April* 14, 1892.)

1. *Corporations—Dedication of bridge to particular use*—The appellee bridge company, which owns a bridge spanning the Ohio river between Cincinnati and Covington, by its charter, was not required to so construct the bridge as that street cars might pass over it, but the bridge was constructed in this manner and for many years all street railway companies in the two cities have been permitted and invited to use the bridge at a fixed rate of toll. In this controversy concerning the right of the bridge company to charge a certain rate of toll, *Held*—That the act of the appellee must be treated as an enlargement by it of its corporate right so far as the public is concerned, and having thus dedicated its bridge for may years to the use of street cars, it can not now refuse to permit such cars to use its bridge at reasonable rates of toll.

2. *Same—Toll—Discrimination between street cars and ordinary two-horse vehicles*—The bridge company may charge one rate of toll for an ordinary two-horse vehicle and a different and higher rate for a street car drawn by two horses. Such difference in rates of toll is not an unreasonable discrimination against street railway companies. A charge of two cents for each passenger in a street car is not an unreasonable rate of toll under the facts of this case.

J. F. & C. H. Fisk, O'Hara & Bryan and Ramsey, Maxwell & Ramsey for appellant.

Simrall & Mack and Wm. Goebel for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

This is a controversy between the Covington & Cincinnati Bridge Company on the one side and the South Covington & Cincinnati Street Railway Company on the other, and involves the question of toll collected or attempted to be collected by the bridge company of the street railway company.

The latter maintains that in the fixing of tolls there is an unjust discrimination in the charge upon its vehicles and the charge made against other vehicles of a like character; that by the rates of toll fixed by the bridge company for years twenty cents was the established rate for a vehicle drawn by two horses, and that as the car or coach of the street railway company is drawn by two horses the bridge company has no right to charge more for such a car than for the ordinary carriage or farm wagon drawn by two horses, and so the chancellor below adjudged.

The bridge company claims it has the right to charge a greater sum and insists that it may exclude the street railway company from the

Digitized by Google

use of its bridge by its cars altogether if it should deem it proper to do so.

The real issue is as to the amount of toll to be charged, for if the appellant (the bridge company), by reason of its duty to the public and to this appellee, is compelled to permit street cars to pass over its bridge, it then becomes a question solely as to the reasonableness of the toll and whether a discrimination is made in fixing the toll as against the appellee (the street car company).

The bridge company obtained its act of incorporation in February of the year 1846, with power given its president and directors "to fix the rates of toll for passing over the bridge and to collect the same from all and every person or persons passing thereon with their goods, carriages or animals of every description or kind. Toll gates shall be kept and tolls received at each end of the bridge and the rates of toll shall be posted up in some conspicuous place where the toll is demanded." The bridge was opened to the public on the 1st of January, 1867, rates of toll were fixed by the president and directors, and that of a vehicle drawn by two horses at twenty cents.

When this act of incorporation was obtained and at the time the bridge was built there were no street railways in the city of Covington, but the bridge company, seeing the necessity for a more convenient and rapid transit from the one city to the other than by the ferry boat, and anticipating the existence of street railways in Covington, so constructed its bridge by laying down iron rails upon it as that street cars might pass over it, and in doing so increased necessarily its cost and added to the expense in keeping it in repair. It constructed approaches to its bridge for cars on each side of the river and invited companies, subsequently organized, to use its bridge, charging the first car company as much as two and one-half cents for each passenger crossing in the street cars, and finally reducing it to two cents.

The appellee was chartered in January, 1876, and from that time on has been operating its cars between the two cities, paying what was charged other street car companies. There was no contract between the bridge company and the appellees, and the latter paid as if it was a part of the corporate duty of the bridge company to allow the use of its bridge to street cars upon paying a reasonable toll.

While it is evident the street car company could not have compelled the bridge company to place rails on the bridge and construct it so as cars might pass over it, as from its charter it was a bridge to be constructed for the ordinary purposes of travel, still when the appellant has seen proper to enlarge its franchise in so far as the public is concerned, and to make it a street railway bridge as well as one for ordinary travel, it has assumed a corporate duty, or, if not a corporate, a public duty with reference to street car companies, that requires it to permit street cars to pass over its bridge at reasonable rates of toll and can not, at its pleasure, destroy this means of travel by removing its rails or refusing to permit such cars to go upon its bridge. This bridge is a highway and dedicated by the company, not only to the uses of ordinary travel, but to its use by street railway companies in passing cars over it from the one city to the other. This company has permitted this use of its bridge for more than a quarter of a century; has induced, from time to time, large expenditures of money in building street railways and inviting the travel upon its structure by all such corporations.

It is the only way of reaching the city of Cincinnati by the use of street cars, and to stop this public travel would not only destroy

Digitized by Google

much of this capital invested in such enterprises but would be disastrous to the public interests. In our opinion the appellee has the right to pass over this bridge by paying a fair rate of toll. The bridge is not a common carrier and, therefore, the question as to the right of requiring one carrier to transport the business of another carrier has no application.

The express cases in 117 U. S., —, and that of K. & I. Bridge Co. v. L. & N. R. R. Co. can, in no wise, affect the decision of this case.

The appellants being under a legal obligation to the appellee as to this right of user, the question then is: Has the appellant, in making its charges, discriminated against the appellee by charging other cars or vehicles of like character a less rate? If so the judgment below should have provided a remedy for the wrong.

There is certainly a manifest difference between a street car and two horse vehicles as ordinarily used by the traveling public. The ordinary vehicles may go upon the street without a license from the city or the State. The one has a franchise that is in one sense exclusive; the other moves as a legal right, subject to pay for the use of the property of others dedicated to the public use by paying such toll as the sovereign has authorized, or such as the one dedicating his property to public use demands, if reasonable; in other words the use of a highway by the general public is no argument in favor of a like use by a street car company.

In regulating tolls no one would classify a street car with a family carriage or a two-horse wagon. A street car could be so constructed as to carry one hundred passengers drawn by two horses and will ordinarily carry eight or ten times as many persons as a two-horse carriage, and, therefore, the injustice of permitting such a travel over appellant's bridge with no greater charge than is imposed on an ordinary two horse vehicle. It is said, however, that if a street car is not classed as a two-horse vehicle there is then no provision of the charter authorizing any toll to be paid. The only answer to such a result would be that if no charge can be made the right to the use of this bridge must be denied.

The appellant had been charging two cents for each passenger within the cars for many years and up to the 2d of April, 1889, when the board of directors fixed the rate at twenty cents for each car in lieu of two cents for each passenger.

The great number of cars passing every twenty-four hours made this charge of twenty cents equal or nearly so to the two cent toll. In a short time, however, the number of cars diminished. The street car company would land its passengers at each end of the bridge so that the car, in crossing, would have full loads, thus placing the passengers in a less number of cars and lessening appellant's toll, and, for that reason, on the 1st of May the charge of two cents was resumed.

The number of cars crossing the bridge prior to 2d of April, from the statement of the appellee, was 436 per day, and by the change made the number was reduced to 344. By lessening the number of cars and increasing their capacity for carrying the number could be lessened to such an extent as to deprive the appellant of sufficient toll to keep that part of the bridge in repair.

If, as adjudged below, a street car is to be treated as an ordinary two-horse vehicle, the discrimination complained of should be prohibited; but when a part of this bridge is dedicated to the sole use of such cars and a particular mode of construction is indispensable to that use, and at the same time creating an additional expenditure by the appellant made necessary by such use, we see no reason for hold-

Digitized by Google

ing, when regulating the toll, that no difference exists between street cars and the ordinary vehicle drawn by two horses and used for every day travel.

Cases have been cited by counsel where a street car has been held to come within the meaning of the word *coach* or the words *accommodation coach*, when imposing a license upon vehicles by an ordinance of a city council, and we would be inclined to say that if all vehicles drawn by two horses were made the subject of municipal taxation, and there was no tax imposed on street cars as such, that the act was intended to embrace them and, therefore, they must pay the tax, as in the case of the Mayor of New York v. Third Avenue R. R. Co., where the ordinance imposing a license used this language: "A stage," "an accommodation coach," "a stage coach," but was silent as to street cars. The court held that cars were vehicles run on wheels and one could not be distinguished from the other, and for that reason the license must be paid. The court, in that case, when applying the facts to the subject-matter of the issue, could see no reason for exempting a street car and imposing a license on all other vehicles and the facts of the particular case often control the determination of such questions. The law-making power might authorize a turnpike company to charge a fixed sum as toll for a two-horse vehicle, but no one would suppose that it was intended by such legislation to authorize a street car company to go upon the turnpike and use it or any part of it for street car purposes. There seems to us to be but little, if any, analogy between the cases cited and the case before us, and, in determining the rights of these parties, it would be unjust to hold that the appellee, in the exercise of its franchise, could use the appellant's bridge and transport as many passengers over it as could be crowded into one car and pay only such toll as is required of an ordinary two-horse vehicle. It would be placing the use of the appellant's bridge at the disposal of another corporation with no remedy as long as the passage over it in these cars is operated by two-horse power.

We find no discrimination as against the appellee in favor of other like companies. They are all charged with the same burden. Nor do we perceive that the charge of two cents is unreasonable, and in fact with the usual number of cars running over appellant's bridge there is no great difference between the charge of twenty cents for each car and that of two cents for each passenger, but whether so or not there is no discrimination shown to exist, that is the question involved on this appeal. There is testimony showing that after the change in the toll tickets were sold at the rate of twenty cents per car to the appellee. If so, the appellant should be compelled to accept these tickets until they are exhausted, and then the rate should be two cents as fixed by the board.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

NEWPORT LIGHT CO. V. CITY OF NEWPORT.

(*Filed April* 16, 1892—*Not to be reported.*)

Pleading—Consent of city—Conclusion of law—Appellant, in an answer, alleged that prior to the erection of certain poles and wires in the streets of Newport it had the consent of the city to so erect them—appellee demurred to this allegation on the ground that it was but a mere conclusion of law

Digitized by Google

reached by appellee by its own construction of a certain written contract with the city. *Held*—The demurrer should not have been sustained and appellant had the right to show the consent of the city in whatever manner obtained—appellees should have entered a motion to make the allegation more specific and certain.

Wm. Lindsay, J. G. Carlisle and Nelson & Desha for appellant.

E. W. Hawkins and C. J. Helm for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

This court, in an opinion rendered between these same parties and in reference to the same subject-matter, held that the appellant had no right to furnish the city electric light in lieu of gas light without the consent of the city. The case is reported in 11 KY. LAW REP., 840.

The fair inference deducible from the action of the city in that case was that it preferred gas light to electric light, this court holding that the change from one light to another could not be made at the will alone of the appellant, and besides that the concession of such a power to the appellant to erect poles and do other acts necessary to supply the city with electric light, without the consent of the latter, would be a virtual surrender of the control of the streets to the appellant.

On the return of the case to the court below the appellant filed an amended petition in which it is alleged "that prior to the erection of said poles, wires or any or either of them, as set out in the original petition, it had the consent of the defendant so to erect and maintain the same in, over and upon the streets, sidewalks and places where the same were so erected and where they now are." A demurrer was sustained to this amended pleading on the ground, as is agreed by counsel for the appellee, that this pleading amounts to a mere conclusion of law, reached by the appellant from its contract to furnish gas or other light to the city. This may be, still the fact of consent is alleged and the appellee should have required the appellant to make his pleading more specific and certain. It is manifest that if the appellant has obtained the consent of the city, that the latter is entitled to have and the former to furnish this light under what is known as the gas contract. The demurrer should have been overruled.

Reversed, and remanded for proceedings consistent with this opinion, that the appellant may show the consent of the city to this change other than by the contract itself.

FAUSTRE V. COMMONWEALTH.

(*Filed April* 16, 1892—*Not to be reported.*)

Criminal law—Bigamy—Verdict supported by evidence—**The jury, under proper instructions, have, for a second time, found appellant guilty of bigamy, and their finding, being sustained by sufficient evidence, will not be disturbed on appeal.**

Weden Oneal for appellant.

W. J. Hendricks and W. W. Cleary for appellee.

Digitized by Google

Appeal from Kenton Criminal Court.

Opinion of the court by Judge Pryor.

This case has been heretofore in court and reversed because some record evidence, showing the former marriage of the appellant, was not properly authenticated. 13 KY. LAW REP., 347. On the return of the cause a new trial was had with instructions given as on the former trial, with evidence competent to show the marriage of the appellant with Caroline Louisa Eickenberger in the Dominion of Canada. The laws of Canada were proven by counsel of that country learned in the law, and the fact of the marriage is established by satisfactory if not convincing proof. While there is much reason for speculation as to the probabilities of its having been a mock marriage, still the jury, for the second time, has passed on the issue and this court ought not to disturb the verdict.

The appellant has been given a fair opportunity of showing his innocence and vindicating his conduct and has failed to do so, and although quite a youth when this marriage is said to have occurred he is nevertheless guilty of bigamy as the testimony conduces to show.

There are some singular facts, however, connected with this case. The appellant, when attending college and not yet nineteen years old, returned home in vacation and, together with others, went to Niagara Falls on a trip of pleasure, and while there the marriage took place. The girl he married was a domestic in his father's home and no one seems to have known of the marriage save those who accompanied them. He returned to school and was at home for several years and no action taken in any way by which the marital rights of wife No. 1 were asserted.

When the appellant married the Kentucky girl he took her, as the first record shows, to his father's home in Canada, and it is passing strange that when in the neighborhood of his first marriage, and with those who now profess to have been present when it was consummated, nothing was said in regard to it and no step taken to make him pay the penalty for such a wrong. The appellant says he was only sixteen years old when this marriage took place; that he was drunk and unconscious of what transpired and never recognized it as a realty.

All these facts, however, were before the jury and can appeal alone to the clemency of the executive and not to this court.

The appellant has been twice tried and convicted, and the facts authorizing the conviction we must affirm the judgment.

WALKER V. NORTHERN BANK OF KENTUCKY.

(Filed March 12, 1892.—Not to be reported.)

1. *Vendor and vendee—Discharge of trust created by parol—Bona fide purchasers*—At a judicial sale of land to satisfy a mortgage lien held by a bank, the debtor became the purchaser and caused it to be conveyed, in 1866, to the bank, the latter agreeing, by parol, to sell the land, and after first satisfying its indebtedness, to pay the balance to the debtor. The debtor was declared a bankrupt in 1877 and his interest in this land was included in his schedule of assets. By an agreement with the debtor and his assignee, sanctioned by the bankrupt court, the bank paid the assignee a certain sum and released the debtor of all claims, and the assignee executed for the debtor a quit

Digitized by Google

claim deed to the land. In this suit against the bank by one claiming an interest in the land under an unrecorded deed executed by the debtor to his son in 1875, *Held*—

First—The attendant circumstances, as well as the language of the deed of 1875, show that the debtor did not intend to transfer his claim against the bank by that deed.

Second—The bank, being the holder of the legal title to the land, had a right to discharge the trust created by its parol agreement with the debtor, by the arrangement it made with his assignee in bankruptcy, and the trust was thus discharged, even though the deed of 1875 may have attempted to convey the debtor's equitable interest in the land, no notice of this transfer having been given the bank.

2. *Same—Indefinite description of land in deed*—The deed of 1875, under whic this son claims, was not recorded for twelve years after its execution, and it described the land as "all lots or parcels of lands owned by the said party of the first part in the county of Kenton, State of Kentucky." *Held*—That in a contest between *a bona fide* purchaser claiming under a deed subsequently executed, and the son of the grantor claiming under this deed, the *bona fides* of the transaction between the grantor and his son might well be doubted, and a court of equity should be very reluctant to sustain the claim of the son under a deed so indefinite in its description of the property conveyed.

O'Hara & Bryan and J. G. Carlisle for appellant.

Richard P. Ernst, Thompson & Richards and Wm. Lindsay for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

In the year of 1862 Samuel J. Walker being indebted to the Northern Bank in a sum amounting to near $30,000, for the purpose of securing the bank deposited with its president and directors eight notes for $3,142.85 each, all of which were secured by a mortgage properly executed and recorded on certain real estate in the city of Covington, and now the subject of this controversy.

In April of the year of 1862, in an action in equity pending in the Covington Chancery Court, under the style of Powell v. Powell, the object of which was to sell the land that had been mortgaged to secure these notes held as collaterals by the bank, the bank and Samuel J. Walker were made parties, and it was alleged that Walker was the owner and that the bank held them to secure Walker's indebtedness to it.

In 1864 this land was sold under a judgment in the case of Powell v. Powell, &c., and Samuel J. Walker became the purchaser and executed his bonds for the purchase money. The sale to Walker was confirmed, and after confirmation, it appearing that the benefit of the purchase had been transferred by Walker to the bank, on the joint motion of Walker and the bank the master commissioner was ordered to convey the land to the bank and in pursuance of that order a deed was executed to the bank by the commissioner, approved by the court and ordered certified for record. This was on the second of October, 1866.

The bank, as is admitted by the pleadings, agreed in parol to sell this land, and if the purchase money obtained exceeded the amount of Walker's indebtedness to it, either at that time or by reason of subsequent loans, Walker was entitled to the excess.

On the 29th of April, 1878, Walker (the debtor to the bank) was

Digitized by Google

adjudged a bankrupt by the U. S. District Court for the northern district of Illinois, and the title to his whole estate vested by deed in Robert Jenkins, his assignee. It appears that in the schedule of property first made by him no mention was made of the property in controversy, but on the 16th of May, 1879, the schedule was amended and the property embraced in this amended schedule. Walker being indebted to the bank and to Ernst and Stevenson in a sum exceeding $300,000 they agreed to take this property, as well as other property owned by the bankrupt, in discharge of their indebtedness, and to pay to the assignee as an additional consideration the sum of $500.

The arrangement was entered into between the bank, Ernst and Stevenson on the one side, and the assignee, Jenkins, on the other, and having been sanctioned by the district court the assignee made to three creditors, the bank, Ernst and Stevenson, or to one Collins as trustee, an absolute conveyance to this real estate. This deed from the assignee in bankruptcy was executed on the 19th of June, 1882, but not recorded until the 2d of June, 1888. In this manner the bank and three creditors obtained the title that is now claimed to be in Isaac N. Walker.

This present action was filed by Isaac N. Walker against the Northern Bank, in April, 1888, in which he claims that in the month of March, of the year 1875, Samuel J. Walker divested himself of all title to this realty, or its proceeds, by a deed then executed to his son, Henry W. Walker, and that Henry W. Walker, in November, 1887, executed to the present appellant a deed for this same land, and in this manner the title was derived by the appellant. That, therefore, the deed from the assignee in bankruptcy passed no title to the bank to the realty or its proceeds, as at that date the title was in the son, Wm. H. Walker, by the deed of March 12, 1875, and in addition the deed from the assignee was obtained by fraud, &c. The conveyance made to the son of the debtor was not recorded in the county clerk's office of Kenton, where the land lies, until December, 1887, a period of more than twelve years after its execution. This conveyance contains no specific discription of the property conveyed, but in general terms conveys to the son "all lots or pieces of lots or parcels of land owned by the said party of the first part in the county of Kenton, State of Kentucky;" "all lots or parcels of lands owned by the party of the first part in the county of Hamilton, State of Ohio." "Also all lots, pieces or parcels of land owned by the party of the first part outside of the county of Cook, in the State of Illinois." "Also all lands owned by the party of the first part in the State of Michigan and in the State of Iowa."

Under such a conveyance, so general in its character, although of record, the chancellor would have some reluctance in disregarding the claim of a *bona fide* purchaser from the original grantor, although subsequent in date, and certainly so where the conveyance is to the son. The *bona fides* of the transaction might well be questioned and particularly where the father subsequently conveys to the son by various deeds, specific in their character, as to both location and boundary, other lands than those in controversy lying in the county of Kenton, that Samuel Walker owned when the deed of 1875 was executed, and if this last deed was intended to be effectual why the necessity of making other conveyances for the same land? It is also manifest, if the father regarded the deed of 1875 as valid, he would not have sanctioned or authorized the compromise that was made between his assignee in bankruptcy and the bank, by which he was attempting to pass the right to an equity that is now contended had

Digitized by Google

passed out of him years before to his son. The amended schedule filed by the debtor said to the assignee and to his creditors that this equitable interest in the proceeds of the sale of this land constituted a part of the bankrupt's estate and was subject to the payment of his debts. There was no fraud practiced on the bankrupt or his assignee by these appellees, but on the contrary the settlement made by the assignee relieved Walker of a liability exceeding $300,000, and besides it is evident this *blanket conveyance* was never intended to embrace the equitable right that the debtor had to the proceeds of the sale of the realty. The title was absolute in the bank and of record when this transaction between the father and the son took place.

Walker paid none of the purchase money for this land, and the provision in the deed, *conveying all the right, title, interest, claim or demand, either in law or equity, of the party of the first part* (the father) to the party of the second part (the son) in and to these lands was never intended to embrace this obligation on the part of the bank to apply the proceeds to the debtor after the payment of certain debts. If the debtor intended to pass to his son this equity it would have been an easy matter to have used language that would have shown the intent, and we are not, therefore, disposed to resort to a construction as indefinite as the conveyance itself, for the purpose of granting relief at the expense of *bona fide* creditors.

The fact that this conveyance of 1875 was kept in the pocket of the grantee for near twelve years without being recorded, and without notice to the bank of its existence; that no claim was asserted by him against the bank until this action was filed in 1888; that his father made numerous deeds for real estate in Kenton county to him subsequent to the deed of 1875, and of real estate that he owned when that deed was executed, and that the assignee compromised this equitable claim, are all facts and circumstances conducing strongly to show that neither the father nor son regarded this claim against the bank as passing by virtue of the deed.

The title to the bank was absolute on its face and of record when the deed to the son was executed, and the deed to the assignee of Samuel J. Walker, the father, divesting him of all title to his estate was recorded in the county of Kenton in the year 1879.

The bank, therefore, had the right to compromise and settle this equity with Samuel J. Walker's assignee, because the assignee stood in the shoes of the debtor. It may be conceded in the consideration of this case that the deed made to W. H. Walker by his father gave a minute and specific description of this realty, and that for a valuable consideration it transferred by its terms the equitable claim of his father against the bank, and still no recovery can be had on the facts of this record. This is not a contest between equities. If so, the prior equity must prevail. But here the holder of the legal title, who has encumbered it with an equity in favor of Samuel Walker, by reason of his parol agreement to give him what the land may bring exceeding the debt, is attempting to remove that equity by compromise or a settlement with Samuel Walker or his assignee.

Suppose, therefore, the bank had paid Samuel Walker a sum of money in satisfaction of his equitable claim, in what manner could the bank's rights be affected by an assignment of this equity, prior to the payment to a stranger, without notice to the bank? A compromise is made with the assignee of the debtor under the sanction of the court, in which his estate is being settled, and the eqitable claim of Walker against the bank is settled by the delivery up of Walker's indebtedness to the bank and the payment of $500. This

Digitized by Google

is without notice of the transfer to Walker's son, and as evidence of the settlement, the quit-claim deed and release in writing of the assignee is produced. It is not necessary that this writing should have been recorded. The bank already had the fee by a deed of record. The equity originated from a parol agreement, and could be removed at any time by a settlement with the debtor, unless notice of its transfer to some one else had been given the bank.

All that W. H. Walker obtained by the deed, giving it the construction contended for by counsel, was the right to the balance of the proceeds of sale after paying the bank's debt, and if this equity was settled between the bank and Samuel Walker's assignee, without notice of the equity having been transferred to W. H. Walker, it must end the controversy. The fact that Stevenson and Ernst were also parties to the settlement can make no difference. The bank did settle—surrendered its claims, paid the $500, or a part of it, and no cause of action exists by either W. H. Walker or his grantee against the bank.

Judgment affirmed.

PRESTON, &C. V. BEALL, &C.

(*Filed April* 2, 1892—*Not to be reported.*)

1. *Pleadings*—Where the issues in a case are fully made, and plaintiff files an amended petition, averring, in substance, the same facts as are set out in the original petition, it is unnecessary for defendant to file any amended answer thereto.

2. *Trusts—Limitation—Construction of contract*—B., who claimed legal and equitable titles to large, indefinite bodies of land, the location of which were unknown, by written contract employed W. to recover the land, to compromise with conflicting claimants and to sell such land as he finally recovered, the agent to have one-half of the land so obtained; the contract provided, that "it is understood that W. holds, and claims to hold, sundry interfering claims. This agreement is not to affect such claims, or to change the merits of any conflicting title which he and the undersigned have." In this action by the heirs of B. against the executor and devisees of W. to recover the value of certain lands and rents alleged to have been received by W. under this contract, *Held*—

The evidence shows that W. was in adverse possession of such lands, claiming them as his own prior to the execution of his contract with B., therefore, under the terms of the contract W.'s right and title to such lands was not in any manner affected by the contract, and it appearing that W. and his heirs were in adverse possession for more than forty years before the commencement of this action by the heirs of B., the cause of action is barred by the statute of limitation. W. did not hold this land in trust for B., and the doctrine concerning an express, subsisting trust does not apply.

3. *Same—Liability of devisees for ancestor's debt—Judgments*—Even though the devisees of W. were liable by reason of assets received for W., it was error to render a joint judgment against them for the whole sum due to B.'s heirs.

Humphrey & Davie, W. H. Mackoy, R. A. Thornton and John G. Carlisle for appellants.

E. W. Hawkins, Jno. S. Ducker, Richard Butler Hawkins, O'Hara & Bryan, Oliver B. Jones, John D. Ellis and Tyson S. Denis for appellees.

Digitized by Google

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

Benj. Beall and others, the plaintiffs below, who are heirs at law of William Kennedy, instituted the present action against the executors of the will of Robert Wickliffe and his children, who are devisees, in the Campbell Circuit Court on the 19th of May, in the year 1874, to enforce an alleged trust, said to have been created by a writing signed by one Benj. D. Beall, sr., and dated on the 6th of February, in the year 1837.

It reads: "Whereas, my grandfather, the late Wm. Kennedy, claimed sundry land claims, as locator or otherwise, supposed to be in the counties of Bath, Montgomery, Nicholas, Fleming and Morgan, or some of them, to some of them he held titles in equity, and to some of them legal titles in conjunction with others, and the said Kennedy having died and leaving James Kennedy and Janette H. Beall, both deceased, his only children and heirs at law; and, whereas, Benj. Beall, deceased, the husband of Janette H. Kennedy, purchased of James Kennedy his interest in all such claims; and, whereas, I have been appointed by act of the Legislature of Kentucky a commissioner, and am vested with the power to sell and convey all such lands, and have this day engaged R. Wickliffe as an agent to settle and adjust such claims with the ———, and sell them when reduced to possession, and have given a power of attorney to the effect. Now as compensation to said Wickliffe for his care, trouble and expense in making the division and sales, if sales are made, I agree to allow said Wickliffe one-half of the land now in possession, or what hereafter I. may reduce to possession, after paying all expenses out of the lands, as a full compensation for his care, trouble and expense. This contract, however, is not to charge said Wickliffe with *any supposed neglect*, it being understood that he is only to proceed as he may think proper, or the claim in his opinion be worth preserving. And it is also understood *that said Wickliffe holds and claims to hold sundry interfering claims*. This agreement *is not to affect such claims*, or to change the merits of any conflicting title which he and the undersigned have; and, whereas, a portion of these lands may be in adverse seizure, if so, it is not intended that this contract is to affect such claims, if any, but in such cases, should they occur, said Wickliffe is to have a reasonable compensation. In witness whereof, I have hereunto set my hand, &c., this 6th day of February, 1837. BENJ. D. BEALL, SR."

The object of the petition is to make Wickliffe's heirs and divisees responsible for the rents of lands alleged to have been recovered by him in his life-time under this agreement signed by Beall, and also to recover the value of land sold by him, which has never been accounted for, and that disposed of by him to his children, the whole amounting, principal and interest, at the date of the judgment rendered by the chancellor, to a sum exceeding $220,000.

The theory of the recovery is, that the trustee, Wickliffe, d'sposed of the trust fund for his own use, and his devisees, Mrs. William Preston, Mrs. John Preston and Mrs. Wooley, having received an estate by devise from their father sufficient to satisfy the demand, a joint judgment was rendered against them for the sum stated. There was no judgment rendered against the executors, because no demand was made as required by the statute, and for the additional reason they had fully administered the estate in their hands and made a settlement of their accounts.

The defendants below and appellants in this court denied the ex-

Digitized by Google

istence of any trust, but admitted the employment of their ancestor, Robert Wickliffe, by Benj. D. Beall, to recover the lands upon the terms contained in the writing, signed by Beall alone, on the 6th of February, in the year 1837. They denied that he recovered any lands for the appellees or their ancestors or received any rents, or that the ancestor of the plaintiffs ever placed patents or deeds or the evidences of title in Wickliffe's hands, or that Wickliffe ever took or held possession of any of the lands in the petition mentioned. They pleaded the statute of limitation of fifteen and thirty years, and further by pleading said, that if the court should construe the writing signed by Beall as an express, continuing and subsisting trust, then the delay and laches of the plaintiffs in enforcing their claim has been so great that no court of equity should compel them to account.

The various claims to land held by Kennedy, in the form of patents and locators claims, embraced, as it is alleged in the petition, over one hundred thousand acres, located, as was supposed, in various counties, to the one-half of which the plaintiffs or their ancestor was entitled.

In the preparation of the case, and from the issue made by the pleadings, the result was made to depend upon the time and the manner in which Robert Wickliffe, the father of the principal devisees, acquired title to about eight thousand acres of land, or a few hundred acres in excess of that quantity, lying in the county of Bath. This land he devised to his three daughters, and when divided up, so as to make the division between them, was known as the Piedmont farm, devised to Margaret Preston, the Maryland farm, devised to Mary Preston, and the Marion Forge farm and a tract of five hundred acres devised to Sallie H. Wooley. The appellees claim, and the chancellor below so held, that the patents to James Taylor for 12,000 acres, dated June 25, 1789; a patent to Francis Buckner for 15,000 acres, dated May 17, 1790; a patent to Charles Taylor for 3,984 acres, dated May 16, 1793; a patent to Francis Taylor for 3,000 acres, dated May 16, 1793, and a patent to one Travis for 2,400 acres, dated June 22, 1799, embraced this land in controversy, and that Wickliffe, as the agent of Beall and others, received this land under the agreement of the 6th of February, 1837, by virtue of these patents.

The devisees of Wickliffe by way of defense say that this land devised to his daughters was originally owned by a man by the name of John Lee and the State Iron Works Company prior to the year 1800; that the land was then sold to George Nicholas and others and in the year 1803 was conveyed to Thomas Dye Owings, and that Owings was in the actual possession in the year 1817, and until the Bank of the United States acquired the title to all of it by judicial sales, and that prior to the 6th of February, 1837, the bank sold this land to Wickliffe, and that his, Wickliffe's, tenants and agents, were in actual possession of this land in the year 1834, and also at the date of the agreement with Beall, in February, 1837, Wickliffe, claiming to be the absolute owner, and that he and his devisees have had the continued possession since that date, a period of forty years from the time Wickliffe took possession under a claim of right, and of seventy-five years from the date the possession has been traced to those under and from whom Wickliffe's heirs hold the title.

The relation that Wickliffe occupied towards the Bealls, by reason of the agreement of February 6, 1837, was nothing more than that of an agent or attorney to obtain the title and possession of lands

Digitized by Google

under certain patents or claims held by James Kennedy. Where the lands were located was not then known to either party. It was supposed, to use the language of the writing, to lie in certain counties and the quantity about one hundred thousand acres. This writing is so worded as not to make Wickliffe liable should he be guilty of any supposed neglect in the prosecution of the claims, and in so far as any conflicting title existed in Wickliffe the parties were to be at arm's length, and the relation of trustee could not exist by its terms, whether regarded as an express or constructive trust, in so far as it affected any hostile claim that Wickliffe then had. It is a familiar principle that a trustee can not convert the estate of his *cestui que trust* by having the title made to himself into property of his own, and if that was the only question involved in this case there would be but little reason for declining to affirm this judgment.

It is insisted, however, that the facts of this record show that Wickliffe was claiming this land, by reason of title in himself, from the year 1834, and being in the actual occupancy by his agents and tenants, using the land by cutting timber, digging ores and making leases, instituting actions in equity to quiet his title and making conveyances of parts of it to others, and finally devising it to his children, was such a notorious adverse holding as was notice of a disclaimer to hold for any one but himself, and, therefore, the statute of limitation was properly pleaded.

This writing, it seems to us, together with other facts, might evidence the existence of a constructive trust as defined by Mr. Perry. A constructive trust "is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself." So if Wickliffe had recovered these lands for his clients or his principals, and had the title made to himself, he would be held in law a trustee, and this is what is alleged was done by Wikcliffe in this case. The writing being signed by Beall alone, when acknowledged to be the agreement by Wickliffe, only evidenced an employment to perform the services for the compensation agreed on.

It is not necessary, however, to pass on the question as to the nature of the trust, for if Wickliffe held and claimed this land under a different title from that of Kennedy's heirs prior to the contract of February, 1837, and this is an established fact, how he can be converted into a trustee for Kennedy's heirs, unless he abandoned his own title and accepted theirs, we are unable to percieve. He and his devisees were in the actual possession and use of the property for forty years before this suit was brought, and dealing at arm's length with the parties as to his own title, because that is excepted from the operation of the agreement, if conflicting at its date, what was to prevent the statute of limitation from applying? So it is needless to discuss the question of laches where there is an express subsisting trust, and no statute can bar the recovery, because as to these conflicting claims the parties were strangers, and each party as to those claims agreed to protect their own interest.

On the merits of this controversy the burden was at least on the appellees, after the lapse of thirty-seven years from the date of the agreement, to show that Wickliffe received some trust estate before his devisees could be made liable, conceding there was no statutory bar. Wickliffe did institute an action in equity against the heirs of the patentees under whom Kennedy's heirs claim, the heirs of James Taylor, Travis Buckner, Charles Taylor, Francis Taylor and others in the Bath Circuit Court, and recovered as against their unknown heirs, the title to the undivided one-half of the patented lands, and at the September term, 1845, of the Bath Circuit Court, where the

Digitized by Google

suit was instituted, A. Trumbo was appointed commissioner, with directions to execute deeds to the heirs of Kennedy for their undivided moiety, which was done. After this litigation ended Wickliffe wrote to Beall, with whom the agreement was made, "that he had obtained decrees for your fathers' heirs moiety in all the claims you employed me to sue for, but have lost the suit against Hawkins' heirs by, I think, a most erroneous decree of the Court of Appeals, so that claim is lost to Kennedy's heirs. I hope to hold some slips in James Taylor's and some in Buckner's and perhaps some other of the claims, but it will, I fear, be a poor turn out, yet I have ordered possession to be taken and will, as is possible, make something out of the claims," &c.

This letter was dated at Lexington, April 24, 1853. Wickliffe also, in the same letter, requested Beall to send him a deed for the undivided equal half of Beall's heirs in the patented lands to which he had obtained the title, showing that he was acting under the agreement of February 6, 1837. He inclosed to Beall in December, 1854, a deed to that effect, but it seems never to have been executed.

On December 6th, 1852, but a few months before Wickliffe obtained a judgment directing the commissioner to divest the patentees of one-half the title by conveying it to the heirs of Kennedy, he, in a letter, said to Beall, in alluding to the other claims of Kennedy's heirs: "It is doubtful whether they are worth the expense of further prosecution; indeed I fear that the whole of the claims that are worth any thing are taken by better adverse claims or possession. I may find strips between old patents."

In the year 1855, two years after the judgment in Bath for the title in favor of Kennedy's heirs, Wickliffe holding an obligation on Benj. D. Beall for the purchase money of land sold him, instituted his action in the Campbell Chancery Court to enforce the lien and for personal judgment against Beall. As a defense to that action Beall, the defendant, pleaded the contract of the 6th of February, 1837, and alleged that under it Wickliffe had recovered land and rents sufficient to pay the debt he owed for the Campbell county land, and that such was the agreement when he executed the obligation.

He annexed special interrogatories to his answer, one of which was to the effect: "Did you, as attorney for the defendants, ever recover for him or compromise any land claim in said counties, if so, how much, and how much have you received thereon, and how have you appropriated the proceeds?" The response by Wickliffe was: "That he had not sold an inch of the land; that he had obtained a decree and deeds from the heirs of the obligors to the Bealls, but, finding the land generally taken and held by other patents or long possession, he only brought two suits in chancery to sustain the title and but one action in ejectment and failed in all; that there was one piece of land vacant, poor mountain land, and he directed his agent to take possession of it, which he supposed he has done, that he never compromised any land claims nor sold any for the defendant nor received one cent of money belonging to him in any way," &c.

That case was tried and a judgment rendered in favor of Wickliffe for his purchase money and interest, its result showing that Wickliffe, after having made a full statement as to his acts as agent and attorney under contract with Beall, was held not to be liable, and an express notice to Beall that at that date Wickliffe had not recovered any of the lands embraced by the patents under which Kennedy's heirs claim.

In the year 1855 this land in Bath county, then in the possession of

Digitized by Google

the testator, Wickliffe, and now in his devisees had become valuable. Beall was a man, doubtless, of at least ordinary business capacity. He was clerk of one of the courts of Campbell county. In the year mentioned the land was subjected to a judgment in favor of Wickliffe for a considerable sum of money, and while the proceeding against him was not *res adjudicata* as to this trust, if any existed, it is very pursuasive at least, that Benj. D. Beall and those claiming with him, were satisfied they had no claim on Wickliffe by reason of the contract from which it is alleged this trust originated.

Wickliffe lived until the year 1859 and Beall died after Wickliffe, and still no action was brought against his devisees until 19 years after the disclosure by him of facts connected with his agency in obtaining the title to these lands.

We have failed to find where Wickliffe ever recovered any land for Beall's heirs or where he even sold any land for Beall's heirs or received any rent for land belonging to them. There is a manifest difference between obtaining the title for Beall's heirs from the unknown heirs of the patentees and recovering the land of others in the adverse possession or holding under different patents after the title had been obtained.

Kennedy's heirs had no legal title. They were entitled to one-half of these patents by contracts between the patentees and their ancestors for locating the land, and to get the title to this half the unknown heirs of the patentees had to be sued. They were sued and the title obtained as Wickliffe wrote to Beall on the 24th of April, 1853. This, however, was not a recovery of the land, but having obtained the title he then brought two equity and one ejectment action and failed, as he says in his reply to Beall's counterclaim in the Campbell suit, to recover in either action.

It is urged, however, that in the action against the unknown heirs of the patentees he should have made himself a party as well as others and thus quieted the title to the whole. This could not have been done then or now. The cause of action was against the unknown heirs alone, and if a bill *quia timet* the heirs of Kennedy were not in possession, and besides, in filing this bill to obtain title, the very contract of February, 1837, shows that none of the parties knew the location of the lands or the patent boundaries.

The patents, when Wickliffe obtained them from Beall in the year 1837, were more than thirty years old, and there is no evidence in this record of possession by any one of these patentees or other vendees against whom Wickliffe recovered of one foot of this land.

On the trial of this case before the commissioner, who was required to take proof, the devisees of Wickliffe exhibited some twelve or thirteen patents for large quantities of land, many of them conflicting with each other, but the land devised by Wickliffe to his children lies within these patents: No. 1 is a patent to George Thompson; No. 2, a patent to John Cooley, Owings and Myers; No. 3, to Jacob Myers and Ed. Owings; No. 4, to Jacob Myers; No. 5, to Jacob Myers; No. 6, to Jacob Myers; No. 7, to Jacob Myers; No. 8, to Owings; No. 12, to Breckinridge and Nicholas; No. 13, to Walter Beall.

Many of these patents are older in date than the patents delivered by Beall to Wickliffe. It is insisted, however, that these patents were also delivered by Beall to Wickliffe as evidence of the title of Kennedy's heirs, but this is refuted by reason of Wickliffe's claim to this land prior to the year 1837, and the actual possession by those who were hostile to the claims of Kennedy, that possession extend-

Digitized by Google

ing as far back as the year 1795, more than forty years before the contract of 1837 was entered into.

This land had upon it furnaces, forges, farms, charcoal works, and were run and owned by the United Iron Works. In the years 1800 or 1802, these works being run by a company, became involved and the lands, furnaces, &c., were sold and purchased by Thomas Dye Owings. About the time that Owings purchased this land, in 1803, he made a mortgage, covering them, to Nicholas, describing the property as all the lands and iron works formerly owned by John Cooley, Owings & Co., all the parties in interest, as appears from their deeds of record, conveyed to Thomas Dye Owings this land, *all the lands of the united furnaces*, which embraced this entire land devised by Wickliffe to his children. These deeds were made, beginning in 1803 and ending in 1812, and the title may be traced back to the original patentees.

Thomas Dye Owings became largely indebted after purchase of these lands and this indebtedness, by transfer, passed to the Bank of the United States, and the bank became the owner by purchase at decretal sale of all these lands and afterwards sold the land to Wickliffe and made him a deed, which was before the year 1837. Wickliffe discovering that Treman and others might, by reason of certain writings, assert claim to the land filed his bill to quiet his title, he was then in the actual possession, claiming as owner under his purchase from the bank, and had been since 1834. His title was contested and finally taken to the Superior Court, where his right to the land was fully confirmed, and, in April, 1837, Thomas Dye Owings, not being satisfied, he obtained a deed from him.

As no deed was made by the commissioner under Wickliffe's proceeding to quiet his title as against Treman and others until after the writing of February, 1837, it is maintained that this title inured to the benefit of Kennedy's heirs, having been acquired after this date. Wickliffe certainly had the equity if not the legal title by his purchase from the bank, and that he had the possession as early as 1834 is shown by several witnesses, and the possession of Owings, as early as 1819, is equally as well established by the old residents in the neighborhood of where this land is located, and that his vendors were the original owners under patents antagonistic to Kennedy and erected buildings, made furnaces, opened farms is well authenticated by both the parol and documentary evidence in the case.

The contract of 1837 protects, in express terms, the conflicting title of Wickliffe. At that date he had purchased the land in controversy, had made leases on it and had an agent in charge of it, therefore, it was provided that as Wickliffe held sundry interfering claims "*that agreement is not to affect such claim or to change the merits of any conflicting title which Wickliffe and the undersigned may have.*" It was saying in effect to Wickliffe, so far as you may have any conflicting claims, we will protect our title as against you.

Wickliffe was an able lawyer and, as the appellees say, in which we concur, was the best land lawyer in the State, and this fact would indicate clearly that no man of his judgment would take claims antagonistic to his own and agree to recover the lands as against himself, and that too when he had a title that he could trace back an actual possession for more than twenty years; in fact the patents set up by the appellees cover but a small part of the land in dispute, but if they embraced the whole of it, it could not affect the title of Wickliffe that he held, at the date of the writing, between himself and Beall, whether that title was legal or equitable.

This case has gone twice to commissioners with a view of ascer-

Digitized by Google

taining what lands were acquired by Wickliffe belonging to Kennedy's heirs, and they each reported, in substance, that none was to be found, one of the reports stating that small parts of the land were embraced by some of the patents. It is contended that the chancellor below adjudged that Wickliffe obtained these lands under the contract of 1837 and his judgment is final, although the case was referred to a commissioner to ascertain what lands had been recovered by Wickliffe. It was not a final judgment, nor did the decree hold that these lands were obtained by Wickliffe under the contract of 1837, because the case was referred to the commissioner to ascertain what lands were acquired under the contract, what land he sold, &c., and there was no final judgment until the court ascertained what to give a judgment for.

Either commissioner, under the order of reference, had the right to hear any testimony, oral or written, offered to him with a view of ascertaining the facts upon which to have his report, and, therefore, all the patents affecting the boundary as well as title and the surveys were competent and should have been received by the commissioner.

There has been some question made as to the pleadings and the failure of the appellants to reply to certain averments of the amended petition. The issue had been fully made up as to the title and a mere repetition of the same facts in an amended pleading required no answer. The issue was as put by the chancellor below. What lands did Wickliffe acquire for the Bealls under the agreement of February 6, 1837? It seems to us apparent, under that contract, a hostile possession being in Wickliffe at the time of these lands, the statute of limitation would apply for this reason if no other, by its express terms the writing *was in no wise to affect their conflicting titles*, and, therefore, the question of laches need not be discussed, even if this was an express trust. On the merits of the controversy, the title of Wickliffe having been traced back to the last century and an actual possession by Dye Owings since 1819, and continued from that time on in the vendees of Owings finally passing to Wickliffe from the bank in 1834 and continued in him until his death, and then in his devisees, with full knowledge on the part of Benj. Beall up to 1860 that Wickliffe had made no recovery for him, must conclude any right of recovery if the statute had not been interposed.

It is not necessary to pass on the question of the joint judgment, yet it ought not to have been rendered if the recovery was otherwise proper.

The judgment below is reversed, with directions to dismiss the petion.

FIRST NAT. BANK OF STANFORD V. MATTINGLY, &C.

(*Filed March* 8, 1892.)

1. *False representation by creditor to surety on note*—"If any material part of the transaction between the creditor and his debtor is, by the creditor or with his knowledge or consent, misrepresented to the surety, the misrepresentation being such that but for the same having been made either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety is, in such case, generally held to be not bound by his obligation."

Digitized by Google

2. *Same*—Where a bank sells a mill and induces one to become surety for a purchaser, who is known by all parties to be insolvent, and falsely represents to him that the mill has capacity to earn $600 per month profit, and that the purchaser had as renter operated it for one month at that profit, knowing such representation to be false and fraudulently inducing the purchaser to confirm them, the surety who relied upon such representation, and thereby became bound as surety, may plead such misrepresentation as a good defense to an action for the purchase price.

3. *False representation as to value of article sold—Principal and surety—Pleading*—The doctrine that a false representation by the seller of an article to a purchaser as to the value thereof, when the purchaser had an opportunity to ascertain such value for himself, has no effect on the legal rights of the contracting parties, does not apply to a surety for the purchaser who was induced to become bound as surety by reason of false representations concerning the value made by the seller to him. He may plead such misrepresentation as a defense, but he must aver that he was unacquainted with the true condition and value of the property sold; and the absence of such averment makes his pleading demurable.

4. *Same*—The fact that the bank represented to the surety that it would loan to the purchaser $2,000 or $3,000 without security, with which to stock and operate the mill and induced him to become surety by reason of such representation, and then failed and refused to make such loan, will not avail the surety as a defense, being merely an expression of an unexecuted intention.

5. *Same*—A representation to the surety by the bank that three purchase-money notes, executed by the purchaser, were due in three, four and five years after date, without condition or reservation, when in fact it was provided that in case of a default in the payment of one note that all should become due, was such misrepresentation as might release the surety.

6. *Same—Instruction*—An instruction to find for the bank, unless the evidence showed that it procured the signature of the surety to the note by false and fraudulent representations, was erroneous, because too general and indefinite.

Hill & McRoberts, Welch & Saufley and Wm. Lindsay for appellant.

O. H. Waddle, Frank Hubble and Robt. Harding for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, the First National Bank of Stanford, being owner of a parcel of land on which was a flour mill and elevator, sold it, November 3, 1884, to R. T. Mattingly for $13,000, payable as follows: $1,000 November 3, 1885, S. Hubble being surety on the note therefor, about which there is now no controversy; $3,000 November 3, 1886, appellee, Levi Hubble, being surety on the note therefor, the subject of this litigation, and $9,000, in equal installments, evidenced by notes of Mattingly alone, November 3, 1887, 1888, 1889, to secure payment of which a lien on the property was reserved, and in relation to which there was a provision in the deed that in case he failed to pay on November 3, 1887, all the notes then due and the accrued interest, the whole debt was to be considered and acted on as then payable.

There having been failure to pay the annual interest accrued up to November 3, 1885, on the note for $3,000, executed by Mattingly and appellee, appellant instituted this action against them to recover $180, amount thereof. Judgment was rendered by default against the former, but the latter made defense and the action remained undetermined until April 19, 1889, when a supplemental petition

Digitized by Google

was filed, wherein was prayed judgment for principal of the note, that had in meantime become due, and additional interest.

The grounds of defense, as stated by appellee, are, in substance:

1. That he executed the note as surety merely, being, as were officers of appellant who made sale of the property, aware of insolvency of Mattingly, and they also knew he so executed it, believing Mattingly would be unable to meet payment of the note except with profits expected to be realized by operation of the mill, yet, for the fraudulent purpose of inducing him to become surety, they represented to him the mill when operated had capacity to earn a profit of $600 per month, when, having full knowledge of its value and condition, they knew it could not be operated except at a great loss to its owner; and that Mattingly had, just before the sale, operated it for one month as a renter from appellant, at a net profit of $600, the proceeds having been handled and expenses paid through one of appellant's directors, when they knew he had in fact operated it for the period mentioned at a loss of near $500, and that they fraudulently deceived and procured Mattingly to confirm that representation as true.

2. That they, for the purpose mentioned, represented to appellee the property was worth $13,000 and they had been offered that price for it by an experienced mill-man, who had examined it, but preferred selling to Mattingly because he was a home man, when in fact it was not worth more than $6,000 and such offer had not been made.

3. That said officers, knowing it was necessary for Mattingly to have capital with which to stock and operate the mill, represented to appellee they would, when the sale was made, for that purpose furnish him with from $2,000 to $3,000 without security, yet, knowing appellee had been induced to sign the note, believing they would do so, they failed and refused to furnish any capital to him and, by reason thereof, he was unable to operate the mill.

4. It is further stated that at the time appellee signed the note they represented to him the three notes executed by Mattingly alone were made payable three, four and five years after date, without any reservation or condition, yet without appellees' knowledge or consent the provision heretofore mentioned was afterwards made in the deed whereby all the notes became due and collectible November 3, 1887.

It is averred in the answer, in respect to each representation mentioned, that it was falsely and fraudulently made before appellee signed the note and he was, by reason thereof, induced to do so.

A demurrer to each paragraph, as we have numbered them, was filed, but overruled as to all but the third, to which it was sustained; nevertheless the court, upon motion to strike out the allegations contained in it, ruled they were traversable, and a reply thereto should be filed.

The general doctrine applicable to this case, as quoted from Story's Equity Jurisprudence and approved in Burks v. Wanterline, 6 Bush, 20, is thus stated: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. *Any concealment of material facts* or any express or *implied* misrepresentation of facts or any undue advantage taken of the surety *by the creditor*, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract."

Moreover, proof or admission of misrepresentations or concealment of material facts, "when fraud is charged by the surety, will,

Digitized by Google

without any regard to the intent to deceive him *malo animo*, make a case of constructive fraud requiring the creditor to replace the legal deduction by proof of integrity of the transaction." Burks v. Wanterline.

In the practical application of the doctrine just mentioned the following rule is laid down in Brandt on Suretyship and Guaranty, section 401, upon authority of cases cited, Wooley v. Louisville Banking Company, 81 Ky., 527, being one of them: "If any material part of the transaction between the creditor and his debtor is, by the creditor or with his knowledge or consent, misrepresented to the surety, the misrepresentation being such that but for the same having been made, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety is, in such case, generally held to be not bound by his obligation."

Applying that rule we think the facts stated in the first paragraph of the answer constitute a defense. For the alleged representation was not merely in respect to supposed capacity of the mill to earn a monthly profit of $600, but of a fact within personal knowledge of one of the officers of appellant that it had, when operated by Mattingly, actually yielded that amount, about which, as alleged, appellee was ignorant and Mattingly had been deceived by that officer. That the earning capacity of the mill was a material part of the transaction between the parties, in view of Mattingly's known inability to meet payment of the note sued on, except with profits made by operating it, there can, it seems to us, be no question.

The well settled rule is, as argued, that mere commendation or even false representation by the seller of property as to its value, when the purchaser has an opportunity to ascertain for himself such value by ordinary vigilence or inquiry, has no effect on legal rights of the contracting parties, even when made with intention to deceive. Marshall v. Peck, 1 Da., 609.

But that rule does not apply to conduct of seller to the surety of the purchaser, for a surety is not required to ascertain for himself condition or value of property sold to his principal, but may rely entirely upon representation made by the seller to him as to even its value, and if induced by his misrepresentation in respect thereto to become bound for purchase money, he would be entitled to discharge from the obligation in every case when, upon the actual value of property sold, may depend his ultimate responsibility. But a party can not be regarded having been deceived or misled by another unless he was, at the time, ignorant or uninformed on the subject of alleged misrepresentation, and it would be misapplication of the rule to permit a surety to escape payment of a note signed voluntarily and with his eyes open upon the ground of misrepresentation by a seller or creditor about a matter he himself had full knowledge of. It is distinctly enough stated in the second paragraph of the answer that officers of appellant were well acquainted with conditions and value of the mill property, but not averred appellee was not also acquainted therewith. And because of that omission the demurrer to that paragraph, we think, ought to have been sustained.

The defense stated in the third paragraph is not made to rest upon any contract or agreement between the officers of appellant and either appelleee or Mattingly, or misrepresentation of any material fact, but upon what, it seems to us, amounts to no more than a mere expression of intention on part of appellant to furnish Mattingly, without security, a capital of $2,000 to $2,500 with which to stock and operate the mill that was not carried out.

Digitized by Google

If appellant's officers had falsely represented to appellee it had agreed with Mattingly to so furnish the capital, or if it had, in consideration or inducement for his becoming surety, agreed with appellee to furnish it to Mattingly there would be no question of his right to release from the note, for in either case his rights and interest as surety would have been materially affected by bad faith of appellant. But a false representation as to a matter of intention, not amounting to a matter of fact nor an agreement, is not a fraud at law, nor does it afford ground for relief in equity, there being a well recognized distinction between it and both a false representation of fact and a representation that amounts to an engagement. Keer on Fraud and Mistake, 88-9.

And that rule is applied to a transaction between the vendor or creditor and the surety as well as purchaser or principal; being thus stated in Brandt's treatise, section 404: "A distinction has been taken between a misrepresentation of an existing fact and of an unexecuted intention, and the latter has been held not to such a fraud as will discharge a surety." We think, therefore, the demurrer to that paragraph was properly sustained, and no reply to it was necessary.

The facts stated in the fourth paragraph clearly constitute a defense.

In Wooley v. Louisville Banking Company, involving a similar question, it was held by this court that when a creditor, as inducement to a person to become bound as surety, falsely represents that he holds collateral security for the same debt the surety will be released.

In this case the representation was equivalent to an assurance that Mattingly, under the contract already made, would have possession and right to operate the mill without hinderance until November 3, 1889, when the last one of the three notes for $3,000 each fell due; but, by provision in the deed subsequently made without knowledge or consent of appellee, the right was given to appellant, upon the condition mentioned, to enforce its lien by sale of the property at any time after November 3, 1887, thereby cutting off profits of the mill relied on by appellee as surety two years before it could have been done, according to the contract as represented to him by appellant when he signed the note sued on.

In the case cited the misrepresentation appears to have been made by reason of misconception by the creditor of his legal right in respect to the collaterals; in this case it is alleged to have been intentional and fraudulent, but in both alike the surety lost benefit of what he was induced, by representation of the creditor, to believe would be substantial and available means of indemnity.

The jury was, by the first instruction, directed to find for appellant, unless they believed from the evidence its agent procured the signature of appellee to the note by false and fraudulent representations. That instruction is improper because, given in general terms and without qualification, it authorized the jury to consider in support of and predicate a verdict for the defendant upon facts as stated in either one of the four paragraphs of the answer, although, as already indicated, only two of them, as they stand, contain enough to constitute a defense to the action. There should have been given an instruction based exclusively upon facts stated in the first paragraph of the answer as we have numbered them, without reference to what is alleged in the second.

The second instruction being hypothecated upon proof of allegations contained in the fourth paragraph is unobjectionable, qualified as it is by a subsequent instruction, involving the question whether

Digitized by Google

the provision in the deed in regard to time the notes were to be treated as due was made with knowledge and consent of appellee.

It naturally follows from the foregoing views that the representations of the first and fourth paragraph, in order to constitute defenses to the action, must, first, have been false; second, apppellee must have been ignorant of truth of the matter in reference to which they were made; third, they must have been made with intention that appellee would act upon them; fourth, he must have been thereby in whole or partly induced to sign the note.

Without referring in detail to the instructions asked and refused they ought, so far as relating to first and fourth paragraghs and conforming to this opinion, to have been given, and of other instructions given no reference is necessary so far as they relate to the second and third paragraphs.

The judgment is reversed for new trial consistent with this opinion.

RANSOM, &C. V. CONNELLY, &C.

(*Filed March* 22, 1892.)

Revocation of will by marriage—Ante-nuptial contract—The will of a man is revoked by his marriage, although he and his wife entered into an ante-nuptial contract by the terms of which the wife was to retain her own property and was to have only a specified interest in a certain part of his estate.

W. W. Dickerson for appellants.

Collins & Finley and O'Hara & Bryan for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Bennett.

In 1854 Thomas Vest made his will, devising his entire estate to his wife and her children. In 1858 his wife died. In 1862 he married Mrs. Rachael Le Vesque, with whom he had an ante-nuptial contract, which was entered into a short time before marriage, by which she was to remain the owner of all her property, and she was to have no marital rights in his property by virtue of the marriage, except a specific interest in a certain tract of land during his life, and the use of two slaves and the use of one room in his house, &c., after his death, during life.

He died in 1885, leaving her as his widow and without destroying the will that he made in 1854. After his death the will was probated in the Boone County Court by the devisees; but some of his heirs resisted the probate of the will, and appealed to the circuit court and that court affirmed the action of the county court in admitting the will to probate, and the same parties have appealed to this court.

The only question presented by the appeal for decision is, whether or not the marriage in 1862 revoked the will made in 1854? The appellees' contention is, that as the object of section 9, chapter 113, General Statutes, declaring that the marriage of any person, whether man or woman, after having made a will revoked the will, was designed to prevent fraud upon the marital rights of the other contracting party, and as the marital rights of the second Mrs. Vest could

Digitized by Google

not be affected by the antecedent will, because of the marriage contract securing to her all her own estate and specifying what interest she should be entitled to in his estate, and excluding her right to any other interest therein, which contract controlled as to her property rights in her husband's estate, the antecedent will was no fraud upon her marital rights; hence, the will was not revoked by the marriage.

The case of Stewart v. Mulholland, &c., is relied on in support of that contention. 10 KY. LAW REP., 824.

In that case Mrs. Mary Hall Jacob and James R. Stewart, being about to marry each other, entered into a marriage contract, by which it was agreed, among other things, relative to their property rights after marriage, that Mrs. Jacob should have the power to dispose of her property by will. The will was made on the 9th of January, after the terms of the marriage contract were agreed on. The said contract was reduced to writing on the 11th of January, and on the 12th of January it was signed by both parties.

Mr. Stewart having been informed that Mrs. Jacob had made said will pursuant to the understanding between them, and on the same day (the 12th) the marriage ceremony was performed, this court held in that case that the close proximity of the events above detailed showed that they were a part and parcel of but one agreement, which was consummated and completed by the performance of the marriage ceremony, which agreement was to control the marriage relation as to property rights, instead of the statutory regulations in regard thereto, and which was to take effect and control the property rights of the parties from and after the marriage; that the agreement as to the particular power of Mrs. Jacob to dispose of her property by will was to be construed as if made simultaneously with the marriage; and as the will, made just three days before, was a part of the whole agreement, consummated and completed by the marriage, and which took effect from and after that event, it should be regarded as speaking from that time forward, and as consenting at that time that said will should be the will that the parties contemplated that the wife should make after marriage.

The case of Stewart v. Powell, 12 KY. LAW REP., 448, thus construes the case of Stewart v. Mulholland. But the case here is not governed by the Mulholland case. That case simply recognized the right of the wife to dispose of her separate property by will, if her husband agreed that she might do so; and that he could agree upon their marriage that the will she had made, just three days before and by his consent and in pursuance to the power that she was to possess, should be her will, the same as if he had, immediately after the performance of the marriage ceremony, executed the power. But it was not intended to say, nor was it said, that the husband by antenuptial contract could continue in force a will already made by him, because he, being *sui juris* all the time as to that matter, can make a will after marriage disposing of all his property as he may wish, subject, however, to such marital rights as his wife may possess, and which can not possibly be a fraud upon her rights; and it was the possibility of a fraud upon the marital rights of either party that caused the Legislature to declare that marriage should, *ipso facto*, revoke a will previously made by either contracting party, save in the instance mentioned in the statute.

But where the husband, simultaneously with the marriage, or after, then gave the wife the power to dispose of her separate property by will and to allow her to adopt a will previously made, would be equivalent to giving her the power to make a will after marriage.

Digitized by Google

The judgment is reversed, with directions to reject the probate of the will.

JENKINS V. KEITH.

SAME V. SAME.

SAME V. SAME.

Devise to one with parol understanding that devisee was to hold in trust for another—Administrators—Testator devised his entire estate, except certain specific legacies, to his mother, entirely pretermitting his wife, who survived him. The executor of the will refusing to qualify, the wife qualified as administratrix, with the will annexed, and gave security as such. She never made any settlement as such administratrix and died having devised her estate to the surety on her bond. In this action by the mother of testator against such surety to recover the estate received by the administratrix and never accounted for, *Held*—

First—The evidence is not sufficient to show that the estate was devised to the mother under a parol agreement by her to hold in trust for the wife. But it is shown that the mother permitted the wife to retain the estate and use it for her maintenance.

Second—The surety on the wife's bond should be held liable for only such part of the estate as she had received as devisee of the wife.

(*Filed March* 24, 1892—*Not to be reported.*)

T. A. Logan and Hallam & Myers for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

Dr. James Keith died leaving a last will by which, after devising some specific legacies, he devised all the rest of the estate to his mother, entirely pretermitting his wife, Clara Keith, with whom he was living upon amicable terms.

The persons named in the will as executors refused to qualify; and the widow, notwithstanding the will pretermitted her, had the will probated in the county court and qualified as administratrix, with the will annexed, and took charge of the estate as such administratrix, giving the appellant, her mother, on her bond for the faithful performance of her duties as administratrix.

The widow died testate, without having settled with the county court, or without having accounted to the appellee for the residuum of the estate, after paying debts and special legacies. The appellee, the mother and the residuary devisee of Dr. Kieth, brought this action against the appellant, as surety on Clara Keith's bond as administratrix and as her devisee, to recover the whole residuum of said estate. The court, however, refused to give personal judgment against the appellant, but adjudged that what remained of Dr. Keith's estate, and which could be traced into the hands of appellant, as devisee, could be recovered; the amount, however, was not to exceed $5,000.

It seems that the court thus limited the amount of recovery, because Clara Keith kept and had controlled and used the estate as she

Digitized by Google

wished, with the consent of the appellee, who offered to take the sum of $5,000 from the appellant in full of her claim.

It was also adjudged that if the appellant refused to pay said sum a sufficiency of some real estate that belonged to Clara Keith, and which she devised to the appellee, be sold to realize that sum. From that judgment the appellant appeals.

She contests the right of the appellee, upon the ground that Dr. Keith devised his estate to her in secret trust for his wife, Clara Keith, which trust the appellee admitted, and in recognition of which she allowed Clara Keith to take charge of the estate, and control and dispose of it as her own, which estopped her from now asserting any claim to the estate.

Mr. Hallam, the only witness that ever heard Dr. Keith say that the residue of his estate was willed to the appellee in trust, says, in substance, that at the request of Dr. Keith he wrote his will; that the doctor, making no provision for his wife, he suggested to him that it might be difficult to sustain the will for that reason. He replied that his mother understood that his wife was to have the benefit of the estate; that after Dr. Keith's death he saw the appellee, and she said, in substance, that the estate was for the benefit of Clara Keith. The appellee denies most positively that she had such conversation with Mr. Hallam; and she denies that her son ever informed her that the estate was willed to her in trust for Clara Keith; or that she understood from any source that such was the purpose of her son. She also says that Clara Keith always regarded the estate as belonging to her and as having no right to it herself.

The appellee was rich and on friendly terms with Clara Keith, and the chancellor had a right to infer, from the facts and circumstances proven, that the appellee was willing that she should use as much of the estate as she needed for a support; and the evidence of Mrs. Walcot is in accordance with that idea. But we think the evidence is clear that the appellee never intended to relinquish her right to any of the estate that might remain after the support of Clara was taken out of it; and she having died, the appellee asserted her right to the estate, and the court, doubtless taking that view of the matter, allowed her the residuum only.

As said, the appellee was rich, and the inference is strong why Clara Keith did not claim her distributable interest in her husband's estate, to-wit: That she hoped that the appellee would provide for her, and as the value of her husband's estate was entirely conjectural, she preferred to look to the appellee and not offend her.

It is needless to discuss whether or not a trust, not intimated by the will, would be allowed to change its plain provisions, because the court had a right to pass upon the conflict of evidence in reference to that matter, which it did, deciding, doubtless, that if such trust could be shown by parol, it should be clearly and satisfactorily established, which is not the case here. On the contrary, we think the proof preponderates the other way.

The judgment is affirmed.

HACKWORTH V. HARLAN'S HEIRS.

(*Filed March* 31, 1892—*Not to be reported.*)

1. *The evidence herein sustains the chancellor's* finding that appellant had no title to the land in controversy at the time of the commencement of this action and that the patent he acquired for said land thereafter was void, because the land had been previously granted to others.

Digitized by Google

2. *Adverse possession—Limitation*—The period of time during which a defendant holds land after a suit is instituted to recover it from him, can not be added to the period he held such land adversely previous to its institution, in order to aid defendant's plea of adverse possession for the statutory period.

3. *A warning order is not void because granted by the court* instead of the clerk. The court is authorized to issue such order as well as the clerk.

4. *Motion to dismiss action—Evidence*—The court did not err in refusing to dismiss the action upon what purported to be the written request of the plaintiffs, objection being made to the dismissal on the ground that the signature to such writing was not genuine, the burden was on defendant to prove its genuineness and this he failed to do.

B. E. Roe and S. J. Pugh for appellant.

R. F. Bennett and Cochran & Son for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Bennett.

In 1852 the heirs of Joshua Harlan brought this action of ejectment in the Lewis Circuit Court against the widow and heirs of Samual Seaton and John Hackworth to recover about 20,626 acres of land.

The case was brought to this court and it was decided that the Harlans were the owners of, and entitled to, the possession of said land, but the Seatons were entitled to pay and a lien on the land for their lasting and valuable improvements. 18 B. M., 312.

Upon the return of the case to the lower court an agreed judgment was entered in accordance with the opinion of this court, which judgment awarded to the Harlans the title to, and the right of, possession of the land, and to the Seatons a right to pay for the improvements put upon the land and a lien on the land to secure the same, and the case was referred to a special commissioner to ascertain and report the value of the improvements, &c. But the claim of Hackworth to a part of the land was not included in the agreed judgment, his claim was left open for future adjudication.

It seems to us, without reciting in detail the facts, that the claim of Hackworth, at the time the action was brought, had no legal foundation upon which to stand, and the decision of this court virtually settled that matter. It also seems to us that the patents that Hackworth obtained for 1,600 acres of the land after the suit was brought, which was then being prosecuted against him to recover the possession of the land by adverse title, could not avail Hackworth in the same action, because said patents were obtained for land already patented to others, consequently they were void; second, the time the land was held under said patents, after suit was brought to recover the possession of it, could not be added to the period of adverse possession which the law requires in order to complete the party's right to the land. The time required to make an adverse holding ceases upon the institution and prosecution of the suit to recover the possession of the land.

But it is said that the order of warning granted by the court against the Hackworth heirs was void, because it was granted by the court and not the clerk. It is sufficient to say that section 504 of the Civil Code expressly authorizes the *court*, upon proper affidavit, &c., to make the order. It is also claimed that the court erred in not dismissing the action upon the written request of the Harlan heirs.

Digitized by Google

The objection to the motion put in issue the genuineness of the paper offered as the basis of the motion, and it devolved upon the appellants to show that it was genuine. But the nearest they came to showing the fact was that one person, Harlan, made affidavit that the persons whose names appeared to the paper were the Harlan heirs. That affidavit does not prove that they signed the paper.

Also, Mr. Roe, attorney for W. W. Jones, who is not a party to the suit but claims an interest in the land, swears that he had authority from the Harlan heirs, referring to the paper filed, to dismiss the suit. That affidavit does not prove that the Harlans signed the paper. But the Seaton heirs were entitled to have the suit remain on the docket and tried in order to enforce the amount of their lien and have the land sold to satisfy it. And if appellant's claim stood in the way of their right they had the right to have the case remain on the docket for the purpose of relieving the land of that claim in order that the realization of the amount of their claim might not be affected by it.

There is no objection to the order of revivor.

The judgment is affirmed.

SUPERIOR COURT ABSTRACTS.

Buckler, adm'r v. Wells, adm'r.

Filed May 11, 1892. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Final order—Revivor*—In an action to set aside a conveyance of land as fraudulent, an order reciting that if the plaintiff's debt was not paid by a certain time judgment would be rendered directing a sale of the land to satisfy the plaintiff's claim, was not a final judgment; and the plaintiff in the action having died and more than a year from the time when the order of revivor might have been made having elapsed without any steps being taken to revive the action, the court, upon the defendant's motion, properly dismissed the action.

2. *A return of no property* must, in the absence of grounds for an attachment, be alleged and shown before a court of equity will entertain a petition to set aside a conveyance as fraudulent.

Winfield Buckler for appellant; Ross & Owens for appellee.

Carden v. Dearing.

Filed May 11, 1892. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *A landlord's lien for supplies furnished* the tenant in order to enable him to subsist and raise his crop can be enforced only by a suit in equity. The remedies of distress and attachment are allowed only for the collection of rent.

2. *Exemptions*—Property exempt from execution is also exempt from dis-

Digitized by Google

tress or attachment for rent; but no part of the tenant's crop is exempt from the landlord's lien for supplies furnished.

3. *Right to personal judgment*—In this proceeding *in rem* to subject the tenant's property to the payment of the landlord's debt, in which there was no summons issued citing the tenant to appear, it was error to render a personal judgment.

Lewis McQuown and W. Beard for appellant; H. C. Martin for appellee.

DEDMAN v. MILTEY.

Filed May 11, 1892. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Brent, reversing.

Forcible detainer—Improvements—Res adjudicata—One who has entered upon land under a verbal lease, which is within the statute of frauds, and has made improvements which have enhanced the value of the land, may, in a proceeding of forcible detainer, rely upon his claim for improvements to defend his possession, and if he does so he can not be evicted until the claim is settled. But if he permits himself to be evicted without asserting his claim, that proceeding is not a bar to an action by him to recover for the improvements.

C. H. Thomas for appellant.

ROBINSON, &c. v. TURNER.

Filed May 11, 1892. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Questions for court and jury*—In an action upon a sheriff's bond to recover damages for his failure to levy a distress warrant, one of the defenses being that the property which the sheriff failed to levy upon was exempt, the question as to whether the distress defendant had a "family" within the meaning of the exemption laws should, under proper instructions, have been submitted to the jury. But as there was no contrariety of evidence, and the court would have been justified in giving a peremptory instruction for plaintiff on that point, the defendant was not prejudiced by the action of the court in hearing the evidence on that point himself and not allowing the jury to pass upon the question.

2. *Exemptions*—As the only persons who lived with the debtor, an unmarried woman, were a sister and aunt who were not dependent upon her for a support, she was not entitled to the benefit of the exemption laws.

White & Brooks for appellants; Young, Mitchell & Young for appellee.

OWENSBORO, FALLS OF ROUGH AND GREEN RIVER RAILROAD CO. v. GRAY.

Filed May 11, 1892. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Right of corporation to abandon condemnation proceedings*—A railroad corporation may at any time after instituting a proceeding to condemn land for its right of way abandon the proceeding, and can not be compelled to pay the attorney's fees and extraordinary expenses incurred by the owner of the land sought to be condemned.

2. *Liability of corporation for costs of condemnation proceedings*—Even if the owner of the land could maintain an action against the corporation to recover such fees and extraordinary expenses, yet as the allegation of the petition in this case is that he lost time and incurred liability whereby he was damaged in a named sum, and there is no allegation of an express promise to pay the damages, or facts showing an implied promise to pay them, it was error for the court to render judgment for the amount without hearing proof and assessing the damages or causing them to be assessed by a commissioner or jury.

3. *Same*—For the witnesses' fees and other court costs the plaintiff should have recovered in the condemnation proceeding and can not maintain an action for them.

J. A. Dean for appellant; Sweeney, Ellis & Sweeney for appellee.

Digitized by Google

Horsley v. Hogg.

Filed May 11, 1892. Appeal from Letcher Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Pleading—Objections waived—A defendant, by joining issue on a petition, waives all right to object to that pleading because the caption did not contain the word "petition" or "petition in equity," as required by subsection 2, section 110, Civil Code.

W. P. D. Bush and John L. Scott for appellant; Jas. Andrew Scott for appellee.

Buckler v. Reese.

Filed May 18, 1892. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

A cross-petition is not allowed to a defendant except upon a cause of action which affects, or is affected by, the original cause of action. It is primarily essential to this pleading that it should be confined to the subject matter of the petition.

Winfield Buckler for appellant; L. W. Robertson for appellee.

Ward v. Rhodes.

Filed May 18, 1892. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Arbitration and award*—As the award of arbitrators to whom the matters in litigation in this suit were submitted by agreement does not bear upon its face evidence of such a mistake of law or fact as to produce the conviction that the conclusion was improperly reached, and there is no allegation by exception or otherwise that there was either fraud or mistake on the part of appellant or the arbitrators in making the award, or that they acted unfairly or corruptly, the appellee was not entitled to have the award set aside.

2. *Same*—While the statute requires that each party shall be furnished with a copy of an award before the court is authorized to render judgment thereon, the failure to comply with this requirement does not invalidate the award, but merely postpones the right to judgment. Therefore, the court in this case having rendered judgment on the award before that requirement of the statute had been complied with it was proper to set aside that judgment, but the court erred in also setting aside the award.

3. *Power of court to set aside judgment*—After final judgment had been rendered and an appeal granted the court had no authority at a subsequent term to dismiss the action and counter-claim over the objection of both parties.

Thomas E. Ward for appellant; E. M. Hutcheson for appellee.

Klotz v. Klotz.

Filed May 18, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Judge Brent, affirming.

Benevolent societies—Who may be beneficiary—Under the constitution of the Knights of Honor, a benevolent society, a member may designate as the beneficiary of the fund to be paid at his death any member of his family or any person dependent on him; and the benefit certificate having been made payable to the person thus designated he is entitled to the fund as against all other persons, provided there are no peculiar equities between the claimants. And the member may designate as the beneficiary an adult child, to the exclusion of the widow and infant children.

Andrew A. Hagan for appellant; Charles A. Wilson and George B. Eastin for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. AUGUST 1, 1892. No. 3

KENTUCKY COURT OF APPEALS.

WOODS, EX'OR, &C. v. DEVERS, &C.

(*Filed April* 7, 1892—*Not to be reported.*)

1. *Where the validity of a will is contested* the jury have the right to determine what parts, if any, of the paper are valid, and what parts invalid as the last will of the decedent.

2. *Devise to draftsman of will—Evidence—Burden of proof*—A devise by a testator to the draftsman of his will is not void *ipso facto*. But where such testator is of feeble intellect at the time of the execution of the will, and the draftsman is, and has been, for a long period, his confidential and trusted adviser, and the will almost wholly excludes his kindred for the draftsman, who is of no kin, then, by satisfactory evidence, the draftsman must rebut the presumption of undue influence that grows out of such facts. But the burden of proof is in the first instance on the contestants of the will and not on such draftsman.

J. D. Hunt, Breckinridge & Shelby and Beauchamp & Allen for appellants.

Geo. Denny, jr., Geo. B. Kinkead and C. J. Bronston for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

The will of Harriet Woods, who died in Lexington on the 28th of October, in the year 1883, was admitted to probate by the Fayette County Court on the 3d of November, of the same year. It was signed and properly executed by her on the 4th of September, 1883. The attesting witnesses were two physicians, R. L. Coleman and Thomas Foster.

Digitized by Google

Her estate, at the date of the will, was of the value of $5,000 or $6,000. After making, by items two and three of the will, a devise of $500 to Adelia Devers, and of a like sum to Barbara Strobridge, she devised to the children of her uncle (John Woods) $3,000, and providing that if none of those children were living at her death that legacy was to become a part of her residuary estate and pass accordingly.

By item seven of the will the testatrix devised all of her property, "not required for debts, legacies and the cost of a monument," to her friend and executor, R. A. Thornton, in consideration, as the testatrix expresses it, "of his kindness to me and as a compensation for his services in administering my estate, and I nominate and appoint him to be executor of this my will and request, this court to require no security of him," &c.

The heirs at law of the testatrix took an appeal from the order of probate and contested the validity of the writing on two grounds: First, the want of mental capacity on the part of the testatrix to make a will; second, that the writing offered as her will was the result of an undue influence exerted over the testatrix by the draftsman, who was one of the beneficiaries of that instrument. The will was written by R. A. Thornton, who is made residuary devisee and who, at the time, was her confidential adviser, and had been for some time prior to the execution of the paper.

The issue of will or no will was presented to the jury and they returned this verdict: "We of the jury find from the evidence that items one, two, three, four and five of the paper purporting to be the last will of Harriet Woods, and also so much of the item seven as appoints R. A. Thornton executor of said will, to be the last will of Harriet Woods. We further find that the remainder of said paper is not the will of Harriet Woods. We further state and put on record that the foregoing verdict is not intended to impugn the motives of R. A. Thornton, but, on the contrary, desire to exonerate him from all intentional fraud or deception in any way planned or carried out by him. S. H. SHIVEL, *Foreman.*"

That part of the instrument which, by the verdict, is held to be no part of the will embraces alone the devise to the draftsman, and as the jury have said that the testratrix had mental capacity to execute the paper, when finding against the devise to the draftsman, it must have been based on the belief that this part of the instrument was the result of an undue influence exercised over the testratrix by the appellant, Thornton.

Section 35 of chapter 113, General Statutes, provides that a jury shall be empaneled to try whether or how much of any testamentary paper produced is or is not the last will of the testator, and the right of the jury, either with or without the statute, to say how much of the paper is valid and what part invalid is not questioned.

It is contended by counsel for the appellant there is no evidence of fraud or undue influence exercised or attempted to be exercised to procure this will, or any part of it, and if the verdict is sought to be maintained on the ground of undue influence there is no evidence whatever to support it, and this branch of the case will alone be considered.

We have read carefully the testimony in this case, and the testimony for the propounders of the will, when considered alone, makes out a clear case that its contents was the offspring of the testratrix's own mind and that her mental capacity could not well be doubted. The arrangements for attesting the will were made by her and the attending physician, at her own request, procured the other attest-

Digitized by Google

ing witness, and both establish the fact that the paper is the will of Harriet Woods. They are sustained in their conclusion by many other witnesses who knew the testatrix well and had known her for years. There is also an absence from this record of any thing said or done by the appellant to induce the testatrix to execute the paper, and if his presence or action led to such a result he was unconscious of that fact, and it is manifest that the condition of her estate and the circumstances surrounding him at the time induced the belief that what was left of the estate would not greatly exceed his fees for services rendered the testatrix and in administering her estate after her death.

Such facts induced the special finding by the jury and clearly appear from the record and induced the appellant, no doubt, to write the will.

While the testimony for the will is strong and convincing in its character, that for the contestants presents a case where a woman past the age of sixty years, in almost a demented condition, feeble, both physically and mentally, is publishing a will by which the draftsman may become the principal devisee of her estate to the exclusion of her own kindred. Although of ample means to live well she denied herself the comforts of life—with an old negro man for her servant and at times in such a filthy and nude condition as would excite the sympathy of those around her, and committing act after act that indicated a mind as well as a body wrecked by disease.

The statements, or some of them, made by witnesses for the contestants, may appear incredible when contrasting it with that for the propounders of the will, still the question of fact was one for the jury, and with this conflicting testimony, coming from the lips of many witnesses on each side, the jury considered and weighed it, and it being their province to determine the issue on the facts we can not disturb it, if supported by the evidence.

The testimony shows the appellant had been kind to her in many ways. That she left no kindred nearer than first cousins and had no social relations with any of her kindred or even communication with them for any purpose, except on one or two occasions. It appears from the testimony of the appellant that the testatrix, for a number of years, sought him as an adviser, if not as an attorney, in regard to her estate and property, and while he made no charge against her he was the only person in whom she had confidence or seems to have confided in with reference to her business transactions. With such a relation existing between them and the fact that he drafted the instrument by which he was made a devisee, connected with her feeble mental condition, as shown by the defense and the exclusion of her own kindred by the provisions of the instrument, the jury had the right to infer the existence of undue influence.

The burden of showing its exercise over the testatrix is, as contended by counsel for the appellant, on the contestants, but when such facts are shown from which this inference can be legitimately drawn, it is then with the propounders of the instrument to rebut it.

The rule of law applicable to transactions between attorney and client, in reference to the subject-matter of litigation or as to transactions about which the attorney is consulted, apply in a case like this.

All dealings between attorney and client will be carefully scrutinized by courts, and in making a purchase from his client, in reference to a matter about which he has advised as attorney, the burden is on the attorney to remove the transaction from all suspicion.

Digitized by Google

The same rule, says Mr. Perry, apply to all persons standing in the relation of attorneys or confidential advisers. Perry on Trusts, volume 1, pages 204, 201, 202, 203.

We are not inclined to follow the cases under which a will is held void merely because there is a devise to the draftsman or to the attorney advising its execution, but where the relation between the testatrix and the devisee is one of confidence, and the testatrix is shown, by testimony, to be of feeble intellect and the will excludes the kindred of the devisee for the benefit of the legatee, who is of no kin, then we say that satisfactory proof must be shown to rebut the inference of undue influence else the will should not be probated.

The jury, it seems, thought that the circumstances authorized this inference and rejected the devise made to the appellant. The appellant insists that an instruction given by the court below induced the verdict. That instruction reads: "By fraud is meant all surprise, trick, cunning, dissembling or other unfair means used to cheat one." "Influence, however obtained, which would give dominion over the will of the testratrix to such an extent as to destroy free agency or constrain her to do against her will what she is unable to refuse, is undue influence. And if the jury believe, from the evidence, that the execution by Harriet Woods of the paper aforesaid, or any part thereof, was procured by fraud or undue influence, as above explained, they should reject the same or such part thereof so procured as not the will of Harriet Woods. And if the jury believe, from the evidence, that R. A. Thornton, named in said paper as a beneficiary, was the draftsman of the paper as aforesaid, they should reject so much thereof as makes provision to him of a pecuniary benefit, other than being named executor, unless they believe, from the evidence, that said provisions were made by the testatrix of her own free will, and the same was not made by the procurement of said Thornton through fraud and undue influence, as above explained."

It is argued that this instruction placed the burden on the propounder of the will to show that no undue influence existed. We do not so understand it, and while it is awkardly constructed it means only that if this provision of the will was not the act of the testator, but that of the beneficiary, they must find against that part of the instrument.

It is also objected that the fact of the appellant having drafted the will and received pecuniary benefit from it should not have been singled out from the other testimony and undue prominence given. to it by calling the attention of the jury especially to that branch of the case.

We do not well see how the jury could arrive at their verdict in a case of this sort without being instructed as to their duty where a devise is made to the draftsman, for certainly where facts appear conducing to show undue influence, or from which it may be inferred, there must be stronger evidence rebutting the inference than where the will was written by another than the one occupying a confidential relation or who is in fact the draftsman of the instrument from which he derives the benefit.

It seems to us the jury should have been told that if they believed, from the evidence, the appellant was the draftsman of the writing, by which he was made a devisee, and that he had been and was, at the time, the confidential adviser of the testatrix, and, further, that at the time of the signing of the paper by her she was of feeble intellect, were facts from which the jury might infer undue influence in the execution of the paper. This inference being one of fact

Digitized by Google

evidence in rebuttal may be given to satisfy the jury that such an inference should not be indulged. Redfield's American Cases on Wills, page 506.

So if the question was left to the jury as to whether any undue influence was exercised and, without reference to the relation existing between the parties and the fact that the one writing the will was a beneficiary, it seems to us the appellant has no right to complain.

In nearly every case and particularly where a court of equity is asked to investigate transactions between attorney and client, principal and agent, growing out of such relations, the chancellor places the burden on the attorney to remove *all* suspicion from the transaction.

The case of a will is one exception to the rule and for the reason, doubtless, that the manner of proving such instruments is regulated by statute, and if the party was capable of executing the instrument its validity necessarily follows if signed and attested as required by law, and proof of fraud or undue influence must be shown by the contestent. Even in regard to wills the doctrine as to the burden of proof is very conflicting when the testimony shows the beneficiary wrote the instrument.

If the instruction in regard to fraud should not have been given it is apparent the jury was not influenced by it, and their verdict presented the law of the case, when they find no fraud or evidence of an impure motive, but infer the existence of undue influence from the relation between the parties, connected with the testimony for the defense showing the woman to be of weak intellect, and the disposition of her property to one who wrote the will and had an influential relation to her at the time and long prior to the execution of the paper.

In relation to the statement of parties in the appeal to the circuit court, it is manifest that some of the heirs were before the court and all before the trial.

The judgment, in our opinion, should be affirmed.

WHIPPLE, &C. V. EARICK, &C.

(*Filed April* 14, 1892.)

1. *Action to quiet title—Pleading*—In an action to quiet title it is not necessary that the petition should aver the nature of the adverse claim or point out its defects.

2. *Same—Defective petition cured by answer*—Even if the petition in this case is defective, in failing to aver that defendants' claim is adverse to plaintiffs, yet that defect is cured by the answer, which sets up a claim adverse and hostile to plaintiffs.

3. *An action to quiet title* can not be maintained, unless the plaintiff has both a legal title and the possession of the land.

4. *Action to quiet title—Adverse possession*—The widow of the owner of a tract put E. in possession of land in 1839, agreeing to send him, in a short time, either the money due him by her husband and herself or a deed for the land. E. held possession and assessed the property for four or five years as the land of the late owner, but no money or deed having been sent him, he, in 1848, assessed the land as his own, and paid taxes thereon and continued to do so until his death, in 1868, during the entire period being in possession and claiming in his own right. His heirs retained possession for twenty years thereafter and paid taxes on such land. In an action by his heirs to quiet their title, *Held*—

First. Under the facts of the case it would be presumed that E.'s posses-

Digitized by Google

sion was adverse and not friendly to the former owner, after a reasonable time had expired after 1839.

Second. **The claim and possession of E. being open, notorious and adverse after 1848, his possessory title to the land is now perfect, and his heirs were entitled to maintain the action of *quia timet.***

5. *Claimants under tax title—Evidence*—**One endeavoring to enforce his legal rights as purchaser of land at a tax sale must show the substantial regularity of all the proceedings necessary to a valid sale for taxes; and the deed of conveyance for the land does not prove these facts.**

6. *Personal judgment against married woman for costs void*—**It was error to render a personal judgment for costs against the defendant married woman herein, who was made a party to this suit with her husband.**

John S. Jackmon for appellants.

Randolph H. Blain for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

This is a petition in the nature of a bill *quia timet.* It is urged that the petition is defective because it does not aver the nature of the adverse claim and point out its defect. This is not required. It would often be impossible to do so. If it be true that the statements of the petition do not amount to an averment that the appellants are claiming adversely, yet their answer, which sets forth the nature of the wife's claim, does so. This cured the defect if it existed.

To maintain this action the plaintiff must have both the legal title and the possession.

It is quite certain that J. W. Earick, whose heirs are the appellees, had no paper title. He was, however, put in possession of the property by the widow of Joseph Low, about 1839, he being at his death the legal title holder, and as she, with the only child of the deceased, was leaving for a distant State, under an agreement that she would soon either send him what was owing him by her deceased husband and herself, or else a deed for the property.

Earick went into possession and for four or five years held it, as the assessments of it for taxation by him tend to show, as the representative of the Lows. Then for two years it was not assessed, but thereafter, and beginning in 1848, it was, with the exception of one year, when it was not listed, assessed either in whole or part by Earick in his own name until his death in 1868.

For at least twenty years before his death he paid the taxes and assessments upon it, and claimed and controlled it as his own. During the most of this period he either cultivated it himself or rented it out. He was the generally reputed owner, and at times talked of building on it.

Not long after he came into possession he fenced it. The fencing was burnt during the war by soldiers, but after the war he rebuilt it. While at times the fencing from age, theft or trespass became dilapidated, yet the evidence tends to show that at least some part of it, as for instance the posts, were always there.

It is plain there was an intention upon his part to claim and hold the property adversely, and this was open, notorious and continued for twenty years or more prior to his death.

Aside, therefore, from the fact that he had come into possession under the agreement above stated, and by reason of which it should be presumed that after a reasonable time his possession was not

Digitized by Google

friendly, but adverse, it is abundantly shown that for a period sufficient to invest him with possessory title his claim was actual, continued, and openly and notoriously hostile to the unknown heirs of Low and every one else. He kept his flag flying all the time. Even a tenant may, by open and notorious renunciation of his allegiance to his landlord, hold hostile to him. In like manner an agent may manifest an intention to hold for himself and against his principal, and it matters not that Earick's entry was amicable, because he soon converted his possession into an adverse one.

It is, perhaps, impossible to lay down a general rule as to what constitutes an actual adverse possession. It must necessarily be more or less governed by the facts of each case. The character and situation of the land is to be considered. What constitutes it may be one thing in a sparsely settled country, and another in a town or city.

The character of the claim, control and use was such in this instance as to make the holding an actual and adverse one.

This was continued by the appellees, the heirs of Earick, until this suit was brought. There was such privity of estate that one possession could be tacked to the other, or more properly speaking, both were referable to the time when the possession of the ancestor became hostile, and constituted but one continuous possession. At the time of his death, however, his possession had ripened into a title, subject only to be defeated by some saving disability in the legal title holder.

When he took possession the property was not worth more than what was owing to him, and between that time and when this action was brought he and his heirs paid out, by way of taxes and assessments upon the property, $2,000 or more, so that the right of the appellees is equitable as well as legal.

It is true that in the spring of 1876 Whipple took possession of the property and put up some fencing; but the heirs of Earick, in their own name, at once sued out a writ of forcible entry against him and obtained a judgment against him for the possession before the justice. He appealed to the common pleas court, where a like result was had, and in 1878 the judgment was affirmed by this court. The appellees were then, in 1878, by the proper writ issued upon the judgment in that case, put back into possession. This did not, in law, break the continuity of their possession. The entry by Whipple was an unlawful one. He was there merely as a trespasser.

In 1883 the Louisville School Board brought suit for the property against the unknown heirs of Low, and Mrs. Whipple, claiming it as escheated property, which, by virtue of legislative enactment vested in it, instead of the State.

The appellees were not parties to the suit. The board obtained a judgment in the lower court, and thereupon it, by an arrangement with the appellees and subject to any right in them, took possession of the lot and built a new fence around a part of it.

Upon appeal by the Whipples the judgment was reversed, this court holding that the appellees were necessary parties. Upon the return of the cause the board dismissed its action and surrendered possession to the appellees, under an agreement with them that it was to be re-imbursed, the cost of the fencing, and that this action would at once be brought to quiet the title.

These facts plainly show that the possession of the school board was amicable to the appellees.

It appears, therefore, that when this suit was brought they had

Digitized by Google

the legal title by possession, and the then possession of the property.

Moreover, these two questions of fact were, as appears, carefully considered by the lower court, and its conclusion should not be disturbed unless clearly erroneous.

The attempt of the appellants to take possession after the bringing of this action by moving a house onto the property can not avail. It was *pendente lite* and can not affect the possession which appellees had at the bringing of the suit.

The appellant, Mrs. Whipple, claims the property under a tax sale made in 1878, and a sheriff's deed by virtue thereof, dated in 1881. The necessary steps leading up to and authorizing a tax sale, such as a valid assessment, are not, however, shown. The *onus* in this respect rested upon her. She was asserting a right to the property, based upon a tax sale only.

Cooley on Taxation, 353, says: "The purchaser at a tax sale, when he attempts to enforce rights under his purchase, is under the necessity of taking upon himself the burden of showing that the purchase was made pursuant to law. To do this he must show the substantial regularity of all these proceedings. The deed of conveyance would not stand for this evidence. It would prove its own execution, nothing more. The power to execute it must be shown before the deed itself could have any force, for an officer can not make out his own jurisdiction to act by the mere fact of acting. The principle is undisputed. It leads us inevitably to this conclusion, that whosoever claims lands under a sale for delinquent taxes, must take upon himself the burden of proving that taxes were duly assessed, which were a charge upon the land, and that the successive steps were taken which led to a lawful sale thereunder, at which he, or some one under whom he claims, became the purchaser."

The rule above announced is well settled, and has been often declared by this court.

The judgment is erroneous, however, in so far as it is one against the appellant, Jennie Whipple, for the costs of the action, to be levied of her general estate. The costs amount to a considerable sum.

She is a married woman, and it was error to render a personal judgment against her. The lower court will, upon the return of the cause to this extent, set aside this judgment, but otherwise it is affirmed.

STEINBERGER, &C. V. GOWDY.

(*Filed April* 17, 1892.)

1. *Homesteads—Liens for building materials*—The homestead of a debtor can not be subjected to pay a debt incurred for materials furnished in the erection of his residence unless the creditor has taken the steps required by the statute in order to preserve his material-man's lien. In the event the creditor fails to do this no lien exists in his favor.

2. *Homestead—Application of partial payments to open current account*—Where partial payments are made on an open current account, with no agreement between the parties as to the manner of their appropriation and no particular appropriation of them at the time of payment by either the debtor or the creditor, the law will apply the payments to the items of the account in the order of time in which they were incurred.

In this case certain items of the account accrued prior to the time when the

Digitized by Google

debtor's right to a homestead existed and some of them subsequently; payments were made on the account by the debtor after the homestead right accrued, sufficient in amount to extinguish the items incurred before that time. They were appropriated generally to the account by the parties. *Held*—That the law will apply the credits to the oldest items and the homestead can not be subjected to pay balance of the debt.

J. R. Robinson for appellants.

Thomas H. Hines for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Bennett.

In January, 1885, the appellant, who was a housekeeper with a family, purchased 100 acres of land lying in Taylor county, Ky., near Campbellsville, Ky., for the purpose of residing thereon with his family. Not long after the purchase of land the appellant erected a residence house thereon and moved into it as a housekeeper with a family about the 6th day of June, 1885. The appellant also purchased one-third of an acre of land adjoining said 100 acres for the purpose of completing on an eligible building spot, which formed a part of the yard, &c., of the residence.

The appellant, about the first of May, 1885, opened a running account with the appellee, he being a dry goods merchant, in the purchase of goods, &c.

The account ran until some time in August, 1885, the appellant making, from time to time, partial payments thereon. The account was closed in August by the appellant executing his note to the appellee for $137 for the supposed balance due. Some time after the note was executed the appellee sued the appellant upon it. The appellant resisted payment upon the ground that the appellee had not given him credit by all the sums of money that he had paid him, which he plead as an off-set to the note. The issue was tried, which resulted in a judgment for the appellee for the full amount of the note. Execution was issued on the judgment and the one-third of an acre of land was sold under the execution, afterwards a portion of the 100 acres of land was sold to satisfy the balance, and the appellee purchased both pieces.

The appellant and his wife then filed a petition in equity against the appellee, alleging that they had executed two mortgages on the land, which created a lien on the same, that was superior to any claim of the appellee thereto and which was superior to any homestead claim of theirs, but that they held a homestead right as against the claim of the appellee. They also plead as an off-set the sum of $380, which they allege the appellant deposited with the appellee on the 20th day of March, 1885, which he had never accounted for. The appellee put in issue these matters, a trial of which resulted in favor of the appellee upon both of them. The appellant has appealed from that judgment.

The appellee bases his right to subject the land to the debt, without reference to a homestead thereon, upon two grounds, to-wit: First, about $90 of the account was created before the execution of the residential improvements on said land; second, that about $80 of the account were for materials furnished in the erection of said improvements.

As to the second ground it is sufficient to say that the appellee did not take the steps required by chapter 70, General Statutes, in order to preserve a lien on the land for the materials furnished. There-

Digitized by Google

fore, the appellee acquired no right that was superior to the appellants' homestead right.

As to the first question it appears the partial payments made by the appellee were more than sufficient to pay the items of the account created before the erection of the improvements. Then the question is, should said items be first extinguished by said payments? If yea, the appellant is entitled to his homestead as against the debt sued on. If nay, he is not entitled to a homestead as against said debt.

Says 1 American Leading Cases, 358, 5th edition: "The rule with regard to an open current account, the items of which do not form distinct debts, but are blended together in one account, is, that the payment shall be applied, as they are paid, to the charges in the order of time in which they accrue."

In accordance with the foregoing views the case of Pierce v. Sweet, 33 Penn. State Reports, 157, says: "There was no evidence of any appropriation by the debtors, none of any by the creditor. Nor was there any intended appropriation by the debtors. Nichols himself testifies that the payments were general, that is not on any particular account. When they were made there were no persons interested in directing an appropriation except the debtors and the creditor; no persons to be injured by any application. Neither of the parties then having made, the law designates how the payments are to be applied. And in such case it deems them to have been made first in discharge of the earliest liabilities of a running account. The principle upon which this rule is founded is, that in such case it allows the creditor to appropriate the partial payments upon such items of the account as are most precarious."

In accordance with these views it was said, in the case of Hammer's adm'r v. Rochester, 2 J. J. Marshall, 144: "In case of litigation the chancellor would see that the payments were applied so as to effectuate justice. Thus the chancellor would not apply the credits to the specialty debts and leave unpaid a simple contract which would thereafter be barred by the statutes of limitations. The payment of debts, likewise, in the order of time they become due, is a circumstance which should not be without its influence."

In Blanton v. Rice, 3 Monroe, 253, the complainant had untertaken to pay the defendants certain claims due to them by a third person; one of these was due by a replevin bond, in which the complainant was surety, and the others, by a simple undertaking not yet settled by judgment, a general payment having been made, the court said: "It is evident that the demand which the complainant insists upon, to be first extinguished, is best secured, and, in such a case, it is deemed equitable to apply the credit to the debt, the security of which is most precarious." It seems to be the common law rule that the law apply partial payments in matters of running accounts to those items that are the most precarious. And as the first items of the account may by be first barred by the statute of limitations, the partial payments must be applied to them in the absence of an agreement or understanding to the contrary.

But it is said that as the application of the credits to the payment of the first items of the account would deprive the appellee, as creditor, of his recourse upon appellant's land for the payment of his debt he, if the rule announced prevails, would be deprived of his right to make the application of the partial payments so as to protect himself in his rights.

In answer to that proposition it is sufficient to say that in case of the exemption of property from execution or coercive sale for the satisfaction of debts, the rule that the partial payments shall be

Digitized by Google

appropriated as to protect the creditor does not apply so as to reach property that would be otherwise exempt from execution, or the coercive payment of debts, any more than such payment would revive a debt barred by time.

As to the offset of $380, while the proof is strong that the appellant deposited it with the appellee on the 20th of March, 1885, yet as in the old suit in which the appellant seems to have strained every nerve in the defense of the claim which resulted in a judgment against him, the said item, so important to his defense in that suit, was not relied upon, that fact, coupled with the other evidence in the case, convinces us that the appellant is mistaken in reference to that matter.

The one-third acre of land was a part of the homestead, and as the appellant is entitled to a homestead as against the said debt of the appellee, the judgment is reversed, with directions to set aside the sales of the one-third acre of land and a portion of the 100 acres, and to allow the appellant a homestead therein as against the said debt of the appellee, but no homestead is allowed as against the said mortgage debts.

LITZ, &C. V. GOOSLING, &C.

(*Filed May* 7, 1892.)

1. *A contract which is not mutually obligatory* on the parties is void and can not be specifically enforced.

2. *Specific execution of contract granting option on land*—A contract for the sale of land which provides "that in case payment or other satisfactory arrangement to complete this bargain as aforesaid shall not be made in the time above specified and until the expiration of sixty days after notice as aforesaid, then all obligations, express or implied, under this agreement shall cease," is a mere option on the land and does not bind the holder to become the purchaser of it; therefore, such holder can not have it specifically enforced against the owners of the land.

Connally & Ferrell for appellants.

Auxier & York for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Holt.

The writing, signed by the appellees, Goosling and wife, recites that they "agree, in consideration of one dollar, to sell and convey unto E. H. Sudduth, * * with general warranty of title, * * all the coal in, upon and underlying a certain tract or parcel of land, situated in the county of Pike and said State, containing, by estimation, about one thousand acres. * *

"The conditions of the above covenant are the following: That the party of the second part be allowed twelve months from the date hereof to dig upon and explore said land for metals and minerals, and in addition thereto, until the expiration of sixty days after notification by the party of the first part of his desire to terminate this contract, to complete this bargain by paying for the said coal right one dollar per acre, or making such other arrangements as may be satisfactory to the party of the first part; that until such payment or arrange-

Digitized by Google

ments are made the party of the first part shall continue in possession of said land and coal, and that in case payment or other satisfactory arrangement to complete this bargain as aforesaid shall not be made in the time above specified and until the expiration of sixty days after notice as aforesaid, then all obligations, express or implied, under this agreement shall cease, and neither party shall have any claim, either in law or equity, on the other by virtue of this agreement."

This action by the appellants, Litz and Jamison, who are assignees of Sudduth, is to compel a specific performance by Goosling and wife. Such an action lies when the legal remedy is inadequate, and resort to it is necessary to furnish a more exact measure of justice. Reciprocity of obligation is, however, essential to the validity of a contract, and it is a general rule that in order to be binding upon or enforceable by one party it must be so as to both. This is the very essence of it.

The act to be done upon the one hand need not necessarily be simultaneous with the consideration paid or to be paid upon the other, but it is elementary that mutuality of obligation is, in general, necessary to uphold a contract.

If one agrees, at the option of another, to convey to him land at a certain price and the consideration is unexecuted, such an agreement is not enforceable, because it rests altogether with one party whether it shall be carried out. There is no mutuality of obligation in it. A mere naked option to one party, where no advantage or disadvantage, necessary as a consideration to support a contract, moves between the parties, is not enforceable. It is a *nudum factum*, because there is not a legal obligation upon each side to perform. Smith, &c. v. Causler, 83 Ky., 367; Bank of Louisville v. Baumeister, &c., 87 Ky., 6.

If the contract for an option to purchase real estate at a certain price within a certain time be based upon a sufficient consideration, which may consist of course either in an advantage moving to the one party or a disadvantage to the other, then it is enforceable; but where a mere naked option, destitute of consideration, is given to one it is not enforceable, because there is no mutuality of right and remedy.

To enable either party to compel a specific execution the contract must, as a general rule, be mutually binding upon both parties.

In Boucher v. Vanbuskirk, 2 A. K. Marshall, 345, the former leased, in writing, from the latter certain lands, and a clause was inserted in the contract that if Boucher should pay a certain price *per* acre, then Vanbuskirk should convey that much land to him; and it was held that Boucher could not, by tendering a certain sum to Vanbuskirk, compel a conveyance of so much of the land as the money tendered would have paid for at the stipulated price, because by the making of the contract he put himself under no obligation to purchase the land. There was no mutuality of obligation. It was left altogether to Boucher's election whether he would become the purchaser of any of the land.

In the case now presented it rested altogether with the appellants whether they would complete the bargain by paying the stipulated price. The writing provides "that in case payment or other satisfactory arangement to complete this bargain as aforesaid shall not be made in the time above specified and until the expiration of sixty days after notice as aforesaid, then all obligations, express or implied, under this agreement shall cease."

The appellees could not have maintained an action to enforce the

Digitized by Google

execution of the agreement because it was left to the other party to choose whether he would take it by paying for it, and there being no mutual obligation to perform, the contract is not enforceable.

The cases of Allen v. Roberts, &c., 2 Bibb, 88, and Jones v. Noble, 3 Bush, 694, also support this view of the law.

Judgment affirmed.

MORGAN V. GIVENS.

(*Filed May* 12, 1892—*Not to be reported.*)

Boundary of land sold by title bond—The bond executed by the vendor to Morgan obligated him to convey 100 acres of land "adjoining the lands of * * J. on the west, but reserved to himself all the wheat now growing on the land now sold except *what is in 4 acres of new ground near the ice house, and provided that the fence now running east and west on back of west portion of premises sold to said Morgan is to be divided equally * * * for the purpose of making a division fence*" between the vendor and Morgan. In this action concerning the location of the western or division line, *Held*—The line should be run along the division fence mentioned in the bond, and so as to include the 4 acre lot, although this will makes the tract contain more than 100 acres. The designated natural objects mentioned ought to control as to the location of the line.

B. F. Procter and E. W. Hines for appellant.

W. P. Sandidge for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Lewis.

In consideration of $3,000, of which $1,125 was paid, $875 to be paid in ten days and $1,000 to be paid in two equal installments one and two years after date of the contract, made March 13, 1886, appellee sold and covenanted to convey to appellant a tract of land described in the bond as follows: "One hundred acres of land * * * adjoining the lands of H. H. Sagg on the south, I. B. Jackson on the west, Dr. Hooker on the east and G. F. Givens on the north. The said G. F. Givens binds * himself, as soon as the payment of said sum of $875 is made, to have said land surveyed and then make unto the said Morgan a good and lawful deed of general warranty of title to said land, above described. The said Givens reserves in this trade timber enough to be cut out of the land sold to make 1,000 rails, which he is to cut and make said rails at any time he may see proper to do so; also all the wheat now growing on the land hereby sold except *what is in four acres of new ground near the ice house, this Morgan is to have.* The said Givens binds himself to give said Morgan possession of the premises hereby sold on or before the 25th day of March, 1886. *The fence now running east and west on back of west portion of premises sold to said Morgan is to be divided equally between Givens and Morgan for the purpose of making a division fence between them.*"

This action was commenced soon after the first of the two deferred payments became due, for the purpose of recovering personal judgment therefor and subjecting the land to satisfy it, and, subsequently, a supplemental petition was filed, in which the same relief was asked in respect to the second installment.

Digitized by Google

By terms of the contract the vendor was required, upon payment of the $875, which was duly made, to have the land surveyed and a deed for the land sold executed and delivered, and, therefore, he was not entitled to judgment for either of the two deferred installments before compliance with that stipulation. A deed, executed and acknowledged, was filed with his petition and tendered to the vendee, but, subsequently, a second deed, containing a different description and boundary of the land was made and tendered, which was decided by the lower court to include and pass title to the land, the contract bound the vendor to convey and the judgment appealed from was accordingly rendered for the two notes and sale of the land to pay them. And whether that deed does include all the land the vendee, now appellant, is entitled to by a fair construction of the title bond is the question before us.

There is no dispute about the true location of either the east, west or south lines of the land sold, for it is, in express terms of the contract, bounded on the three sides by lands of persons designated. Nor is there controversy about the location of the northwest corner at a stake on Jackson's line, the dispute being as to the direction the line should be run from that point east so as to divide the tract sold by Givens from the residue of his land in accordance with the contract.

If that line be run n. 72¼ e. continually to Hooker's line, as provided in the first deed tendered by appellee, there will be included in the boundary 100 acres, but a barn, orchard, the 4 acres of new ground mentioned in the bond and part of a stock pond will be excluded, and, moreover, the line will be located with exclusive reference to the quantity of land mentioned, and away from and in disregard of objects by which it is obvious the division line was intended to be marked and described. The line, according to the deed appellant is required by the lower court to accept, beginning at the stake on Jackson's line, runs the same course n. 72¼ e. to a stake; thence passing back of the orchard n. 17½ w. 4.34 chains to a stake; thence passing about 50 feet back of the barn and north of it, also north of the pond and the 4 acres n. 69 e. 18 chains to a stake; thence s. 17½ e. 4.29 chains to a stake; thence n. 72¼ 7.31 chains to the beginning on Hooker's line.

It may be that the orchard, barn, pond and 4 acres are all included in the boundary, and that the quantity is just 100 acres, nevertheless the line must be regarded as run and fixed arbitrarily.

It is plain that the division fence mentioned in the title bond was intended to be on the division line between the land sold to appellant and that retained by appellee, and we know of no rule of law permitting a court, in fixing the location of land line, to depart from objects called for in a written instrument, except in case of mistake as to such cases. According to the report of the surveyor the course of the line from the stake on Jackson's line, if run with that fence, is n. 68½ e., and, continued, passes along the north boundary of the 4 acres of new ground, which is likewise mentioned in the title bond and clearly intended to be within the boundary of land sold. And, in our opinion, the line should be so run from the stake on Jackson's line to the northeast corner of the 4 acres of new ground. But as no objects are called for beyond that point and to continue the line further would, without reason, increase the excess of land over 100 acres, it should be run thence with the east line of the 4 acres to the line running n. 72¼ e. and thence to the beginning on Hooker's line. There will, it is true, be a few acres more than 100 acres in the boundary thus described, but as the sale was made in gross and not by

Digitized by Google

the acre there is no other alternative but to run the line n. 68¾ e. at least as far as the northeast corner of the 4 acres of new ground, otherwise designated objects by which it was clearly intended the line should be run would have, contrary to well-settled rules of this court, to be departed from and ignored.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

MARTIN V. COMMONWEALTH.

(*Filed May* 12, 1892.)

1. *Criminal law—Evidence of motive for murder*—On appellant's trial for murder, in order to prove his motive for the commission of the offense, it was proper to prove that deceased had caused appellant to be indicted for robbery, which fact might properly be shown by the exhibition of the indictment against appellant for robbery, with the name of deceased thereon as a witness. But it was error, prejudicial to appellant's substantial rights, to permit evidence to go to the jury concerning all the circumstances and details of the alleged robbery by appellant.

2. *Same—Instructions concerning the right of self-defense*—An accused can not avail himself of the plea of self-defense, if, for the purpose of killing deceased, he went to a place where he knew deceased must pass, and awaited his coming and killed him without abandonment of his original intention to kill. But the evidence of this case did not authorize any qualification or limitation in the instructions concerning accused's right of self-defense.

Thos. H. Hines, Geo. T. Duff and James Garnett for appellant.

W. J. Hendrick for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Pryor.

The appellant has been convicted and sentenced to confinement in the State prison for life for the murder of John Burks. He has appealed to this court, and the grounds for a reversal are, first, the admission of incompetent testimony; second, an error in an instruction given at the instance of the State.

It is made manifest from the testimony that the accused and the dead man had been hostile towards each other for months prior to the killing; that each was ready to slay the other upon the slightest provocation, and such was the bad feeling between them that when seen on the highway they had, as their choice weapons, either a double-barreled shot-gun or a Winchester rifle.

The origin of the difficulty between the two seems to have been caused by the willingness of the appellant and his family to give shelter to the wife of Burks, who had left him and gone to the house of the appellant, the cause of the separation is not shown from the testimony. The dead man, however, made inquiry as to where his wife and Martin were and threatened then to kill them both and solely for the reason that when Mrs. Burks left her husband she had gone to Martin's house, for there is not the slightest proof of any improper conduct on the part of Mrs. Burks. After this threat it seems that Martin claimed that Burks was indebted to him for services rendered (having, doubtless, made friends in appearance at

Digitized by Google

least) and that Burks would not pay him. Martin, to collect his debt, used a shot-gun and compelled Burks, against his will, to pay him, and for this conduct, Burks had Martin indicted in the Barren Circuit Court for robbery. From that time on the parties were threatening to take each other's life, and were armed whenever seen.

On the day of the killing Burks had gone to the county seat of Metcalfe and passed a grocery store that was located on the highway leading to his destination. He had gone in the morning, and returning in the evening was shot from the front of this grocery store by the appellant with a double-barreled gun, loaded with large squirrel shot.

At the time he was shot Burks was in his buggy on the highway and had with him his rifle. There were no eye witnesses to the shooting but the appellant and one Johnson. They each state that Burks first presented his rifle at the appellant and Johnson cried out to the appellant, *look, he is going to shoot*, when the latter immediately fired both barrels of his shot-gun, the contents entering the back of the deceased under the shoulder, from the effects of which he died in a few minutes.

That appellant knew that Burks passed the grocery that morning is evident, and the theory of the Commonwealth is that he placed himself at that point with a view of shooting the deceased as he passed, while the theory of the defense is that the appellant was there looking for his wife and child, who were expected in the neighborhood that evening, and that he had been squirrel hunting with his gun. The shoooting took place shortly before sun down.

We will not discuss the testimony in the case as it must be sent back for another trial.

During the progress of the trial, for the purpose of showing a motive on the part of the accused to take the life of Burks, the fact that Burks had procured the indictment for robbery against him was permitted to be shown by the production of the indictment, and the namé of Burks as a witness. This was all proper, but the court permitted, over the objections of the accused, the witness or witnesses to detail the facts connected with the robbery, the mode of extorting the money from Burks by the appellant and all the facts connected with the commission of that offense. This was erroneous and prejudicial to the accused.

Motive may be shown in certain cases by a state of facts conducing to make out another and distinct offense from that for which the accused is being tried.

In passing a counterfeit bill, for the purpose of showing guilty knowledge, it may be shown that the accused had passed similar bills, knowing them to be counterfeit.

When the husband was murdered by the accused the intimate relation between the wife of the deceased and the accused may be shown as a motive for the commission of the offense. Stout v. People, 4 Parker's Criminal Record, 71.

So it was competent to show, in this case, that the accused had been indicted for robbery at the instance of the deceased, but not to establish the offense by testimony of the facts necessary to show guilt or to permit the entire record, including the affidavits for a continuance, to be read to the jury.

The appellant was being tried for two offenses. His guilt of robbery was permitted to be shown in order to fix upon him the crime of murder and must have been prejudicial to his substantial rights. This character of evidence is likely to be wrongfully considered by

Digitized by Google

a jury and made to constitute a part of the offense for which the party is being tried, as it might well be argued that one so depraved as to commit the crime of robbery would not hesitate to commit murder; and, we think, therefore, proof of the charge of robbery on the facts, with a view of showing guilt, was error. Such evidence goes to a jury as a matter of necessity for the purpose alone of showing motive on the part of the accused to commit the crime and no more than is necessary to show motive should be allowed, and then the jury told the purpose for which the evidence is to be considered by them. Commander v. State, 60 Alabama, —; Pinckford v. State, 13 Texas, —.

The instruction in regard to self-defense was qualified by adding, "unless they should further believe, beyond a reasonable doubt, that the danger to the defendant was occasioned by his own fault in seeking the said Burks for the purpose of inflicting death or other great bodily harm upon him and endeavoring to execute said purpose." While it is the law that if the appellant stationed himself at this point, knowing that the deceased would pass, for the purpose of taking the life of the deceased and had not abandoned his intention at the time he fired, he is guilty of murder. Still, it seems to us, on the facts proven, the law of self-defense, without qualification, should have been given. If the deceased first presented his rifle at the appellant and the appellant, to save his own life, fired before the deceased the plea of self-defense in sustained.

The judgment is reversed, with directions to award a new trial and for proceedings consistent with this opinion.

BEARD, &C. V. MORRIS, &C.

(*Filed May* 14, 1892—*Not to be reported.*)

1. *The failure of the commissioner to sell lands in order in which he is directed* does not render the judgment for the sale or the sale made thereunder void.
2. *Where the report of such sale is made and confirmed without objection* the proceedings are thereafter final and binding on all parties to the suit. And the defendants can not thereafter complain because the commissioner did not sell the land as directed by the court.

Garnett & Dehoney for appellants.

McQuown & Muncie for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Pryor.

In this case the land in controversy was sold under a judgment of the Metcalfe Circuit Court to satisfy a lien created by mortgage. The appellants, W. B. Morris and wife, the original mortgagors, were before the court by service of process and a judgment rendered. The report of sale was made, confirmed and a deed executed by the commissioner to the purchaser, Morris, who is the appellee.

While this suit was pending the owner, W. B. Morris, sold the two and one-half acres in controversy to one Clark and he to Mrs. Stonall, and the latter to the wife of W. B. Morris.

The wife of W. B. Morris is now claiming this land, on the ground that by the original judgment the commissioner was not authorized

Digitized by Google

to sell it. That it constituted a part of the mortgaged land is conceded and this land he was directed to sell, the judgment requiring him to sell first another tract included in the same mortgage. His failure to sell as directed does not render the judgment or the sale under it void.

The report of sale and confirmation make the proceedings final and binding on all the parties. With proper exceptions the sale by the commissioner would be held an error for which a reversal might be had in this court, but, when made and confirmed, is binding on all the parties before the court.

This judgment is for a small sum, but the appellants had ample opportunity to pay the debt. A personal judgment was first rendered and, at a subsequent term, the judgment of foreclosure was entered and why the owner failed to pay this debt does not appear.

Beard, another appellant in this case, is not affected by the judgment. If he has a private right of ingress and egress to this property it does not appear to have been disturbed, nor does it appear that the public, by any judgment in the case, had been deprived of any right they have to use the water on this land. Whether or not such an easement exists is not a question before us. It is evident that no redemption was made within the year or any tender of the money, nor do the facts authorize the conclusion that the commissioner and the appellee combined to injure these parties by selling this property. It was mortgaged and sold to satisfy the debt. It was a public sale and if they wanted the title retained in the then owner there is no cause shown for their not being present and bidding. That they did not know of the sale is no reason for disturbing after confirmation.

The fact of the amended petition having been filed in the year 1884, after the pretended sale to Clark of this land, did not remove the *lis pendens* existing by reason of the original action. That was filed and process served before W. B. Morris sold the land, and his wife, who was a party to the original action, and where a defense by way of set-off was only pleaded, is now claiming to be the owner through the title of her husband, who conveyed to Clark after the action was brought and process served.

Clark and Mrs. Stonall have no interest in this controversy. They have sold to the wife of W. B. Morris, who purchased with a full knowledge of the pending action under which the appellee derived title.

Judgment affirmed.

PEOPLE'S BANK OF KENTUCKY V. BARBOUR, &C.

(*Filed May* 14, 1892—*Not to be reported.*)

Attachments—Equitable assignment of deposit in bank—A creditor sought to attach a certain fund to the credit of the debtor in a bank. The debtor was the executor of his father's estate and claimed that he had appropriated this fund to himself as executor to pay a debt due by him to the estate. The fund was to his individual credit. *Held*—That the evidence fails to show that the fund had, in fact and in good faith, been appropriated by the debtor to the payment of his indebtedness to the estate of his father; and a mere unexecuted intention to so appropriate it, without any act done to carry the intention into effect, can not operate as an assignment of it.

Digitized by Google

Fairleigh & Straus for appellant.

Brown, Hnmphrey & Davie for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellant, People's Bank of Kentucky, brought this action, November 2, 1888, to enforce satisfaction of a personal judgment against J. D. Barbour, on which an execution had been issued and returned no property found, the sum of $876.42 on deposit to his credit with the Bank of Louisville being attached for that purpose. And the question presented is whether that fund had, prior to the commencement of the action, been in fact and in good faith appropriated in payment of his individual indebtedness to the estate of P. D. Barbour, his father, of whose will he is executor.

It appears that he had, for several years, received one-half the fees of the office of sheriff of Jefferson county, either as principal or deputy sheriff, and, under an arrangement with the Bank of Louisville, became entitled, in his own right during that period, to about $4,000 of interest on deposits made by him, from time to time, of such fees, which interest, as it accrued, was placed to his credit on books of the bank. Of that amount there had accumulated, from about August 1, 1885, $1,881.17, of which $500 was, September 8, 1888, and the same amount, November 1, 1888, applied by the bank to payment of two notes he had previously given to it, leaving to his credit, until this action was instituted and attachment executed, $876.42, now in dispute.

The testimony of J. D. Barbour is, in substance, that, having used money that came to his hands as executor, he intended to apply the interest on the deposits mentioned in discharge of his indebtedness to the estate thus created and, for that purpose, directed the president and cashier of the bank to place the same, as it accrued, to his credit as executor, and did not know until this action was commenced the $1,881.17 mentioned had been placed to his individual credit. The time when, according to his testimony he gave the direction, was prior to August 1, 1885, but how long after he qualified as executor in 1881 does not appear. It does, however, appear the direction had reference also to interest accrued on the deposits before that date, all of which he withdrew and used for individual purposes.

The amount of his alleged indebtedness to the estate is not stated nor shown by him, no settlement of his transactions as executor having been made. He does, however, testify he received as executor $2,500, to be held in trust for his sister's children until the youngest of them arrives at full age, but it is merely inferable, not being expressly stated, that he had used any part of that particular fund. Russell, president of the bank and only other witness in the case, testified he had no recollection of J. D. Barbour giving such direction, did not think he had done so, but admitted he applied the $1,000 to pay the two notes without consulting him.

In Newby & Taylor v. Hill & Million, 2 Met., 330, it was held that in order to constitute an equitable assignment of a debt or other chose in action, no particular form is necessary; any order, writing or *act* which makes an appropriation of the fund amounts to an equitable assignment of that fund, and that it may be made in writing or by parol without assent of the debtor.

But though it may have been entirely competent and legitimate

Digitized by Google

for J. D. Barbour to assign to himself, as executor, the fund in question for the purpose alleged, it was just as necessary to validity of it that he should have, by some open act, divested himself of individual control and ownership of it as if the transaction had been with another person. Otherwise it would be in the power of an executor or administrator to thwart his own creditors by simply alleging and testifying to an unexecuted intention to appropriate to payment of his indebtedness to the estate any fund sought to be subjected to payment of his individual debts.

Therefore, conceding the alleged direction to the president would have been a valid equitable assignment, it was still incumbent on J. D. Barbour, executor, to satisfactorily show not only that the direction was actually given but done in good faith.

It seems to us, considering ordinary business methods, such as a man fit to be sheriff or executor would be expected to observe, the conduct of J. D. Barbour is utterly inconsistent with the alleged fact of appropriation of the fund to pay indebtedness to the estate. For though the interest accumulated prior to August 1, 1885, was, according to his testimony, likewise directed to be placed to his credit as executor, he admits he drew all out of bank and used it all in paying other debts and personal expenses. He admits he did not know until after November 2, 1888, when this action was commenced, whether the $1,871.17 stood on the books of the bank to his credit, individually or as executor, although a part of that sum had been subject to his draft three years or more.

We can readily see why that money would have remained unproductive and undisturbed that length of time if subject to his individual order. He had borrowed of or owed the bank $1,000 on the two notes, which, it is fair to presume, both the bank and himself expected would be paid out of that fund, for it does not appear that either the bank looked to or he had provided any other means of payment; the remainder was subject to his order and might just as well been drawn and used by him as was the interest which accumulated previous to August 1, 1885. But we are unable to see why, if the fund accumulating after that date had been in fact appropriated to payment of his indebtedness to the estate, it was left then, some of it for three years, without either applying it to that purpose or investing it so as to produce interest.

The testimony of the president is not entirely negative in its effect but consistent with and borne out by the conduct of both J. D. Barbour and the bank. Moreover, the fact of the fund remaining for three years to the credit and subject to control of J. D. Barbour is such evidence of bad faith of the transaction as that a court of equity could not, without setting a very unsafe precedent and a disregard of well known rules applicable in analogous cases, sustain the claim of the executor to the fund. And it should, therefore, in our opinion, have been adjudged subject to the payment of appellant's judgment.

Judgment reversed, and cause remanded for proceedings conforming to this opinion.

Digitized by Google

HILL, &C. V. MCGARVEY.

(*Filed May* 14, 1892—*Not to be reported.*)

Jurisdiction concerning sales of property held for benevolent educational purposes—The funds of certain donors was invested in certain property for the purpose of educating colored men for the christian ministry. On account of local prejudice the institution was a failure and the property was sold for re-investment at some other more favorable location. In this action, concerning the power of the trustee to confer a good title, *Held*—That section 5, chapter 13, General Statutes, concerning the jurisdiction of the circuit court over property held for charitable uses, limits the power of the court to a sale for re-investment in the same county, only in cases where the original donation was for the benefit of the particular county or locality; and where, in cases such as this, the object of the charity is in no sense local, the trustees, under the sanction of the chancellor, may sell such property in one county and re-invest the proceeds in another, when the advancement of the contemplated charitable purpose so requires.

George Thomas and B. P. Hill for appellants.

W. B. Moody for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Pryor.

In the month of November, of the year 1885, J. W. McGarvey and others, who were then trustees of the Christian Bible College, purchased of one Bernard Goins a lot of ground, with numerous buildings upon it, lying in the town of Newcastle and once known as the Henry Male and Female College, with a view of establishing a college for the education of colored men for the christian ministry.

The fund from which the purchase was made consisted of voluntary contributions, made by the various churches of the denomination known as Christians, and by the individual members. The money thus contributed was placed under the control of the bible college trustees, to use, manage and control for the purposes contemplated by the donors. The college seems never to have prospered, and although every effort was made to make it what its founders and patrons desired. The effort resulted in a complete failure. The trustees of the bible college and those interested in the school, laboring under the belief that they had the power to sell the lot and the improvements and re-invest the proceeds for similar purposes, and in a location where no hostility existed on the part of the inhabitants to such an enterprise, sold this entire property to the appellant, B. F. Hill, by a written contract and for a full consideration, delivering to him the possession.

Some question arising as to the right of the trustees to sell so as to pass a perfect title, this action in equity was instituted that the chancellor might be consulted and the sale to Hill confirmed if, in his opinion, the trustees had the power to sell, and their action was to the interest of the parties concerned.

The donors of the fund being numerous, one or more of them were made defendants, with the power conferred of defending for all, and the case submitted on the pleadings and the proof. It appears from the testimony of various witnesses that the undertaking was a failure, and such a result is to be attributed, as the proof conduces to show, more to the prejudice of the people living in the vicinity against the school than to the want of effort on the part of the trus-

Digitized by Google

tees to build it up. In fact it is plain from the uncontradicted proof that it would be useless, on the part of those interested, to further prosecute this liberal move in the vicinity where this property is located. The answer of the defendants admits the allegations of the petition, and a case is presented where all the parties in interest want the property sold and the sale already made to the appellant confirmed.

The only question raised by the appellant as to the title he has obtained originates from the fifth section of the chapter on charitable uses in the General Statutes, 245. That section provides that it shall be competent for the circuit court of the county in which real estate held for schools, colleges, churches, under devises, conveyances, gifts, &c., to adjudge a sale of the same for the purpose of re-investment in similar property in the same county. The provisions of this statute evidently intended to restrict the power of sale and re-investment of such realty in another and different county, only in cases where the donor, grantor or devisee had designated the locality in which the benefits of the grant or gift have to be enjoyed, and not in a case where the donors have invested their means for a particular purpose, not for the benefit of the locality, but to accomplish an object foreign to such a purpose. Nor was it intended by this section of the statute to deprive the chancellor of the jurisdiction over trust property in this character of case. The trust must fail unless a sale is made, and to re-invest in the same county must result in a like failure, and where the trustees, invested with title and the donors consent, or without their consent, on the facts before us, and where the object of this section of the statute is not disregarded, we see no reason why the title is not perfected by the judgment confirming the sale to the appellant. This donation was not for the benefit of the locality, but to advance the cause of christianity by this particular church, and to benefit those who, by reason of their peculiar condition, required their assistance. These benefits can be confined elsewhere, and the appellant must accept the title.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

VANMETER, &C. V. SPURRIER, &C.

(Filed May 18, 1892.)

Contract in violation of statute—Sale or fertilizer—Every contract made for or about any matter or thing which is prohibited by any statute is void. And it is not necessary that there should be an express prohibition in order to render the contract void; it is sufficient that a penalty is attached, as that implies a prohibition.

A contract for the sale of a fertilizer not labeled as required by the statute is void, although such a sale is not expressly prohibited. The fact that the statute fixes a penalty for selling without having previously complied with the provisions of statute implies a prohibition.

Digitized by Google

J. H. Vanmeter, Chelf, Sprigg and Hobson & O'Meara for appellants.

Chas G. Richie and James Montgomery for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barbour.

Appellees sold appellants a quantity of commercial fertilizer and took their note for the price. In this action upon the note appellees resist a recovery against them upon two grounds: first, because the fertilizer was worthless; and, second, because it had not been analyzed and labeled as required by law.

The first defense presented merely a question of fact which is concluded by the verdict of the jury. The second defense, based upon the illegality of the contract, presents the important question for our consideration.

The statute in question (General Statutes, chapter 42*a*, 650), entitled "An act to regulate the sale of fertilizers in this Commonwealth and to protect the agriculturist in the purchase and use of the same," provides as follows:

SEC. 1. On or before May 1st of each year, before any person shall sell or offer for sale in this State any commercial fertilizer, he shall furnish to the director of the Agricultural Experiment Station a quantity of such fertilizer sufficient for analysis, accompanied by an affidavit that the substance so furnished is a fair sample of a fertilizer which he desires to sell in this State.

SEC. 2. It shall be the duty of the director to make a chemical analysis of every sample of fertilizer so furnished him and print the result of such analysis in the form of a label, which shall set forth the name of the manufacturer, the place of manufacture, the brand of the fertilizer and the essential ingredients contained in it, together with a certificate setting forth that the analysis is a true analysis of the sample furnished and the money value of such fertilizer computed from its composition as he may determine. Which labels shall be furnished to any person desiring to sell any such fertilizer in this State.

SEC. 3. Every package of fertilizer sold or offered for sale in this State shall have attached to it in a conspicuous place the label as provided in the foregoing sections.

SEC. 4. Any manufacturer or vendor of fertilizers who shall sell or offer for sale any fertilizer, without having previously complied with the provisions of the act hereinbefore set forth, shall, upon indictment and conviction, be fined $100 for each violation or evasion of this act.

SEC. 5. The director shall receive for analyzing a fertilizer and affixing his certificate thereto $15.00, and for labels furnished $1.00 per hundred.

It is conceded that none of the fertilizer sold to appellants had the labels required by the statute attached to it, but it is insisted for the appellees, in an able and learned argument, that as the statute does not, in terms, declare that the sale of fertilizer without the analysis and label shall be unlawful, or that the contract of sale shall be void, the appellees are entitled to recover upon the contract sued upon.

In support of his contention counsel relies upon the cases of Harris v. Runnells, 12 How., 79, and Miemeger v. Wright, 25 Va., 239, 40 Am. Rep., 720. But we are of opinion, both upon principle and

Digitized by Google

from the decided weight of authority, that the contract should not be enforced.

The principle governing such cases is best stated by Mr. Chitty, in his work in contracts. The author says: "Clearly, if an act of parliament expressly prohibit the transaction, in respect whereof an agreement is entered into, such agreement will be invalid. And so a contract may be illegal, although it be not in contravention of the specific directions of a statute, provided it be opposed to the general policy and interest thereof."

But it was at one time made a question whether, if a statute contained no distinct prohibitory clause and only inflicted a penalty on the doing of a certain act, the law would sanction the contract and hold that the payment of the penalty was the only consequence resulting from the transgression of the statute, or whether it would treat the agreement as void, and thereby add a punishment which the statute had not expressly provided.

In some of the older cases it seems to have been considered that the contract would not be void if there were no distinct prohibition and the act stipulated for was only forbidden under a penalty. And Lord Ellenborough appears to have been of opinion that an unlicensed surgeon might sue for his fee, although the statute, 3 Hen., 8c 11, prohibited persons, under a penalty, from practicing as surgeon without a license.

But in Baeltell v. Vinor, Holt, C. J., said: Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition though there are no prohibiting words in the statute. And it is now quite settled that this doctrine contains the true rule on the subject now under consideration.

The same rule is announced in Parsons on Contracts, volume 1, page 382; Pollock on Contracts, page 260, and Benjamin on Sales, Kerr's Ed., section 695. But, says Mr. Chitty, if a contract be made in violation of the provisions of a statute, and the effect of such statute be merely to impose a penalty on the offending party, for the benefit of the revenue and not to prohibit the act done or avoid the contract itself, the fact of such provision not having been complied with will not invalidate the contract.

Quoting with approval from Chity and recognizing the distinction stated by him the Court of Appeals, in Lindsay v. Rutherford, 17 B. M., 246, sustained an action brought by an unlicensed broker upon a bill purchased by him, holding that a statute which imposed a penalty upon a person who engaged in the business of a broker or exchange dealer, without first obtaining a license, was a mere revenue measure and not intended to strike a blow at the business itself.

The statute in question is not a revenue statute, but, as its title indicated, a law for the protection of the individual. The 5th section requiring the payment of $15 to the director making the analysis was designed not as a source of revenue to the State, but simply as a fund to meet the expenses of the experiment station.

Woods v. Armstrong, 54 Ala., 150, 25 Am. Rep., 671, and notes, and McConnell v. Kitchens, 20 S. C., 430, 47 Am. Rep., 848, are directly in point. The statutes considered in those cases was almost identical with the statute we are considering. In the McConnelly case, Harris v. Runnells and Miemeger v. Wright were distinguished. As said in the McConnell case, indeed, aside from any authority, it would seem to us altogether anomalous, not to use any

Digitized by Google

harsher term, to hold that a court of justice should enforce a contract founded upon an act which is absolutely forbidden by the law-making department of government, and we may add that it would seem strange if the very court, which is required by the law to impose a penalty upon a person for the commission of an act, should be required upon his application to reward him by adjudging to him all the benefits he contracted for and intended to receive in the commission of the illegal act.

As the appellees' reply admits that there were no tags upon the fertilizer sold to the appellants, the latter were, upon the pleadings, entitled to a judgment dismissing the petition.

There was no evidence which could have authorized a recovery by appellants upon this construction, beyond the expense of going after, hauling and putting in the fertilizer, and the instruction relative to the counter-claim was, therefore, substantially correct.

The judgment is reversed, and the cause remanded for further proceedings.

AZBILL V. AZBILL.

(*Filed May* 18, 1892.)

1. *Divorce—Confirmed habit of drunkenness*—While it is difficult, if not impossible, to lay down a rule by which it can be ascertained when a man has formed a confirmed habit of drunkenness, the evidence in this action by the wife for a divorce is certainly sufficient to establish the fact that the husband has formed such a habit, which, "accompanied with a wasting of his estate without any suitable provision for her maintenance," is sufficient to entitle the wife to a divorce.

2. *There may be a wasting by the husband of his estate* within the meaning of the statute, although his estate consists alone of his mental and physical faculties and his habits of industry.

W. M. Beckner for appellant.

Haggard & Benton for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Presiding Judge Yost.

From the judgment dismissing her action, in which she sought a divorce from her husband, the appellee, on the ground of his confirmed habit of drunkenness, accompanied "with a wasting of his estate and without any suitable provision for her maintenance," the appellant prosecutes this appeal.

It is difficult, if not impossible, to lay down a rule by which it can be ascertained when a man has formed a confirmed habit of drunkenness. Bouvier defines an habitual drunkard to be a person given to inebriety or the excessive use of intoxicating drink, who has lost the power or will by frequent indulgence to control his appetite for it. A man may drink to excess occasionally, and yet not be an habitual drunkard. There must be both drunkenness and a habit, and the question is, what amount of drunkenness does it require to form the habit? Lawson in his Rights, Remedies and Practice, section 786, says: That one is addicted to habitual drunkenness, as ground for a divorce, who has a fixed habit of frequently getting

Digitized by Google

drunk, and he may be so addicted, though not oftener drunk than sober, and though sober for weeks at a time.

Getting drunk, whenever exposed to temptation; being usually drunk in business hours; being drunk for several days at a time, four or five times each year; being driven to drink by excitement; frequently drinking to excess, have all been held as sufficient proof to secure a divorce under statutes similar to ours.

In this case one witness swore that the appellee had been a hard drinker and frequently drunk during the preceding ten or twelve years. A second, that he had been drinking to excess for years. A third, that he had been frequently under the influence of liquor. A fourth, that he had been drunk half of his time for several years. A fifth, that during the last five years he had frequently seen him in town drunk day and night. A sixth, that he had been a heavy drinker for years, getting drunk almost every time he came into town, which was all public days and many Saturdays. A seventh, that he had often seen him staggering drunk and oftener drunk without staggering. Besides these, ten witnesses introduced by both parties swore that he had been a drinking man for years.

It seems to us clear that this evidence conclusively establishes the fact that the appellee had acquired a confirmed habit of drunkenness.

He had no estate to waste except his brawn and brain and his capacity to use them. The evidence shows that he was a reckless, wandering man, absenting himself from home for days and working regularly at no time. In the few years, covered with the proof, he had worked at blacksmith, miller, shingle cutter and sewing machine agent for three different companies. He followed none of these callings industriously or earnestly, but from the proof seems to have plumed himself most upon his ability as a horse jockey. The testimony sufficiently proved a wasting of his only estate, which consisted not alone of his mental and physical faculties, but his habits of industry by which he could suitably provide for his wife.

While we hold in highest regard the sanctity of the marriage bond and know that courts should be cautious in severing it, we feel that the good of society does not demand or require a wife, without fault in her marital relations, to be bound for life to a drinking, shiftless husband.

The judgment is reversed, and cause remanded, with instructions to decree the relief sought by the appellant.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

COMMONWEALTH v. MILES & CO.

SAME v. NEW HOPE DISTILLERY CO.

Filed May 11, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Taxation of distilled spirits—Board of valuation and assessment*—By the statute providing for the assessment and collection of taxes on distilled spirits the auditor, treasurer and secretary of state were *ex officio* constituted the board of valuation and asessment and it was not necessary that they should formally organize and take an oath to discharge faithfully their duties as members of such board.

2. *Assessment—Presumptions*—Under that statute it is essential to the validity of the tax that the board of valuation and assessment shall file their assessments or valuation in the office of the auditor of public accounts, a record being necessary to the legal imposition of a tax. But in a suit to recover the tax the court will presume, in the absence of an allegation to the contrary, that the auditor, treasurer and secretary properly discharged the duties imposed upon them by the statute.

3. *As denial of knowledge or information* sufficient to form a belief as to the assessment is not good, the means of information being within defendant's reach.

4. *A party can not plead ignorance of a public record* to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact.

5. *Proof of record*—As the statute provides for a record of the imposition of the taxes and the assessment of the property, that record can be proved by a certified copy, but the deposition of the custodian of the record as to what it shows is not competent evidence.

6. *The judgment dismissing the petition is an entirety*, and can not be affirmed in part and reversed in part.

Nat. W. Halstead for appellant; N. T. Crutchfield and Humphrey & Davie for appellees.

GOODIN v. TINSLEY, &c.

Filed May 11, 1892. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

Husband and wife—Separate estate—Timber growing upon land which was the wife's general estate belonged to her, and if, with her consent, while it was growing upon her land, her husband sold it for her benefit, the money arising from it, when received by her, or by her husband who loaned it out for her, taking the note payable to her, became her separate estate, and was not liable to his debts.

Hugh Rodman and John T. Hays for appellant; J. H. Tinsley for appellees.

HIGDON v. HIGDON, &c.

Filed May 18, 1892. Appeal from Grayson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Construction of will—Evidence to show intention—A will, by which the testator disposes of his estate and then, by a codicil, assigns as a reason for excluding one of his sons that he has received his portion of the estate "heretofore in land," must be regarded as excluding his son named in the codicil from any interest in the personal as well as in the real estate, and there being no ambiguity extrinsic evidence is not competent to show the testator's intention.

G. W. Stone for appellant; J. S. Wortham for appellees.

Digitized by Google

BAUGHMAN, &c. v. LOUISVILLE, EVANSVILLE, &c., R. R. Co.

Filed May 25, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Contract limiting liability of common carrier*—A common carrier is liable for the value of goods lost through his negligence, notwithstanding the bill of lading provides that he shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so fixed is less than the value of the goods; and this is true, although less is charged and paid for the transportation than when the exempting clause is omitted.

2. *Contract by agent for different principals—Separate right of action*—Where an agent ships, in his own name under one bill of lading, goods belonging to different persons, acting as the agent of each owner separately and not as agent of the owners jointly, each owner can maintain his separate action for the damages sustained by him.

Muir, Heyman & Miller and E. F. Trabue for appellants; Humphrey & Davie for appellee.

N. N. &. M. V. Co. v. DECKER'S ADM'R.

Filed May 25, 1892. Appeal from Grayson Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Railroads—Evidence—Res gestæ*—In an action against a railroad company to recover damages for injuries received by plaintiff in attempting to leave the train, in which the defense was that the plaintiff contributed to his injuries by attempting to leave the train before it had stopped, it was not competent for plaintiff to prove that after he entered the train he had a conversation with the baggage-master, who told him that the train would not stop long enough at his destination for him to get off. The testimony was not competent to fix a liability on the company, and as the conversation did not occur in immediate connection with the plaintiff's act in attempting to get off the train it was not admissible as a part of the *res gestæ*.

2. *Contributory negligence*—It is only in cases of death resulting from willful neglect that contributory negligence can not be pleaded as a defense.

P. H. Darby and G. W. Stone for appellant; J. S. Wortham and H. W. Stoy for appellee.

LOU., ST. LOUIS & TEXAS RAILROAD CO. v. GATEWOOD.

Filed May 25, 1892. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Railroads—Duty to trespasser in ejecting him from train*—It is the duty of the servants in charge of a railroad train in putting a person off the train, even though he be a trespasser, to see that he has a safe place to alight; and if he is compelled to leave the train at a place where it is necessarily dangerous to do so, as when the train is on a trestle, and is injured, the company is liable for the injuries received, although its servants, by reason of the darkness, may not have been aware of the danger. Nor can the company defend upon the ground that the plaintiff was drunk and thus contributed to his injury, as that fact made it the more incumbent upon the servants of the company to see that he had a safe place to leave the train.

2. *Same—Prejudicial errors*—Even if it was error to instruct the jury that if plaintiff entered the train without the consent of its officers, their demand for his fare "waived the manner of his getting on and riding to that point," the instruction was not prejudicial, as the material question under the testimony was whether the plaintiff was warned of the danger before he leaped from the train in the dark.

3. *Excessive verdict*—As the evidence shows that plaintiff's injuries are permanent, the court can not say that a verdict for $1,125 is excessive.

Helm & Bruce and Yeaman & Lockett for appellant; S. B. and R. D. Vance, John F. and H. T. Lockett for appellee.

Digitized by Google

BLACKBURN v. WILLIAMS.

Filed May 25, 1892. Appeal from Powell Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

Liability on bond—An assignee for the benefit of creditors having delivered to the husband of the assignor the notes and accounts in his hands belonging to the estate, and authorized him to collect them and pay the debts against the estate, at the same time taking from him a bond with surety by which they bound themselves "to save the assignee harmless" in the event the husband failed to properly discharge the trust, in an action on the bond it was error to render judgment against the sureties for money loaned the principal after the execution of the bond.

Wood & Day for appellant; J. B. White for appellee.

BRANNIN, &c. v. GLEASON, &c.

Filed May 25, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Judge Brent, affirming as to Brannin and dismissing as to the other appellants.

1. *Appellate jurisdiction*—An appeal from a judgment enforcing a lien on land does not involve the title to a freehold, and, therefore, the amount in controversy must determine whether an appeal lies from such a judgment, and if so, whether it lies to the Superior Court or the Court of Appeals.

2. *Same*—The provision of the charter of the city of Louisville authorizing an appeal to this court, on the sole ground that the validity of an ordinance of the city is in question, applies only to appeals from the city court in criminal and penal cases.

3. *Street improvements—Evidence to contradict records of city council*—In an action to enforce a lien for the cost of street improvements, if the records of the city council show that the city engineer's report of apportionment has been approved, the defendant will not be allowed to show that the record has been altered since the institution of the suit so as to make it show that fact, unless he lays the foundation therefor in his pleadings. A denial that the apportionment had been approved is not sufficient for that purpose.

4. *Pleading*—An allegation that an ordinance was "duly passed" is an allegation of fact and not a mere conclusion of law.

Bright & Brandeis for appellants; Lane & Burnett for appellees.

CARROTHERS & BRO. v. AMBROS.

Filed May 11, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Limitation—A surety's right of action against the principal commences when he pays the debt, and is barred in five years.

Nat W. Halstead for appellants; John S. Kelley for appellee.

SCRUGGS v. MEYER & CO., &c.

Filed May 18, 1892. Appeal from Fleming Circuit Court. Opinion of the court by Judge Brent, affirming.

Weight given judgment of chancellor—This court must give some weight in every doubtful question of fact to the determination of the court below; and while it will not hesitate to reverse when the judgment is clearly against the preponderance of the evidence in cases tried on the equity side of the docket, it is always reluctant to do so where there is any thing like an equipoise of conflicting proof.

In this case an attachment sued out upon the ground that plaintiff had not enough property to satisfy plaintiff's demand, &c., having been discharged by the lower court, this court will not disturb the judgment, the proof as to whether the value of the property was greater than the amount of plaintiff's demand being conflicting.

W. J. Hendrick, J. P. McCartney and R. Reid Rogers for appellant; J. H. Power for appellees.

Digitized by Google

Anderson v. Eminence, &c., Turnpike Co.

Filed May 18, 1892. Appeal from Shelby Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Parties to actions*—When the president and directors of a corporation sue as such, the corporation is virtually a plaintiff, and the objection that it is not named as plaintiff can not be made by general demurrer.

2. *Contract for free travel on turnpike road—Equitable relief*—Where the question as to who is entitled to travel free of toll on a turnpike road under a particular contract with the turnpike company is in dispute, and various persons persist in using the road without paying toll, claiming the right under the contract, the turnpike company is entitled to the chancellor's protection as in other cases of repeated trespasses, and may, therefore, call upon a court of equity to construe the contract and determine the rights of all the parties in interest.

3. *Same*—Where a turnpike company agrees with the owner of land, in consideration of certain privileges affecting his land, to allow him to use its road free of toll, the contract for free travel is purely personal, and not a contract running with the land.

G. G. Gilbert for appellant; L. C. Willis and W. H. Anderson for appellee.

Continental Insurance Company v. Coons.

Filed May 18, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. *Insurance—Power of attorney to waive forfeiture*—An attorney at law employed by an insurance company merely to collect a premium note has no power to alter the contract of insurance or to waive a forfeiture incurred by the insured.

2. *Same*—In order to establish a waiver of any condition in a policy the conduct of the company or its agent must have been such that the assured might reasonably presume that the company did not intend to insist upon a compliance with the condition.

Even if an attorney employed to collect a premium note had power to waive a forfeiture incurred by the insured taking additional insurance without the consent of the company, the fact that he accepted payment of the note after being notified of the additional insurance did not amount to a waiver, as he expressly told the insured that he had nothing to do with the second insurance, that all he had to do was to collect the money.

3. *Taking of additional insurance—Waiver of forfeiture*—Where an insurance policy provides that it shall be void if the insured takes other insurance without the consent of the company in writing, if the insured notifies the agent of the company of his intention to take additional insurance, the company is bound within a reasonable time to notify the insured of its election to treat the policy as void, otherwise the forfeiture is waived.

4. *Same—Pleading*—Where the insured, by his pleading, relies alone upon the conduct of the company subsequent to the taking of additional insurance by him as a waiver of the forfeiture incurred thereby, he is not entitled to an instruction telling the jury that certain acts of the company or its agent, prior to the taking of the second insurance, will amount to such a waiver.

5. *Same—Company liable only for proportionate part of loss*—If a party sues upon a contract which has a condition providing that upon the happening of a certain event the obligor's liability is to be less than that primarily assumed, and in his pleading shows that the event has occurred, he can not recover the full amount of the liability primarily assumed, and all of the plaintiff's pleadings, in so far as they assert affirmative matter, must be regarded as constituting his cause of action.

When a policy of fire insurance provides that if other insurance on the same property is taken with the consent of the company, the company shall be liable only for its proportion of the loss, and in an action on the

Digitized by Google

policy the plaintiff's pleadings show that additional insurance was taken with the consent of the company, a judgment for the full amount of the policy is erroneous. It is not necessary that the company should, in its answer, rely upon the condition in the policy in order to reduce its liability.

Muir, Heyman & Muir for appellant; Robt. W. Woolley and W. O. Harris for appellee.

HENDERSON BELT RAILROAD CO. v. STAPP.

Filed May 25, 1892. Appeal from Henderson Circuit Court. Opinion of the court by Judge Brent, reversing.

1. *Railroads—Damages to abutting property*—In an action against a railroad company by the owner of abutting property to recover damages for injury to his property, resulting from the obstruction of the street by reason of the improper construction of defendant's road, it was not error to instruct the jury that they might consider the fact of the rails and ties being left above the general level of the street as a source of obstruction and element of damage. The fact that it is the city's duty to have this corrected, and that on plaintiff's complaint it will do so, is too remote to relieve defendant from liability. If defendant's road was not finished when plaintiff's suit was brought and it intended in good faith, without unreasonable delay, to so finish it that when it was completed plaintiff's cause of complaint would be removed, it should have so alleged and proved.

2. *Same*—It was error to instruct the jury in substance that the defendant is conclusively bound, so far as plaintiff is concerned, to put its rails and ties on a level with the general surface. So far as the plaintiff's right of action is concerned defendant was under no obligation as to that matter, except to avoid placing the rails and ties so as to obstruct unreasonably plaintiff's ingress and egress.

3. *Same—Evidence*—It was not competent for plaintiff to prove that persons seeking to rent the property objected to it on the ground that since the railroad was built it was less desirable. Nor was it competent for him to prove that the rent had fallen since the construction of the railroad, in the absence of a showing that all other circumstances that could have affected the renting of the property were exactly as favorable as when he received the larger rent.

H. F. Turner and Yeaman & Lockett for appellant; John T. Hundley and Ben P. Cissell for appellee.

FIDELITY TRUST, &c., CO. v. SHANNAHAN, &c.

Filed May 25, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Judge Brent, affirming.

Set-off—Assignment for creditors—Against a firm note, held by a banker, the members of the firm may set off their individual claims for balances due them as depositors. And the banker, having made an assignment for the benefit of creditors, the members of the firm have the same right of set-off against his assignee, as an assignee for creditors stands in the shoes of his assignor.

Goodloe & Barr for appellant; Matt O'Doherty for appellees.

L. & N. R. R. CO. v. BROWN.

Filed May 25, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Brent, reversing.

Liability of purchaser of railroad—Covenant running with land—Where a railroad company as consideration for the right of way through a tract of land promised the owner of the land to fence its line through her place on both sides and build cattle guards on each side of her farm as soon as the road was completed, and after this contract was made sold all its property and franchises to another company, in an action by the owner of the land against

Digitized by Google

the purchaser of the road to recover damages for breach of contract, it is to be presumed, in the absence of an allegation to the contrary, that the contract was verbal and, therefore, not a covenant running with the land; and in the absence of any thing to show that the defendant assumed the liabilities of its vendor, it is not liable for a breach of the contract. An allegation that defendant "assumed" all its vendor's liabilities is a mere conclusion of the pleader. Plaintiff should either have shown a covenant running with the land or stated facts showing that defendant had assumed this liability.

John S. Kelley for appellant; John D. Wickliffe for appellee.

Day, &c. v. Cunningham.

Filed May 25, 1892. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Sale of bank stock—Misrepresentations by vendor*—If a president of bank knowingly misrepresents the condition of the bank for the purpose of inducing another to buy the stock of the bank, he is liable in damages to the purchaser whether the stock sold is his own or belongs to another for whom he is acting as agent. And in an action to recover such damages it is competent for plaintiff to show that the defendant was familiar with the business of the bank and knew that his representations were untrue, and to that end to show the condition of the bank, both before and after the sale of the stock to plaintiff, and the fact that defendant, a large stockholder, had sold almost all his stock.

2. *Res adjudicata—Dismissal without prejudice*—A former suit by plaintiff for a rescission of the contract, which was dismissed without prejudice, presents no bar to this action to recover damages. And the fact that defendant objected to the dismissal of the former action without prejudice is immaterial.

Wood & Day and Wm. Lindsay for appellant; Tyler & Apperson and Young, Mitchell & Young for appellee.

L. & N. R. R. Co. v. Meader.

Filed May 25, 1892. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Railroads—Killing of live stock*—In this action against a railroad company to recover damages for the killing of a horse by one of its trains, a verdict for plaintiff is not against the evidence.

2. *Same—Instructions to jury*—As there was nothing in the case indicating that any extraordinary effort to stop the train was expected of those in charge of it, an instruction in regard to the duty of those in charge of the train owed to the persons and property on it would, under the circumstances of the case, been superfluous.

J. W. Alcorn and Wilson & Rawlings for appellant; D. N. Cull for appellee.

Cox, &c. v. Roof

Filed May 25, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

A mortgage of goods to be acquired in the future becomes effective, as between the parties, as soon as the goods are acquired.

N. W. Halstead for appellants; C. T. Atkinson for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. AUGUST 15, 1892. No. 4

KENTUCKY COURT OF APPEALS.

OVERTON V. FITCH.

(*Filed May* 5, 1892—*Not to be reported.*)

Judgment of chancellor affirmed—The land involved herein was divided among the parties by the chancellor, in the manner directed by this court on a former appeal, and the judgment below is affirmed.

C. C. Fairleigh and C. R. Wathen for appellant.

Thos. B. Fairleigh for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Pryor.

The rights of these parties were settled on the original appeal, and the case remanded, with directions to allot to the appellee seven-ninths of the 150 acres of land to be laid off on the west end. The court below, when the mandate was entered, appointed commissioners to divide the land as directed by this court. There were three references before the commissioner's report was confirmed, and every opportunity afforded the appellant to present his objections. The mandate has been followed, and no reason exists for disturbing the judgment of confirmation.

Judgment affirmed.

STONE V. MATTINGLY.

(*Filed May* 5, 1892—*Not to be reported.*)

1. *Right of a partner to sue his firm at law for his passed due salary*—A member of a partnership, who is entitled to a stated salary for services as manager of the partnership business, to be paid "out of the proceeds of said

Digitized by Google

business," can not maintain an action at law against his co-partner for his salary passed due, without demanding, and in the absence of, a settlement of the partnership accounts.

2. *Pleadings*—An amended petition by a plaintiff, asking a settlement of the partnership affairs, was properly rejected when it was not offered until several days after the action had been submitted, which action was brought by the plaintiff against his co-partner for salary alleged to be due him as manager of the partnership, and in which action the defendant was seeking a rescission of the partnership contract—said action having been pending for three years and all the issues having long since been enjoined.

3. *Right of partner to salary—Construction of contract*—The partnership contract between two persons who owned two distilleries, provided that each partner was to manage one distillery and receive a certain salary per month "for his services in said business." By agreement only one distillery was operated, and in an action by the partner, who was to have managed the distillery that was not operated, for his salary as manager, it is held that he is entitled to no compensation as manager, never having rendered any services as such.

G. W. Williams & Son, Wm. Lindsay and Geo. W. Jolly for appellant.

W. N. & J. J. Sweeney and Weir, Weir & Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Holt.

March 10, 1882, the appellee, M. P. Mattingly, was the owner of two distilleries, one of which had been purchased from the appellant, W. S. Stone.

The latter was then the owner of a certain whisky brand, which had been used by him for a considerable time and had become valuable.

At the date named they entered into a written contract, to become operative at a certain time, by which Stone became the owner of an eighth interest in both distilleries, the brand to be for use therein exclusively, and each to share the profits and losses in proportion to their respective interests.

The contract further provided: "W. S. Stone is to take charge of one of said distilleries as its manager, and Miles P. Mattingly shall, from said date, have charge of the other distillery as its manager; and that out of the proceeds of said business each party shall be entitled to $100 per month for his services in said business. * * * The general management of the business and financial management of the business shall be under the control of Miles P. Mattingly so long as he owns a majority of stock in the business and property."

This suit was originally, at law, brought by Stone to recover of Mattingly his salary as a manager of one of the distilleries.

It is not claimed that he in fact rendered any services in that capacity, but only that he was ready, able and willing to do so.

Mattingly, by proper pleading, sought a rescission of the contract upon various grounds that authorized a transfer of the action, and it was transferred to equity. The court refused each party the relief asked.

Mattingly appealed to this court and the judgment as to him was affirmed. There was no cross-appeal by Stone, and the court, in its opinion, therefore, expressly declined to pass upon his claim. Mattingly v. Stone, 12 Ky. Law Rep., 72. He now presents an original appeal, to which, under the circumstances, he is entitled.

Digitized by Google

After the case had been submitted, and two days after the evidence had been heard, the appellant offered to file an amended petition, seeking a settlement of the partnership. It was refused. The cause had then been pending over three years. The one party had, by his pleadings, limited his claim to one for pay for services, and the other to an effort to rescind the contract.

The case had been prepared upon these issues, and the rejection of the amended petition, if indeed not entirely proper, was certainly not such an abuse of that discretion, necessarily lodged in the lower court, as to authorize a reversal of its action by this court; and more especially when either party may yet have, by suit, a proper adjustment of the firm matters.

The only remaining question is, was the appellant entitled to recover the sum named in the contract as pay for services?

The testimony, aside from the contract, clearly shows that when it was made it was the intention to operate both distilleries. This is also shown by the contract, and it seems plain to us, from its terms, that the parties to it contemplated and intended the monthly allowance named in it as compensation for services to be actually rendered in the conduct of the business. Each as to a distillery was to be the manager of the business. He was to be paid out of the proceeds of the business, and "for his services in said business." The contract looked to the rendition of services in return for which the monthly allowance was to be paid.

The testimony shows that after the contract was made the parties deemed it best to operate but one distillery, because of lack of means and the condition of the whisky market. Even Stone testifies that this was the arrangement, but says he thought it was merely temporary.

It is evident the operation of both distilleries would have been a losing business. Indeed this would likely have been true of the one that was operated, and which was managed by the appellee, but for the fact of the pre-existing contract to furnish a party a large lot of whisky. It is not to be presumed the parties would have operated both when it was evident it would be a losing business.

During the time some money was paid to the appellant upon orders drawn by him upon the appellee. They did not specify upon what account they were drawn. Stone testifies they were, as he understood it, upon the allowance of $100 *per* month for services; but Mattingly says they were advances to Stone, to be re-imbursed out of his portion of the profits then being made from the one distillery that was in operation, or which it was supposed would be realized from its operation.

By the contract Mattingly was to have the general management of the business. If Stone became dissatisfied with it he had the right to sell his interest or withdraw from the service of the firm. Mattingly had, of course, no right fraudulently, or with the purpose of depriving Stone of his monthly allowance, to say that but one distillery should be run; but there is no evidence supporting such a state of case.

The question of fact was presented to the lower court, whether, after the making of the original contract which contemplated the operation of both distilleries, it was agreed by the parties that but one of them was to be operated. The monthly allowance being dependent upon services to be rendered by the party in managing the operation of a distillery, if it was agreed it was not to be run, then, of course, the stipulation in the contract for pay was not operative.

The lower court found there was such a subsequent agreement,

Digitized by Google

and, upon a consideration of all the facts and circumstances proven, we do not feel authorized to disturb its conclusion. Moreover, it is equitable, because Mattingly has, upon record, waived all claim for his services in the management of the distillery that was operated.

We have considered the question aside from appellant's right to maintain this character of action. The allowance of salary was to be out of the proceeds of the business in which the parties hereto were partners.

Losses were to be borne by them in proportion to their interests, and, upon a settlement of firm matters, it might appear that the appellant was indebted to the firm. In that event he would have no right to recover for salary, even if otherwise entitled to it.

In any event his right to recover depended upon the state of accounts between him and the appellee as partners. The subject of the suit was a partnership matter. There had been no act of the parties separating this claim from the partnership. The written contract did not do so, because by it any indebtedness on this score was to be paid out of the proceeds of the venture. The claim for it was against the firm, and it is an elementary rule of the law of partnership that in general one partner can not sue the other at law on account of a firm transaction in the absence of a settlement of the partnership accounts. Lawrence v. Clark, 9 Dana, 259. The reason is, that justice can not be done without taking an account of all the firm matters.

Judgment affirmed.

JOHNSTON'S ADM'R V. JOHNSTON.

(*Filed May* 7, 1892—*Not to be reported.*)

Husband and wife—Homestead—Where a husband uses his wife's money to erect a dwelling-house on land owned by him, under a parol agreement to transfer the title to the property to her, and dies without having done so, in a contest between her and her husband's administrator and creditors such agreement will not be sufficient to authorize a diversion of the proceeds of said property from the payment of the husband's debts.

John McChord for appellant.

Sam'l Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

William Johnston having died in 1890, appellant, Barr, administrator, brought this action to settle his estate, and asked for sale of a lot of land, on which is a dwelling-house, where he resided and his widow and children still are, and application of proceeds to pay debts against his estate, which, it seems, has turned out to be insolvent. But appellee, the widow, claims the lot and asks the title be conveyed to her.

It appears they were married in 1873, he being then the owner of the lot in question, but, with money inherited by her, the dwelling-house was erected and occupied by them and their children until his death. Assuming it to be proved that before the money was so used he promised to have the title of the lot made to her, but died before doing so, still, as it was applied with her knowledge and consent,

Digitized by Google

the property can not now, according to repeated decisions of this court, be diverted from payment of debts against his estate. For it is a reasonable presumption that he was given credit upon the faith of his title to that property that his wife consented to remain for eighteen years undisputed.

When the husband has reduced to possession and converted to his use money of the wife, by investing it in real estate and taking the title to himself, a post-nuptial parol agreement between them for such real estate to be conveyed to her, but which is never done, will not, after his death, avail her in a contest with his administrator and creditors. Walson v. Robertson, 4 Bush, 37. See also the recent case of Meade v. Straus, 88 Ky., 6, where the authorities on the subject are cited and the rule is distinctly stated, that, although money of the wife may be obtained by the husband under a verbal agreement to invest it in a house for her, still, if she acquiesces in the conversion of it to his use by purchase, in his own name, of property, her subsequent claim to the proceeds of the property will not prevail against his creditors.

A contest between herself and husband, or between her and his heirs, would, under such circumstances, present a different aspect, for, unlike creditors, they could not claim that her act of consent or acquiescence had mislead or prejudiced them.

It seems to us the court erred in adjudging she was entitled to the property, and in refusing to direct a sale to pay debts against the estate.

The judgment is, therefore, reversed and remanded for proceedings consistent with this opinion.

MORRIS V. SALLE, &C.

(*Filed May* 7, 1892.—*Not to be reported.*)

L. A. Sypert for appellant.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Pryor.

This is an appeal from a judgment of the circuit court on an appeal from the county court establishing a road. It must be reversed for the following reasons:

1. It does not appear that any notice was given of the application for the opening of this new road.
2. The application fails to state the necessity for the road to enable the appellants or the public to reach the places designated by the statute.
3. The report of the viewers fails to state or give the names of the owners of the land over which the proposed road is to run.
4. The circuit court heard additional testimony on the appeal.

The judgment is, therefore, reversed, with directions to the circuit court to reverse the judgment of the county court, with a mandate ordering that court to dismiss the proceedings.

Digitized by Google

L. &. N. R. R. Co. v. Owen, &c.

(*Filed May* 17, 1892.)

A common carrier can not, by special stipulation in its bill of lading, limit its liability for damages resulting from its own negligence, therefore the jury were authorized to find in damages the full amount of the injury done to a horse in their care by the negligence of the carrier, although the bill of lading stipulated that in case of damage to the horse its value was not to exceed $100.

Wm. Lindsay and Barnett, Miller & Barnett for appellant.

Humphrey & Davie and L. C. Willis for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

This case has been here before and decided. See 10 Ky. Law Rep., 554.

The appellant contracted with the appellees to carry by rail the appellees' race-horse from Shelbyville, Ky., to the fair grounds, near Chicago, Ill. The horse was to be, while on the appellant's train, under the control of the appellees' servants. Upon the arrival of the train at the place of destination the appellees' servants were ordered to take the horse off of the train; but they objected because the platform was not safe for the purpose of taking off live stock; but they did take the horse off by way of that platform, in obedience to the appellant's orders. The platform was about four and one-half feet high, about ten feet wide and several hundred feet long, with large headlights at each end, and no railing or banisters on the sides. The horse, while being taken on the platform, became frightened and restive and fell from the platform and struck the rail of the railroad track and injured himself permanently.

This suit was instituted for the purpose of recovering damages for said injury, upon the ground that the injury was caused by the negligent structure of said platform. The jury found that the injury to the horse was the result of such negligence, and judgment was rendered for the compensation awarded by the jury. The appellant has appealed from that judgment.

The decision, *supra*, settles the legal questions in this case, except the following one that is material to be noticed: The bill of lading stipulated, as a part of the contract, that in case of damage to the horse its value was not to exceed $100; and the lower court instructed the jury that they might, in a certain state of case, disregard that stipulation, and find the actual value of the horse. The appellant objects to the form of that instruction.

But as the jury evidently found that the horse was injured by the negligence of the appellant, the instruction in question was not material. For it is well settled, in nearly all the States of the United States, that common carriers can not limit their liability for damages done by their negligence to property they have in charge for transporting.

Says Lawson, in his work on Common Carriers, page 31: "In this country it is generally held that he may limit his responsibility as an insurer by special contract, but that he can not by any contract exempt himself from responsibility for the consequences of his own negligence, or for the negligence of his servants or agents; contracts of the latter kind being considered as being void, because they are against public policy, and because they are supposed to be obtained

Digitized by Google

under circumstances which give to the carrier an undue advantage in obtaining terms which the law can not enforce without giving its sanction to injustice and oppression."

This rule seems to be sanctioned by this court in the cases of L. & N. R. R. Co. v. Hedges, 9 Bush, 645, and Rhodes v. L. & N. R. R. Co.

We find no error in the other instructions. The verdict of the jury as to the negligent structure of the platform, for the purpose of receiving and discharging live stock, was sustained by the evidence.

The judgment is affirmed.

COLLINS V. POWELL, &C.

(*Filed May* 7, 1892—*Not to be reported.*)

1. *A county court of one county has no jurisdiction to appoint a statutory guardian* for an infant who is a resident of another county.

2. *Residence of infant at time statutory guardian was appointed—Evidence*—Twenty years after the land of an infant was sold by proceeding in a suit brought in the county of M. by her statutory guardian for that purpose, she brought this action against one who purchased it at the sale at its full value to recover it, on the ground that the appointment of her statutory guardian by the county court of M. county was void, because, at the time of such appointment, she was a resident of the county of C., and that, therefore, the proceedings under which the purchaser claimed were void. *Held*—The evidence being conflicting as to the residence of the infant at the time of the appointment of the statutory guardians it will be presumed now that the county judge of M. county was at the time satisfied by proof as to such residence, and that he had jurisdiction to make the appointment.

J. A. Sullivan and Haggard & Benton for appellant.

C. F. & A. R. Burnam for appellees.

Appeal from Madison Court of Common Pleas.

Opinion of the court by Judge Pryor.

Edwin Collins died in the winter of 1862. He left the county of Clark, in this State, and joined the Confederate Army. His widow and one child survived him.

Letters of administration were granted to one Lilly Emerson by the Clark County Court, and his personal estate being insufficient to pay his debts it became necessary to sell his real estate. The personalty was of but little value, and his realty consisted of a tract of land located in the county of Madison, the tract containing ninety-two acres.

He lived on this tract shortly after his marriage, but rented it out a short time defore he left for the army, and it was in possession of a tenant at his death.

He owned no realty in Clark county and his wife and child lived with her relatives, with no fixed place of abode, unless it was at the residence of Mrs. Collins' father, in the county of Clark. In the year of 1864 the administrator, Lilly Emerson, qualified as guardian of the infant, Polly Collins, in the Madison County Court, and his intestate's estate being involved in debt, he filed a petition in equity in the Madison Circuit Court, the widow of the deceased uniting with him, for a sale of the infant's real estate, viz: The ninety-two

Digitized by Google

acres of land lying in that county. He sued both as administrator and as the statutory guardian of the infant, alleging that it was to the interest of the infant that a sale should be made; had commissioners appointed to value the infant's estate, gave bond and complied strictly with all the requirements of the statute in regard to the sale of infant's real estate.

The land was sold and purchased by the appellee, Powell, under the judgment, the money paid over under the order of the court and a deed made. This was in the year of 1866. In the year 1886, twenty years after the confirmation of the sale to the appellee, the daughter, the present appellant, brought this action of ejectment to recover the land upon the ground that the proceeding in the Madison Circuit Court was void.

If the action for the sale of the land in Madison is to be regarded as a sale to pay debts by the administrator it is then maintained that the judgment was void, because the infant, in whom was vested the legal title, was not before the court, and if regarded as a proceeding, under the statute for the sale of infant's real estate for the purpose of re-investment, or because the sale would redound to the interest of the infant, it is still insisted the sale was void, for the reason the infant lived in the county of Clark, and the Madison County Court had no jurisdiction to appoint a statutory guardian. It is evident that an action by the administrator for the sale of realty for the payment of the debts of his intestate, or for any other purpose, would not pass the title without the heir invested with the title was before the court, and equally certain that if the infant was domiciled in the county of Clark when the administrator was made statutory guardian by the Madison County Court, the order appointing him such was void, and, therefore, he had no right to bring an action as guardian for the sale of the infant's real estate. It was, in fact, an action by the guardian under the statute, and the sole question is, was the child a resident of Madison ccounty, this court having held that under the practice at that time a guardian, upon his petition in behalf of the infant, could obtain a decree without making the infant a defendant, or that at least the judgment, in such a case, would be erroneous and not void.

If the testimony as to the residence of the widow and her child, when the appointment of the guardian was made, is to be determined alone by the statements of witnesses examined, then this court would have no hesitation in holding that the decided weight of the testimony made Clark county the home of the widow and infant child. The testimony for the appellant leaves the mind in doubt as to the home of herself and mother in the county of Clark—some witnesses fix it at one place and some at another, but all agree that it was some where in Clark county.

It is a fact that Collins and his wife before he left had no fixed home, and it appears from the testimony of Emerson that after Collins left for the army some of his personal property was removed by his wife to Clark county, showing that Collins had the purpose of returning to Madison after his lease expired.

He had no other home, and his wife and child, after his death, were going from place to place, with no permanent abode, having no income upon which to live but the rent of the farm in Madison. The widow proposed to sell the land to the appellee and represented that she was living at Sam Shearers', her uncle. She claimed that as her home, and had his aid in so arranging matters as that the appellee might purchase the land. This uncle also represented the mother as living with him, and she was, in fact, at his house when

Digitized by Google

these negotiations, inducing the appellee to purchase the land, were made. They had applied, as Emerson swears, to the judge of the county court of Clark, to have him appointed guardian in that court and he was told that he must go to the county of Madison. It is to be presumed that the county judge of Clark had sufficient information on such a subject as to enable him to know the county in which a guardian should qualify, and the county judge of Madison must have known that he had no right to appoint a guardian for an infant when that infant lived in an adjoining county.

He says he knew that the jurisdiction was in Clark if the infant lived there, and it was his usual custom to have proof on the subject. The mother was in the court-room when Emerson qualified and, no doubt, made to the county judge the same statement as to her residence that she made to the appellee. After the lapse of more twenty years, the facts transpiring when the order was made must necessarily have passed out of the mind of the county judge, but when his jurisdiction is questioned upon such facts as are presented here, and after the lapse of so many years, great weight should be attached to the proceeding in his court, although *ex parte* so far as this appellee is concerned.

There was no motive on the part of the mother to defraud her infant child. None is alleged, and yet it is evident that she claimed her home in Madison and was living first with one relative and then with the other, some living in Clark and some in Madison county. There was every reason for regarding Madison county as her home. All she and her child owned in the way of property was in that county, and an intelligent county judge would doubtless have informed himself before entering an order that was being made to enable the widow and child to dispose of their home to one who had agreed to pay them its full value when the title was perfected. He did pay its full value. He acted in good faith, and when the appellant and her kindred, all claiming to live in an adjoining county, failed to discover her actual residence until after the lapse of more than twenty years from the date of the appointment of the guardian, and when the purchaser has parted with his money and the land doubled in value, the chancellor should be reluctant to disturb judicial proceedings, the effect of which would be to divest the innocent purchaser of title, and upon no other testimony than the recollection of witnesses refreshed, doubtless, by the insolvency of the guardian.

Judgment affirmed.

MAIZE v. BOWMAN.

(*Filed May* 17, 1892.)

1. *Contract for use of mare to breed and retain colt*—The owner of a mare for a valuable consideration, under a verbal agreement, delivered her to plaintiff, who was to breed her at his own expense, keep her until the colt, which was to belong to him, was foaled and weaned, when the mare was to be returned to the owner. Subsequently a creditor of the owner had the mare levied on and sold, she being in foal at the time, and purchased her at the sale, with notice of plaintiff's claim to her colt. In the suit, wherein the plaintiff and the purchaser each claims the colt, *Held*—

First. The agreement between the owner of the mare and plaintiff was not merely for the sale of something which had neither an actual nor a potential existence. It was a contract for the use of the mare for a particular purpose and was valid, and plaintiff is entitled to the colt.

Digitized by Google

Second. The dismissal upon demurrer of a suit by plaintiff against defendant, to recover possession of the mare before the colt was foaled, is not a bar to this suit by him to recover the colt, the two relating to different subject-matters.

2. *Pleadings—Res adjudicata*—The determination of a court upon a demurrer to a petition dismissing it, is a bar to a future action upon that same cause of action, where the decision upon the demurrer was based upon the merits of the case, and not merely the result of a defective statement of the cause of action.

Barnett, Miller & Barnett for appellant.

Humphrey & Davie and Marshall & Lochre for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

In March, 1886, Howard Bowman delivered a mare belonging to him to the appellee, Hite Bowman, under a verbal agreement, based upon a valuable consideration, by which the latter was to breed her at his own expense, and keep her until the colt, which was to belong to him, was foaled and weaned, when the mare was to be returned to her owner. Subsequently, the appellant, William Maize, a creditor of Howard Bowman, had the mare levied upon and sold, she being then with foal. [13 KY. LAW REP., 233].

Public notice was given at the sale of Hite Bowman's claim to the unborn colt. Maize became the purchaser.

After the sale, but before the colt was born, the appellee, Bowman, brought suit for the possession of the mare, claiming that by reason of his contract he had a special interest in her, and was entitled to hold her until the colt was foaled and weaned, which the petition averred would belong to him.

Before the colt was born the action was dismissed upon a demurrer to the petition. After its birth this suit was brought for its recovery.

Maize claims to be the owner of it by virtue of his purchase of the mare, and that the dismissal of the former suit upon demurrer is a bar to this one.

It is urged the contract between the Bowmans was void because the subject-matter of it was not then *in esse*, the colt being then unborn. In other words that it was merely a contract to sell something which then had neither an actual nor a potential existence.

The general rule is, that a sale or mortgage of something thereafter to be acquired is void as to creditors. If the debtor has, when the contract is made, no right to the article—if as to him it has then neither an actual nor a potential existence, then the contract is invalid as against his creditors. It relates to a mere possibility, coupled with no interest, and public policy forbids the making of such contracts.

Thus a mortgage of goods, to be thereafter purchased, or of an unsown crop, vests no title in the mortgagee, and none in vendee in case of a sale, as against creditors and purchasers. This is a settled rule in this State.

This, however, is not such a contract. It was not an agreement to sell a thing not in existence, but for the use of something for a particular purpose. While the owner of a field can not sell the corn to be thereafter raised upon it, and which is then not planted, yet

Digitized by Google

he may contract the use of the field to another for corn raising, and the latter will be entitled to the crop. There is no difference between the latter case and this one.

The appellee was entitled to the possession of the mare for a special purpose until a certain time, and her produce in the meantime, and to this end he had her in possession. McCarty v. Blevens, 26 Am. Dec., 262.

The instructions of the lower court required the jury, in order to find for the appellee, to believe from the evidence that the appellant, or his agent, had notice before the purchase of the appellee's claim.

The dismissal of the former suit is not a bar to this one. That related to the possession of the mare, while this relates to the ownership of the colt, which was unborn when the first action was dismissed. The subject-matter is different. It is not the same claim. The statement in the petition in the first suit that the colt when foaled would belong to the appellee was unnecessary matter. The court had no right in that suit to determine any thing as to it. This was not the purpose of that action.

It was not brought to test the title to any thing. The *gravamen* of it was the right to the possession of the mare.

Courts do not favor a plea of *res adjudicata* unless it be clear that the merits of the case were considered.

The opinion of the court in the first case does not show upon what ground the demurrer was sustained. It is true where it does not appear from the record what was determined, it may be shown, *aliunde*, or by parol evidence.

It is also true that it matters not whether the facts upon which the court acted were shown by evidence, or were averred in the petition and admitted by demurrer. The determination of the court is equally conclusive and renders the question *res adjudicata*. In either case the determination has reached the merits of the case, and is, therefore, conclusive of the matter. It is unlike a case where the action has been dismissed upon demurrer by reason of the lack of a material averment in the petition. This never constitutes a bar to a second action where the petition supplies the averment that was lacking in the first one.

Where, however, the facts are found by the court, whether upon evidence or by demurrer to a sufficient petition, its judgment is the sentence of the law upon those facts and is conclusive between the parties.

In this case, however, the lower court properly rejected the record of the former suit as evidence, because it appeared from the petition that the subject-matter of that action was different from this one. In one it was the right to the possession of the mare; in the other it is the question of ownership of the colt. The issue in this suit could not have been determined in that one. The point of controversy was not the same. This appeared from the pleadings, and, therefore, it was purely a question of law to be determined by the court, and as the petition in the other suit did not present the issue made in this action, the court was bound to consider that it could not have been determined, and, therefore, it properly refused to hear testimony upon this point.

The record of the first suit showed that the question in this case could not have been determined, because it was not presented by the pleadings.

Judgment affirmed.

Digitized by Google

ALBRO v. ROBINSON, &c.

(*Filed May* 14, 1892.)

1. *Allowance to executors who are testamentary trustees*—The executors of a will can not be allowed for their services exceeding 5 per cent. on the estate administered, although by the will they were appointed trustees for testator's infant child— it appearing that they have always managed the estate as executors and made their settlements as such, and have never, in any manner, charged themselves as trustees.

2. *Liability of one executor for the default of his co-executor*—One of two executors, who executed a joint statutory bond as such, is liable for the acts and defaults of his co-executor as principal, where his co-executor managed the estate and made default therein. The executor can not be treated as a surety for such co-executor and held liable only as a surety jointly with the sureties on the joint executorial bond. Collins, &c. v. Carlisle's heirs, 7 B. M., 13, overruled.

3. *Executors—Sureties—Subrogation*—Where one of two executors has made waste of the trust estate, and his co-executor and sureties are sought to be charged therewith, they have a right to be subrogated to such executor's right to compensation for managing the estate, and to have the amount of the default credited by the value of such services, even when the defaulting executor is dead and had stated that he did not intend to charge the estate for his services, and when his administrator is asserting no claim for such compensation.

W. H. Mackay and Thomas McDougall for appellant.

Hallam & Myers and J. F. & C. H. Fisk for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

Vincent Shinkle and E. D. Albro, as executors of Thomas H. Albro, who died in 1872, executed a joint bond with Uriah Shinkle and Harriet Albro as their sureties.

Subsequently, upon the suggestion that Uriah Shinkle had become a bankrupt, they executed an additional joint bond with Henry Ranshaw as their security.

Vincent Shinkle mainly managed the estate. He advised with his co-executor some, but otherwise took complete control and retained it until his death in the fall of 1885, although in the meantime he had become insolvent.

The appellant, E. D. Albro, claims that for any loss to the estate through his co-executor, Shinkle, he is not liable as a principal but only as a co-surety with Henry Ranshaw and Harriet Albro.

At common law an executor was not liable for the acts of his co-executor as to property over which he had exercised no control. He was, in such a case, not chargeable with the wrong or *devastavit* of his companion and only liable for the assets which had come to his own hands.

Indeed they were not required to execute bond, but after a while chancery assumed the power to require it in case of insolvency, and now it is required by statute in most of the States of this country.

If two executors execute a joint bond for the faithful discharge of their duties, as was done in this instance, then, by the import of it, each is liable in a suit upon it for the acts of the other falling within its conditions.

They are joint obligors and jointly liable as principals to a surety upon their bond, who may be compelled to answer for a loss through

Digitized by Google

the act of one of them. By the terms of their bond, the form of which is prescribed by our statute, they are bound to truly administer, satisfy all legacies, so far as the estate will admit, and make proper distribution of all of it. General Statutes, chapter 39, article 1, section 5.

Each is bound for the other as a principal as to their sureties, the creditors and distributees. 7 Am. and Eng Ency. of Law, page 216; Brandt on Suretyship and Guaranty, section 498.

To hold that one of them is, as to the sureties in the bond, but a surety for the default of his co-executor and only liable jointly with those who in name and fact signed it as sureties, would contradict its terms and the plain understanding of the parties at the time of its execution.

The bonds, in this instance, are in the usual and statutory form. They recite who are the principals and who the sureties. By their terms Uriah Shinkle, Harriet Albro and Henry Ranshaw became the sureties of both Vincent Shinkle and E. D. Albro as executors, and to hold that one executor, as to the conduct of the other, occupies the position of a surety only, as to those who are denominated as sureties in the bonds, would not only be contrary to their letter but the evident spirit in which they were signed.

It is true that the one executor becomes liable for the acts of the other only by virtue of the joint bond, but this liability is as a principal as to the sureties in it and those who are entitled to the estate. The one executor has a right to consult with the other and help control the estate. His position is different from that of a surety in the executorial bond. Assets in the hands of one are assets in the hands of both by virtue of the joint bond. It changes their common law relation and makes both principals as to their sureties simply because it so stipulates; and the case of Collins, &c. v. Carlisle's heirs, &c., 7 B. M., 13, in so far as it holds otherwise, is overruled. The decree below, in this respect, was correct. The chancellor refused, however, to allow any thing for the services of Shinkle, as executor, and allowed Albro but $1,000 for his services.

The administrator of Shinkle, who is a party to the record, is asserting no claim, upon the ground that the decedent did not intend to charge for his services, owing to his near relationship to the distributees. Albro and Ranshaw claim that if they are liable for the default of Shinkle, as executor, then they are entitled to be subrogated to whatever he may be entitled to for services by having it applied in satisfaction of the claim for such loss. If entitled to compensation this would certainly be equitable. It would be in the direction of doing complete justice, and this is the basis of the doctrine of subrogation.

The appellant claims that $5,000 should be allowed for the services of both executors. This would exceed 5 per cent. upon the estate administered, which is the limit of compensation to executors under our statute.

It is said, however, that the allowance should not be so confined because the executors were, under the will, testamentary trustees, being required to sell the real estate and invest the two-thirds coming to the child of the testator at her majority in profitable and safe securities, she receiving from them the profits in the meantime. They, however, acted all the time in the capacity of executors. As such they made settlements bi-ennially or nearly so from the time they qualified until the death of Shinkle, and the infant distributee became of age about two years thereafter. They were responsible

Digitized by Google

for the estate all the time as executors, and so denominated themselves in their settlements.

The commissioner, to whom the case was referred to audit their accounts, allowed $2,500 for their compensation, or $1,000 to Shinkle and $1,500 to Albro. This allowance as a whole, it appears to us, was reasonable and not in excess of the statutory limit. It is evident, however, that Shinkle did the most of the work. The chancellor, doubtless, refused any allowance for his services upon the ground that he did not expect to charge for them. It is true no allowance for the services of either was made in any of their settlements and, so far as shown, no claim was then made for any, but these settlements were partial ones and no final one was ever made. It is not shown that there was any agreement when the executors qualified or at the outset that Shinkle was to act gratuitously. The only evidence upon this point is that, years after, and when he had become insolvent, he said he did not intend to claim any compensation.

This testimony, if competent, does not authorize a rejection of a claim for an allowance for his services by his co-executor and his surety when they have been made liable for his default and are asking that the amount of it be applied in reduction of that liability. It is insufficient to support a rejection of it.

Prima facie it should be allowed and it ought not to be rejected upon such a state of case. Shinkle himself would not have been bound by such a statement, and much less, in an equitable view, should it affect those who are now held liable for his default.

The estate was well and profitably managed. The services were valuable, long continued and judicious, and the chancellor should have allowed for the entire service of both executors $2,500 and applied it upon the balance due from them to the estate. Otherwise his decree was correct, but for this error the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

The cross-appeal of Robinson and wife, which questions the allowance of $1,000 for Albro's services, is dismissed.

NEALE, &C. V. ROUSE, &C.

CRUM, &C. V. ROUSE, &C.

(*Filed April* 16, 1892.)

1. *Renewal of note—Novation—Limitation*—A change of sureties at various renewals of a note, in which the payee and maker have always been the same, is not, at any time, equivalent to such novation of the note as prevents the maker from pleading, in an action by the payee, as usury the amount of interest paid at such renewals, even though more than one year has elapsed since the last renewal. So long as any part of the original debt exists the plea of usury paid may be sustained and the usury extracted from balance due.

2. *Bills and notes—Renewals—Usury*—Where a note has been renewed, from time to time, by the maker, who has paid usury as such at such renewals and renewed the note for the principal, the amount of such usurious payments may be pleaded by the maker in an action on the last renewal note by the payee, and if such usurious payments of interest have been sufficient to pay the note, with legal interest, then the payee can recover nothing, the existing note being regarded wholly as usurious; and the plea of usury will

Digitized by Google

be heard in such case, even though more than one year has elapsed since the last renewal and payment of such usury.

G. G. Gilbert and W. C. McChord for appellants.

W. P. D. Bush and Fairleigh & Straus for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Chief Justice Holt.

These cases involve the same question and are, therefore, heard together. The defense is that the original loans with legal interest have been overpaid, and that the notes sued upon are altogether for usury. Each of the debts was renewed several times but the payee and the principal were the same in all of the notes. The sureties were changed, however. It is claimed this was a novation, equivalent to payment, and defeats the plea of usury as our statute bars its recovery after the lapse of a year from its payment.

Indeed more than this is claimed. It is insisted, first, that no usury was ever promised or paid, but, if so, that it was in fact paid *eo nomine* as usury, was not embraced in any renewal note, and can not, therefore, be now relied upon as a defense, there having been a novation by the change of sureties. It was once held that a mere renewal of a debt, by the execution of a new note by the parties to the old one, was such a novation as entitled a party to at once sue for any usury that had been paid, and unless he did so within the statutory period he was barred of the right. This rule has, however, long since been overturned, and the modern one is that as long as any debt exists the usury may be reclaimed and relied upon as a defense, although the evidences of the debt may have been repeatedly renewed. It is said, however, that this is not so where there has been a change of parties to the note, because a new debt has then been created.

It was, however, held in Fitzpatrick, &c. v. Apperson's ext'x, 79 Ky., 272, that while a change of a part of the obligors creates a new contract and releases all obligation upon the old note, yet it does not operate as a payment of the usury. It is true in that case the usury was carried into and embraced in the new note, and it was held that the usury should be extracted upon the request of the debtor.

It is, however, further said that if, in the case before us, any usury was exacted it was in fact paid, not embraced in any new note, and that the notes sued upon, therefore, contain no usury. It is, therefore, urged they are not tainted, and the debtor having renewed the debt with other sureties and not having sued for what was paid as usury within a year from the payment, can not now rely upon such payment as a defense to the note, but is remediless, although if what he paid had been applied in discharge of his debt and legal interest, there would perhaps be nothing owing, leaving the notes sued upon composed altogether of usury. This question does not appear to have been expressly decided by this court.

It was said, however, in Kendall v. Crouch, 88 Ky., 199: "Any payments theretofore made will be treated as having been paid upon the principal and legal interest, without regard to how they were in fact made or received. They will be so treated at the election of the debtor, although they were paid as usury, and so far as the usury has been carried into the new note it is without consideration and can not be recovered. A change of payee or a part of the obligors

Digitized by Google

will discharge those bound upon the old obligation because it is a new contract, but it is not a payment of usury, and if it be carried into the new obligation as a part of the sum to be paid upon it, it is to that extent tainted, and the usury will, upon plea, be extracted."

If any payments, although paid as usury, are at the election of the debtor to be treated as payments of the principal and legal interest, then it logically follows that when the principal and legal interest are satisfied whatever claim remains is composed of usury and is open to defense upon this score. The renewal note is for too much by the amount of usury that has been paid, and one should be regarded as paying usury only when he has paid all that is legally due. This right of defense would of course exist only where the creditor is still asserting a claim by reason of the loan. This view is, in our opinion, consistent with common sense and reason. It will prevent litigation by lessening the number of suits and it will effectuate the real spirit and purpose of the law against usury. If not the rule then this law will, in effect, be of no avail. The debtor is largely at the mercy of the loanor. He feels and is usually in fact compelled to obey his request. The latter has only to demand of him the usury, let the rate be what it may, and then require other security, and then if the debtor does not sue him for the usury within a year he is safe in an evasion of the law.

The debtor is not of course going to do so if he still owes the debt, he would not dare to do it. So, unless so long as any claim is being asserted by the loanor by reason of the loan, the debtor can rely upon any payments of usury as against it, the creditor is comparatively safe and the statute against usury in the main a dead letter. To fairly carry out its spirit and purpose the debtor should have the right to require a proper application of the payments, although they may have been made as usury. All payments are made upon the note and should be so treated because then there can be no evasion of the law.

We do not of course determine whether any usury was in fact paid, and, if so, how much in this instance. That is a matter to be yet ascertained and determined.

The cases stand as if the plea of the statute of limitation had, upon demurrer, been held good. They were referred to a commissioner, who merely reported a calculation of the debts from the outset at legal interest, and that if any usury had been paid it had not been incorporated into the renewal notes, and that their execution with other sureties cut off all claim by the debtor for usury as against the note sued upon after the lapse of a year from its payment.

He decided the legal question, leaving the facts unreported, and the lower court confirmed his report and rendered a judgment for the sum reported by him as owing upon the notes sued upon, they being subject to certain admitted credits. The case was not tried on its merits, the facts were not inquired into, the decision being that the statute of limitation rendered it unnecessary.

The judgments are reversed for further proper proceedings.

Digitized by Google

UNDERWOOD V. WOOD, &C.

(*Filed May* 5, 1892.)

1. *Constitutional law—Power of Legislature to divert common school fund*—The act of the Legislature is unconstitutional which allows the trustees of an incorporated academy, within a certain common school district, to make special contracts with parents of the children of such district, whereby, for an agreed tuition, such children attend the academy instead of the common schools, and which act provided for the payment of the *pro rata* of the common school fund due for such children to the teachers of the academy, and exempts the parents of such children from all the burdens of taxation for maintaining, furnishing or repairing any common school-house during the year their children attend such academy.

2. *Same*—The fact that the common school building is not of sufficient dimensions to accommodate all the children of the district, does not authorize the Legislature to enact such a law.

3. *Injunctions—School funds*—The teacher of the common school of said district may maintain an action to enjoin the county school superintendent from paying any part of the common school fund of such district to the trustees or teachers of the academy, who were claiming it under an unconstitutional act of the Legislature.

4. *Same*—Such common school teachers can maintain the action for an injunction, although the common school term they were teaching had not ended and they had, for that reason, only partly performed their contract with the common school trustees to teach the school for the term

5. *Parties to action—Appearance*—The original petition made only the county superintendent a defendant, and the latter appeared and filed an affidavit, disclaiming any interest in the funds in his hands and alleging that the teachers of the academy claimed such interest. Thereupon, an order was entered requiring the teachers of the academy and the trustees to appear and assert their claim, if any they had. Thereupon such teachers and trustees appeared and filed a general demurrer, and also a special demurrer, because they had not been made parties to the original petition. *Held*—Their appearance and the filing of the demurrers made them parties to the suit, and their demurrers were properly overruled.

Samuel Avritt and R. S. Montague for appellant.

Knott & Edelen, James Garnett, C. Patteson and J. R. Robinson for appellees.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Pryor.

J. R. Robinson, a resident of the county of Taylor, being interested in having good schools in his county, and particularly within the district in which he lived, erected, at his own expense and on his own land, a large school building, sufficient to accommodate and seat comfortably more than 150 pupils. He had the institution chartered and called the Taylor Academy. It was and is a higher grade of schools than the ordinary common schools of the State, and the evident purpose of this philanthropic man was to elevate the standard of education in his county and benefit his people by furnishing from his academy teachers better qualified for teaching than is usually found in the common schools.

If this case only involved the question of liberality and benevolence on the part of Robinson the judgment below would be at once affirmed, but other questions are presented and among them one involving the right of the Legislature to take a part of what is

Digitized by Google

known as the school fund of the State from one of the school districts of Taylor county and appropriate the money to the payment of the tuition of certain children, living within the school district but taught under a special contract by the teachers of the academy, that contract being made with Robinson, the principal trustee and owner of the college building.

The act incorporating the academy, in substance, provides that Robinson may contract with the parents of children residing within the common school district for teaching their children, and the parent or parents making such contracts, paying, doubtless, a higher price than the amount of the ordinary school tax, are exempt from the burden of maintaining, furnishing or repairing any school-house for and during the school years their children may be sent to the Taylor Academy.

There are not less than 350 children within the common school district (two of the districts having been consolidated), and out of this number, by the provisions of the act, Robinson can select such as he may desire to attend his school by making a contract with their parents, and, having done so, these children attending the academy get their part of the common school fund to be paid to the teachers of the college; and in this manner diverting the fund from the common school to the payment of teachers in an individual enterprise, and relieving its patrons, who live within the district, from the burden of taxation imposed for building and keeping in repair the school buildings erected for common school purposes.

In the case of Halbert v. Sparks, 9 Bush, 259, this court held that the school fund could not be appropriated in such a manner. This case, however, is a more palpable violation of the provision of the Constitution, in reference to the school fund, than Holbert v. Sparks.

The patrons of the college within the district, who send their children to the academy, are relieved from the burden of maintaining and keeping in repair the school buildings; and, in the second place, they are given the benefit of the school fund in proportion to the number of children sent to the academy, the number not to exceed 100.

It is also reasonable to assume that the parents of the children attending the academy are in a better condition to assume the burden of taxation imposed to aid in building school-houses than those whose children are attending the common school. The principal of the academy, being left to contract with the parents, would, of course, select those who are able to pay, and when relieving them from taxation, and at the same time giving them a part of the school fund, places the burden of building and repairing school buildings for common school purposes upon those who are less able to pay, and might result in having no school building for those who are unable to attend the college. The position that the school building is not sufficient in dimensions to accommodate all the children, and for that reason the Legislature had the power to divide the fund, can not be sustained. If not sufficient, those in charge of the common school should make it so, and to allow the legislative department of the government to divide the fund in such a mode, when, in the opinion of those interested, the school buildings were insufficient, would be subversive of the whole school system. If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no

Digitized by Google

reason for establishing a precedent that must, if followed, destroy the very existence of common schools. This court has held, in several cases, that when graded schools have teachers under the control of the common school trustees, and where all children have the benefit of the school within the district, that the fund may be appropriated to the payment of the teachers.

In this case the trustees have no voice in the election of the teachers, nor can any child go to the academy as a pupil without paying tuition, and in fact the legislative act has applied the school fund to be used by a private institution. These appellants were the teachers of the common school within the district, and ascertaining that the superintendent had determined to pay this money to the teachers of the academy, filed this petition in equity, alleging they were then teaching this common school, under a contract with the trustees, and asking that the superintendent be enjoined from paying over this money to the academy. Wood, the superintendent, was alone made a defendant. He appeared and filed an affidavit, stating that he had no interest in the matter, but that the teachers of the academy were claiming the fund, and he was willing to pay it over as the court might direct.

Upon the filing of this affidavit the court made an order, requiring the teachers in the academy, naming them, and Robinson to appear and assert their claim, if any. They did appear, by filing special and general demurrer to the petition. The special demurrer was for want of proper parties, in not making them defendants. Their appearance to the action made them defendants, and, having appeared, contesting the claim of the appellants, the action, by reason of the affidavit of the superintendent, Wood, was in the nature of an interpleader, and was so treated by the court, and a judgment rendered dissolving the injunction and directing the superintendent to pay the money to the teachers of the academy. If they (the appellees) were not parties, no judgment should have been rendered for them, but having made themselves parties, not only by their demurrers, but by answer, they were properly before the court. They will not be allowed to demur, and then say they were not parties to the action. The sole question, it seems to us, in this case, arises as to the power of a court of equity to grant relief by way of injunction in such a case. It is said that Wood, the superintendent, would be liable on his bond if he paid the money over to the party not entitled. This can scarcely be so when the parties are before the court and a judgment directing him to pay the money to the trustees or the teachers of the academy. It is insisted that the general demurrer should have been sustained. We think not. The superintendent held this money, or was entitled to receive it, as trustee for these teachers. An act had been passed directing its payment to some one else, and, from the averments of the petition, the superintendent had announced his purpose to pay it as directed, and a court of equity having control of such funds, especially when they are about to be divested, may be applied to, in order to prevent a misappropriation, although the trustee may be perfectly solvent and able to meet any claim asserted against him by the beneficiaries. The case, as presented, is simply this: The trustee comes into court and offers to pay it as may be ordered. The parties contesting the right of the appellants enter their appearance, and it is adjudged they, and not the appellants, are entitled to the money, and it is ordered to be paid over. It is a contest between two claimants of a fund then in the hands, or about to reach the hands, of the superintendent, who has no interest in the controversy. The court decides

Digitized by Google

in favor of the one and against the other. The appellants allege they were then teaching the school under a contract with the trustees. The contract was in writing, and signed by the trustees, and was certainly sufficient, when they, the teachers, were in the actual execution of the agreement. The petition was good and the appellants entitled to the money, if they fulfilled their contract, and this may be evidenced by the certificate of the trustees, who are the interested parties in this case. It is true that there had been only a partial performance when the action in equity was instituted. The term had not fully ended, still the fund out of which they were to be paid was diverted to another purpose by a legislative enactment that was void, and they had the right to go into a court of equity and have their right to the fund established, as they had not only contracted with the trustees to teach the common school, but had taught the greater part of the session.

On the return of the case the court below will grant the relief sought and direct the superintendent to pay this money to the appellants upon the evidence offered him, as required by the common school law, that they have complied with their contract with the trustees.

Judgment reversed and remanded for proceedings consistent with this opinion.

KELLEY, &C. V. BALL, &C.

(*Filed May* 12, 1892—*Not to be reported.*)

1. *The proceeds of a policy of life insurance, payable to the "widow and children"* of the insured, must be distributed according to the statutory rule for the distribution of personal property, therefore, the widow is entitled to one-third of such fund and the children to two-thirds.

2. *Construction of will—Dower*—A will gave testator's widow all of his real estate, "to be held and used by her in any manner she may see proper" until their youngest child became twenty-one years of age, when it was to be equally divided among testator's children; the widow to have entire control and use of the rents from the property until such time, unless she married previously, in which event she was to have her dower interest in the estate. In the distribution of the estate, after the youngest child became twenty-one years of age, *Held*—

First. The devise to the widow of the use of the real estate was not intended by the testator to be in lieu of dower.

Second. In determining the value of her dower the widow will not be charged with the rents and profits derived from such use of the real estate.

3. *Descent and distribution—Subrogation*—The widow having paid out of her own funds debts that were a lien on the real estate, so as to prevent a sacrifice of it at a forced sale, is now entitled to be subrogated to the rights of the lien holders whose debts she paid.

4. *Liability of devisees for taxes*—The widow and her children should be charged with the taxes that accrued on the real estate before the time for its division, since they enjoyed the rents and profits of such estate during said period.

Fairleigh & Straus for appellants.

F. Hogan for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

Digitized by Google

Joseph K. Ball died testate in February, 1876, leaving a widow and six children, three of them being by a former wife. He was then the owner of three houses and lots in the city of Louisville, one of which was occupied by the family. His will provides:

"1. I will and bequeath all of my real estate of all kinds to my wife, Mary R. Ball, to be held and used by her in any manner she may see proper, until my son, Victor J. Ball, becomes twenty-one years of age, then I wish all of my real estate to be equally divided among my six children, Mattie, Linnie, Emma, Victor, Bessie and Morrison Ball, and should the said Victor J. Ball die before he becomes twenty-one years of age, then I wish my real estate divided among my surviving children at the time he should have become twenty-one years of age if he had lived.

"2. The remainder of my personal estate, after paying all my just debts, I wish held by my executor and used by him in supporting my wife and children as they may need the same.

"3. I wish my wife to collect and use the income from my real estate in any manner she may see proper, and to have full control over the same and said real estate, without accounting to any one, and in case my wife should marry before the division of my real estate, then I wish my executor to collect the rents and control the same for my children and give to my wife her dower interest in the same."

The son, Victor, became of age July 9, 1889, and the real estate being indivisible this action was, on July 27, 1889, brought by the three children by the first wife and their husbands against the widow and her three children for a sale of it. It has been sold and the questions now arise over the proceeds.

The right of the widow to dower is denied, and it is claimed she is, in any event, chargeable with the bequest to her in the will which would, in effect, defeat any dower right as the value of the use of the property during the time she controlled it would more than equal its value.

Manifestly the use of the property until Victor reached his majority was not intended by the testator to be in lieu of dower. A bequest to the wife is not to be so treated unless so intended. He did not say so, and indeed substansially says otherwise. If she had married before the time arrived when, by the provisions of the will, the property was to be divided, then, although she might have already had the use for years, yet she was to have dower, and it is hardly supposable the testator intended that, in the event of her marriage, she should have more than though she remained his widow.

Section 12, chapter 31, of the General Statutes, says: "When a widow claims her dowable and distributable share of her husband's estate she shall be charged with the value of any devise or bequest to her by his will. * * * Nothing herein shall preclude the widow from receiving her dowable and distributable share, in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will or necessarily inferable therefrom."

When the will was executed, and at the death of the testator, none of his children were married. Those by the last wife were quite young and one of them is an imbecile, and it is evident, from the provisions of the will, the testator, in giving to his widow the use and control of the property until her oldest child became of age, had in view the support and raising of his children by her. He directs that, in the event of her marriage, this control shall cease and pass

Digitized by Google

to his executor for the benefit of the children, his widow getting dower.

While it may be said he did not expressly say that she was not to be charged with the use, while it might continue, manifestly he had no such expectation or intention. This is not only the necessary inference from the character and evident purpose of the bequest but from the language of the will itself.

The testator, at his death, held a policy of insurance upon his life for $5,000, payable, by its terms, "to Mary R. Ball, wife, and the children of the said Joseph R. Ball by his former and present wife."

The money derived from it was of course not a part of his estate. It belonged to the widow and children. The personal estate of the decedent was not sufficient to pay his debts.

Under the advice of friends and to save the real estate from being sold at a probable sacrifice the widow took enough of the insurance money to pay two of these debts, then amounting to $2,276, and paid them, taking an assignment from the creditors to herself of the notes, one of which was a lien upon a portion of the real estate left by her husband. She now claims she should be substituted to the rights of these two creditors and that the amount so paid should be returned to her out of the proceeds in contest. If she has not already accounted to the beneficiaries under the insurance policy she will have to do so, and this question can not affect her right to be subrogated to the rights of the creditors whose claims she satisfied. The doctrine of subrogation is founded upon pure equity. It is applied in order to do complete and perfect justice. These creditors had a right to look to the real estate for payment, and if she satisfied their claims she is equitably now entitled to be re-imbursed from the proceeds of the property, because the payment was beneficial to the estate.

It is contended, however, that the insurance money was divisible equally *per capita* among the widow and the six. children, or one-seventh to each.

In McLin v. Calvert, &c., 78 Ky., 472, where, by the charter of an insurance company "the fund created for the benefit of the widow and children of a deceased member shall be paid to them," it was held that the statutory rule of distribution of personalty should govern, under which the widow is entitled to a third of the surplus personalty of her husband and the children to the remaining two-thirds equally. We fail to see why this rule should not be applied where the charter is silent, but the policy merely provides that the money shall go to the wife and children without fixing the share of each. This, it seems to us, would naturally be the understanding of the person effecting the insurance, and what he would likely have directed if the question had then arisen.

If it be just and equitable to thus divide the surplus personalty of a decedent, it seems to us it is equally so in a case like this one. The widow was the guardian of her children and her third of the insurance money and their portion was more than enough to satisfy the debts paid by her.

When the property was sold there was a claim against it for improvements held by the appellant, John S. Kelley, and also unpaid taxes were owing for a considerable sum. The latter were paid by the purchaser of the property and credit given him. When these claims accrued the appellants were deriving no benefit from the property.

The widow and her own children were alone receiving the benefit

Digitized by Google

of it. The improvements were necessary to its enjoyment. The statute says the owner or possessor of estate shall pay the taxes.

It is true the widow was not a mere tenant, in which case the landlord, in the absence of contract providing otherwise, should pay the taxes. Nor was she a life tenant who, as held in Fox v. Long, 8 Bush, 551, must pay them, but she was entitled to the use of the property under the will for a term of years and took it with the burden of taxation.

She received some money of the estate from the executor which she used in the support of the family, but paid out for the estate as much or more in the way of funeral expenses and otherwise, for which she is not asking re-imbursement.

The lower court properly ordered the Kelley improvement claim paid out of the entire proceeds of the sale of the property, all of the parties interested in the property should contribute to its payment in proportion to their interest, but it is equitable to charge the portion thereof of the widow and her children with the unpaid taxes, to be apportioned between them in the ratio of their interests, inasmuch as they had the use of the property.

For this error alone the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

CONNER, &C. V. COVINGTON TRANSFER RAILWAY COMPANY, &C.

(*Filed May* 28, 1892—*Not to be reported.*)

Reversionary interest in county road—Injunctions—Appellants have failed to show such clear right to a reversionary interest in the county road, over which appellees are about to condemn a right of way, as authorizes them to maintain this action to enjoin the proceedings by appellees to condemn such right of way. If appellees' rights are involved they have a remedy by making themselves parties to the condemnation proceedings.

Hallam & Myers for appellants.

O'Hara & Bryan for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

What is known as the "River Road," between the cities of Covington and Ludlow, was established as a county road nearly seventy years ago. Some time thereafter, but also many years ago, the ancestor of the appellants, who owned the land upon both sides of it, recognized it in deeds made by him, and fixed its width at sixty feet. About 1854 it was converted into a turnpike road, but its charter was subsequently forfeited, and it, by a proper judgment in conformity to statute, turned over to the board of commissioners of Kenton county as an ordinary county road.

The object of this suit is to enjoin the further prosecution of proceeding by the appellee, the Covington Transfer Railway Company, to condemn for its roadway a portion of said road.

The appellants, who claim the reversionary right in the land covered by the county road, say that it has reverted to them, save about twenty feet in width, which is now in use for travel, and that they are entitled to compensation for so much of the reverted land as may be condemned.

Digitized by Google

This claim, on account of reversion, is based upon the statement that land slides, upon the upper side, and the action of the water of the Ohio river upon the lower side of the road has destroyed it, except the twenty feet in width above named. This of itself would not, however, create a reversion.

The mere fact that the road has been out of repair would not divest the public of its right. It is said, however, that the appellees have a special interest in the road being kept open; that they owned property upon each side of it, and that it is the only means of ingress and egress to it, and if the portion sought to be condemned be taken for a steam railway that left will not be sufficient in width for the ordinary and usual travel. In fact it is asserted that owing to the destruction already of a part of the road that the contemplated taking of a part of the remainder will close the road altogether.

It is, however, denied that there will not be ample roadway left, and this denial is not overturned by evidence.

Much has been said as to whether the road is subject to the control of the county, or the cities of Covington and Ludlow. But as the appellants have manifested no right, it matters not, so far as they are concerned, whether the parties to the condemnatory proceedings are the proper ones.

If the appellants are entitled to the land by reversion, or if they are about to be specially injured by an obstruction of the road so that it can not be used for reasonable and ordinary travel, we see no reason why they can not make themselves parties to the condemnation proceedings and therein assert their rights.

The process of injunction should be applied with the greatest caution. If the complaining party has other adequate remedy he should resort to it. The writ now sought should not be allowed unless the case has been clearly made out. This has not been done.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

CONTINENTAL INS. CO. V. COONS.

(*Filed May* 18, 1892.)

1. *Insurance—Power of attorney to waive forfeiture*—An attorney at law employed by an insurance company merely to collect a premium note has no power to alter the contract of insurance or to waive a forfeiture incurred by the insured.

2. *Same*—In order to establish a waiver of any condition in a policy the conduct of the company or its agent must have been such that the assured might reasonably presume that the company did not intend to insist upon a compliance with the condition.

Even if an attorney employed to collect a premium note had power to waive a forfeiture incurred by the insured taking additional insurance without the consent of the company, the fact that he accepted payment of the

Digitized by Google

note after being notified of the additional insurance did not amount to a waiver. as he expressly told the insured that he had nothing to do with the second insurance, that all he had to do was to collect the money.

3. *Taking of additional insurance—Waiver of forfeiture*—Where an insurance policy provides that it shall be void if the insured takes other insurance without the consent of the company in writing, if the insured notifies the agent of the company of his intention to take additional insurance, the company is bound, within a reasonable time, to notify the insured of its election to treat the policy as void, otherwise the forfeiture is waived.

4. *Same—Pleading*—Where the insured, by his pleading, relies alone upon the conduct of the company subsequent to the taking of additional insurance by him as a waiver of the forfeiture incurred thereby, he is not entitled to an instruction telling the jury that certain acts of the company or its agent, prior to the taking of the second insurance, will amount to such a waiver.

5. *Same—Company liable only for proportionate part of loss*—If a party sues upon a contract which has a condition providing that upon the happening of a certain event the obligor's liability is to be less than that primarily assumed, and in his pleading shows that the event has occurred, he can not recover the full amount of the liability primarily assumed, and all of the plaintiff's pleadings, in so far as they assert affirmative matter, must be regarded as constituting his cause of action.

When a policy of fire insurance provides that if other insurance on the same property is taken with the consent of the company, the company shall be liable only for its proportion of the loss, and in an action on the policy the plaintiff's pleadings show that additional insurance was taken with the consent of the company, a judgment for the full amount of the policy is erroneous. It is not necessary that the company should, in its answer, rely upon the condition in the policy in order to reduce its liability.

Muir, Heyman & Muir for appellant.

Robt. W. Woolley and W. O. Harris for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

The policy of insurance issued by appellant to appellee provides "if the assured shall have, or hereafter make, any insurance or contract for insurance (whether valid or not) on the property herein named, or on any part thereof, without notice to and consent of this company in writing hereon, then, and in every such case, this policy shall be null and void.

In an action upon the policy to recover the value of the property destroyed by fire, the appellant, relying upon this provision of the policy, alleges that after the date of said policy the plaintiff, without its knowledge or consent, insured a large part of the same property in another company, which insurance was in force when the property was destroyed. The reply admits the second insurance, but alleges that "after it was obtained the defendant acquired knowledge of the fact and waived the enforcement of the said condition and recognized said policy sued on as still in force, and compelled plaintiff by writ to pay, and plaintiff did pay, to defendant the premium notes given in consideration of said policy, and after knowledge of the issual of said second policy collected of plaintiff $20, the installment of premium for which no note had been given, and waived the right to cancel or annul its policy." These allegations are traversed by the appellant.

The only evidence upon the question of waiver, as alleged in the reply, is this: The three premium notes executed by appellee to ap-

Digitized by Google

pellant, each for $20 and due respectively in November, 1883, 1884 and 1885, were placed for collection in the hands of Col. Stone, an attorney at law, who instituted suit upon them.

In December, 1885, pending the suit, Hoskins, as appellee's agent, paid the attorney the face of the notes and the costs of the action—the attorney, to induce the payment, deducting $3 or $4, the accrued interest.

In the conversation preceding the settlement Hoskins informed Stone that appellee had taken out insurance in another company, and (using his language) "the question of paying this money on this policy was discussed thoroughly. I didn't want to pay the note if I could avoid it, in any way possible, and we talked over the insurance that had been taken out in another company, and whether the policy was valid or not. Col. Stone said he had nothing to do with it; all he had to do was to collect this money, and, unless Mr. Coons paid it, he would have to enforce it by writ; and I paid it."

There is no pretense that Col. Stone had any other authority from the company than that connected with his employment as an attorney at law to collect these notes, nor does it appear that Col. Stone, when he remitted the money to the company, or at any other time, informed it of the conversation with Hoskins. On the contrary the evidence is that he did not.

Upon this issue and this evidence the court instructed the jury that if the plaintiff's agent notified the attorney, who had the premium notes for collection, of the second insurance, and the attorney received the money after such notice, it was a waiver by the company of the forfeiture incurred by making the second insurance.

This instruction, it seems to us, was erroneous. The authority of an agent must be determined by the nature of his business, and is, *prima facie*, co-extensive with its requirements. An agent authorized to issue policies binds the company by all waivers, representations or other acts within the scope of his business, unless the insured has notice of a limitation of his powers. The question always is, not what power the agent did in fact possess, but what power the company held him out as possessing. His power can not be limited by special private instructions, unless the insured has notice, or there is something in the nature of the business or the circumstances of the case, to indicate that the agent is acting under such special instructions. May on Insurance, section 126.

The contention that an attorney at law, employed merely to collect a premium note, has the right to alter the contract of insurance, to relieve the insured of conditions imposed by his contract with the company, to make in effect another contract of insurance, can not be sustained, either upon principle or authority.

The rule announced in Brumfield v. Union Ins. Co., 10 Ky. Law Rep., 13, that "the courts should be prompt to seize hold of any circumstance indicating an election to waive a forfeiture or any agreement to do so, upon which the party has relied and acted," could never have been intended to apply to such a state of case as this.

While the great mass of persons in the country who procure insurance never read, or if they do read are unable to understand the legal effect of the numerous conditions and provisions prepared and inserted by the insurers for their own benefit; and, in view of this fact, the courts should give to those conditions and provisions a strict construction against the company and a liberal construction for the insured. Still, where the terms of the contract are plain, and their meaning is unmistakable, it is questionable whether the tendency of the courts to seize upon slight circumstances to relieve

Digitized by Google

the thoughtless and inexperienced individual does not in the end work injury to the class sought to be benefited. But beyond this, in order to establish a waiver of any condition in a policy, the conduct of the company or its agent must have been such that the assured might reasonably presume that the company did not intend to insist upon a compliance with the condition. Wood on Insurance, section 394; May on Insurance, sections 505, 507.

The appellee could not have believed that the company intended to waive the forfeiture, could not have been misled, for the attorney flatly told his agent that he had nothing to do with the second insurance; that all he had to do was to collect the money.

The plaintiff says that when he insured with the defendant, and shortly after and before the second insurance was taken out, he told the agent that his property was not insured for enough, and that he intended to insure in another company, and that the agent made no objection. Upon this evidence the court told the jury that if, prior to the taking out of the second insurance, the plaintiff notified the defendant's agent (who had authority to take applications, make surveys, receive premiums and deliver policies) of his intention to take out other insurance, the company was bound, within a reasonable time, to notify the plaintiff of its election to treat the policy as void.

We agree with counsel that the evidence upon this point is of the most unsatisfactory character—the amount of the insurance, the time when it was to be taken out and the company with which it was to be made, were not mentioned. Still it seems to us to come within the rule laid down in Brumfield v. Union Ins. Co., and, upon the authority of that case, the instruction, as an abstract principle of law, is correct. But there was no pleading which authorized it. The waiver as pleaded relates solely to, and is based upon, acts occurring after the second insurance.

Another question, in view of a retrial of the case, must be decided. The policy provides that if other insurance is with the consent of the company taken upon the property, or any part of it, "the insured shall be entitled to recover of the company no greater proportion of the loss sustained than the sum herein bears to the whole amount named thereon. Re-insurance to be on the basis that in no event will this company be liable for a sum greater than such proportion thereby re-insured bears to the whole sum insured by the company re-insured, and in case of loss this company to pay *pro rata* at the same time and in the same manner as the company re-insured."

Appellee's contention in the court below was that the second insurance was consented to by the appellant. Appellant denied that it consented and it, therefore, could not and did not, in its pleading, rely upon this condition as reducing its liability under the contract. Though the pleadings and the evidence show the amount of the second insurance, the appellee insists that because the appellant did not, in its pleading, claim the benefit of this provision he is entitled to the verdict which the jury gave him for the full amount at which the property was insured.

We can not think so. If a party sues upon a contract which has a condition providing that upon the happening of a certan event the amount of the obligor's liability is to be less than that principally assumed, and, in his pleading, shows that the event has occurred he can not recover the full amount of the liability primarily assumed. All of the appellee's pleadings, in so far as they assert affirmative matter, must be regarded as constituting his cause of action. Suppose, in

Digitized by Google

his petition upon the policy, appellee had set up the second insurance and the defendant's consent to it, but, nevertheless, had prayed judgment for the whole amount of the insurance against the first insurer, could there be any question but what a judgment for the full amount would have been erroneous? Upon the face of the pleadings the appellee's judgment was for too much.

There are other errors which it is insisted are causes for reversal, but as they are not likely to occur upon another trial it is unnecessary to express our opinion concerning them.

The judgment is reversed, and the cause is remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

PRATER v. VINCENT, &c.

Filed May 25, 1892. Appeal from Carter Circuit Court. Opinion of the court by Judge Barbour, affirming.

Garnishment for taxes—Assuming that the tax collector provided for by the act of January 30, 1878, which is an act for the benefit of Carter county, has all the authority to garnish for taxes which was at that time conferred by statute upon the sheriff, still no judgment could be rendered against the tax-payer. All that the court could do would be to require the garnishee to pay over the amount owed to the extent of the taxes and costs. Therefore, in this proceeding by the collector to enforce the collection of taxes by garnishment, in the absence of any thing to show that the garnishee was indebted to the tax-payer, it was proper to dismiss the proceeding.

Frank Prater for appellant; J. D. Jones for appellees.

CLEMENTS, &c. v. SHEBLEY, &c.

Filed June 1, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Advancements*—Where a testator provides in his will that his children are to be charged with advancements in the distribution of his personal estate, and then provides that after payment of debts they "are to share equally in the distribution of the personal estate," they should be charged with advancements, although the entire estate has been disposed of by the will. And in determining what is to be regarded as an advancement the intention of the testator must govern.

In this case a daughter of the testator is chargeable with an annual rent of $480, which she received for ten years prior to the testator's death under a lease executed by him, in which it was provided that the rent was to be paid to her, the evidence showing that the testator intended it is an advancement.

2. *Same*—Although the testator recites in his will that he has kept "an account" of the sums "advanced" to his children, the account kept by him is not conclusive in determining what is to be regarded as an advancement, the direction of the testator being that each child is to be charged "the amount advanced to her," and not the amount he has charged or shall charge.

Wilson & Thum for appellants; Humphrey & Davie and W. B. Dixon for appellees.

Digitized by Google

Roysterr v. Heck.

Filed June 1, 1892. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Release of surety*—The release by a creditor of a lien upon the property of the debtor releases a surety for the debt. And the value of the property released is not material, as the release of the surety is absolute and not merely a release to the extent of the value of the property released.

Where creditors, who had acquired a lien upon all the property of their debtor by virtue of an assignment made by him for the benefit of his creditors, released to the debtor a part of the property, a surety for one of his debts was thereby released.

2. *Where a surety pays the debt after he has been released* from legal obligation he has no right of action against the principal to recover the amount paid.

John Young Brown and R. H. Cunningham for appellant; M. Merritt for appellee.

Cincinnati Cooperage Company v. Bate.

Filed June 1, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *A corporation has no power to change its name except in the mode prescribed by law;* and if, without having complied with the requirements of the law, the stockholders assume a new corporate name, they surrender the rights and franchises of the old company and stand in the same attitude as if, without authority, they had begun business in the new name.

A corporation, organized under the laws of Indiana, can not change its name except by an order of a circuit court of that State, made after publication of notice as required by the statute.

2. *Where a company acts as a corporation without having been legally incorporated* the members are individually liable for all the debts of the company. The creditors of the concern are not estopped to deny its corporate existence for the purpose of holding the members individually liable.

Fairleigh and Straus for appellant; James S. Pirtle for appellee.

Brook & Gregory v. Woody.

Filed June 1, 1892. Appeal from Crittenden Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Acceptance of individual note of partner in satisfaction of partnership debt—In this action upon a firm note appellee, one of the defendants, pleaded that plaintiffs had accepted the individual note of the other defendant in payment of the note sued on, which was surrendered, and that he was thereby released from liability. The court instructed the jury that if, after the firm note was executed, it was surrendered and the individual note of one of the defendants was delivered and accepted as payment of the firm note, then they should find for plaintiff against that defendant alone. *Held*—That as this instruction was not excepted to it must be regarded as the law of the case, and as the evidence authorized the jury to find that the individual note was accepted in payment of the firm note a verdict for appellee can not be disturbed upon the ground that it is against the evidence.

James P. Gregory for appellants; Nunn & Cruce for appellee.

Paducah Water Supply Co. v. Paducah Lumber Co.

Filed June 1, 1892. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Water company—Failure to supply water for fire protection—Evidence*—In this action against a water company to recover damages for breach of contract in failing to supply sufficient water to protect plaintiff's property against fire, persons who were present at the fire, although having no ex-

Digitized by Google

perience as firemen, were competent to testify that, in their opinion, if there had been a stronger pressure of water the fire could have been extinguished in time to save a considerable part of the property.

2. *Same—Instructions to jury*—The court properly instructed the jury, in effect, that even though the pressure of water was insufficient, defendant was not liable unless its agents had notice of the need of more water or pressure on the mains, and could, by the use of ordinary care, have furnished it, but failed to do so. And that then they were not authorized to find for plaintiff unless they further believed the fire company could and would, had they had the requisite supply of water, have saved plaintiff's property. As the fire was close to defendant's standpipe and engine-house, and was under the immediate observation of defendant's engineer and other agents, and they must have known the necessity for a greater pressure of water, no further notice ought reasonably to have been expected. It is, therefore, no objection to the instructions that they do not specify the character of notice to be given.

3. *Instructions to jury*—The court properly refused an instruction which singles out the statement of one witness and gives it undue prominence.

Burnett & Dallam for appellant; J. C. Gilbert for appellee.

TYDINGS, &c. v. ROGERS, &c.

Filed June 1, 1892. Appeal from Bath Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Tax sales—Purchaser's lien for amount paid*—Where a purchaser of property at a tax sale acquires no title, because of some irregularity in the assessment or sale, he is entitled to a lien upon the property for the amount paid by him, and he is entitled to have this lien enforced in an action against him by the owner to quiet the title. But as the title to part of the land in this case was in one set of plaintiffs, and the title to the other part was in other plaintiffs, it was error to direct the sale of the whole tract for the full amount paid by defendants. The chancellor should ascertain the proportion of the amount paid which should be borne by each parcel of the land and give defendants a lien upon each parcel for the amount which should be borne by it.

2. *An increase by the State Board of Equalization* of the taxable value of the property in a county affects the assessment for county as well as that for State purposes.

R. Gudgell & Son and R. Weissinger for appellants; J. J. Nesbitt for appellees.

THE L. DODGE LUMBER CO. v. MACQUITHY.

Filed June 1, 1892. Appeal from Livingston Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Corporations—Service of process*—In this action against a Tennessee corporation, to recover damages for injury to plaintiff's boat, alleged to have been caused by defendant's negligence in towing the boat under a contract with plaintiff, the captain of defendant's boat was the proper person upon whom to serve process, as he was defendant's chief agent in this State, defendant having no officer or agent in this State other than those employed in running its boat.

2. *Appearance*—Even if there was no service of process defendant, by entering its appearance, waived any right to object to the jurisdiction of the court. And while the court, on defendant's motion and against plaintiff's objection and exception, set aside the order entering defendant's appearance, and it was permitted to make a motion to quash the return of service, yet the order overruling that motion should, if necessary to sustain jurisdiction, be treated as re-instating the order entering defendant's appearance, there being no intimation that defendant's appearance was entered without authority or that there was any mistake in the orders.

Bush & Worten for appellant; J. C. Hodge and J. K. Hendrick for appellee.

Digitized by Google

KY. LUMBER CO. v. COXE, &c.

Filed June 1, 1892. Appeal from Whitley Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Verdict not against evidence*—As the verdict is a fair and equitable settlement of the differences between the parties, it will not be disturbed upon the ground that it is against the evidence.

2. *Construction of pleadings*—The pleadings should be construed favorably for appellees in support of the judgment.

Hill & Denham for appellant; Crawford & Mason for appellees.

MYERS v. PATTERSON.

Filed June 4, 1892. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Limitation—Settlement of mutual accounts*—In this action, involving the settlement of mutual accounts, the statute of limitations does not bar any of the items of the mutually running accounts between the parties.

2. *Fraud of corporation*—The judgment of the chancellor settling the accounts is more favorable to appellant than he was entitled to.

James Montgomery for appellant; J. B. Hobson for appellee.

LOCKE v. LOCKE.

Filed June 8, 1892. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Divorce—Abandonment*—The trial courts have a broad discretion in granting divorces, and appellate tribunals are reluctant to interfere with their judgments; but this discretion is not an arbitrary one, and must not be the mere caprice of the court, but should be governed by the evidence.

In this action by the wife for a divorce, upon the ground that the husband had abandoned her without fault on her part, and that they had lived separate and apart more than one year, the evidence established the facts alleged, and, therefore, the wife was entitled to an absolute divorce, and not merely a divorce from bed and board.

2. *Same—Attorney's fees*—In a suit for divorce the husband should be adjudged to pay the wife's costs, including her attorney's fee, unless she is in fault and has ample estate to pay such costs.

Z. Gibbons for appellant; George Denny for appellee.

LYONS, &c. v. HARRIS, TRUSTEE, &c.

Filed June 8, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Yost, affirming on original and cross-appeal.

1. *Attachment*—In this action in which an attachment was sued out upon the ground that the defendant was a non-resident of the State and was about to dispose of his property, with the fraudulent intent to hinder his creditors in the collection of their demands, the evidence is sufficient to support the judgment of the court sustaining the attachment.

2. *Rents and improvements*—The commissioner's report as to rents and improvements is an equitable settlement of the matters in dispute and, therefore, the judgment of the chancellor, confirming the report, must be affirmed.

Helm & Bruce and James C. Preston for appellants; Junius Caldwell and John Roberts for appellees.

CINCINNATI, &c., RAILWAY CO. v. BARKER.

Filed June 8, 1892. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Brent, reversing.

1. *Negligence—Pleading*—When the petition specifies the facts or character of negligence relied upon the plaintiff can not recover upon the showing of a different state of negligence.

Digitized by Google

In this action against a railroad company to recover damages for the loss of plaintiff's property by fire communicated from defendant's burning depot, it was error to instruct the jury that they must find for plaintiff, if they believed, from the evidence, that defendant was guilty of negligence "in the construction of its depot," as the court had, upon defendant's motion, stricken from plaintiff's petition all allegations as to negligence in that regard, and limited the issue to negligence of defendant in setting fire to its depot by sparks and coals from its locomotive, that being the only negligence alleged after striking out the allegations referred to.

2. *Railroads—Fire from escaping sparks—Evidence*—No evidence of the depot having been on fire at other times was competent unless confined to fires occasioned by sparks or coals from a locomotive similar to the one used by defendant at the time plaintiff's property was burned; and the fire must have occurred when the depot was in the same condition substantially that it was on that day.

C. B. Simrall, O. H. Waddle and W. A. Morrow for appellant; W. O. Bradley and J. L. & J. W. Colyer for appellee.

Bridgeford & Co. v. Ky. Glass Works Co.

Filed June 8, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Judge Brent, affirming.

1. *Constructive fraud by a debtor in the disposition of his property will not authorize an attachment* upon the ground the debtor has disposed of his property with intent to defraud his creditors. There must be actual fraud to sustain this ground of attachment.

2. *Fraud of corporation*—While the fact that the officers of a corporation, created under chapter 56 of the General Statutes, have incurred liabilities in excess of the limit fixed by the articles of incorporation constitutes "intentional fraud" within the meaning of section 9 of chapter 56 of the General Statutes, it does not constitute such fraud as will authorize an attachment against the property of the corporation.

R. J. Elliott and John Roberts for appellants; George Eastin for appellee.

Willging v. Walker.

Filed June 8, 1892. Appeal from Madison Circuit Court. Opinion of the court by Judge Brent, affirming.

Consideration for note—Defendant executed to plaintiff his promissory note in consideration of plaintiff's agreement to give him credit for the amount of the note in a bank of which plaintiff was then an officer. Plaintiff gave defendant credit for the amount by entry upon his pass-book and notifying the officers of the bank and authorizing them to charge defendant's overdrafts to him, which over-drafts he has since paid. *Held*—That the note was based upon a sufficient consideration, and the defendant can not escape liability upon the ground that plaintiff did not deposit the money as he agreed and ought to have been done.

B. F. Buckner for appellant; J. A. Sullivan for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. SEPTEMBER 1, 1892. No. 5

KENTUCKY COURT OF APPEALS.

CITY OF COVINGTON, &c. v. GEYLER, &c.

(*Filed June* 2, 1892.)

1. *Liability of a city for negligent acts of a contractor erecting engine house for it*—Where the contract between a city and one agreeing to build an engine house for it provides that the contractor shall erect the house under the direction of certain committees representing the city, "who shall have entire control over the *manner* of doing or shaping all and every part of said works," the relation of the contractor to the city is not that of an independent contractor, and therefore, the city is liable for any damages resulting from the careless or negligent manner in which such contractor performs his work.

2. *Damages resulting from withdrawal of natural support to land of adjacent land owner*—One has no right to remove or disturb the soil of his own land so as to withdraw the natural support of adjoining land belonging to his neighbor. But where the neighbor, by the erection of a building thereon, has changed the condition of his land so that the lateral pressure thereof is increased, such rule does not apply.

3. *Same*—A lot owner has the right to make an excavation on the division line of his lot for the purpose of erecting a house thereon, even though such excavation is to be dug below the foundation of a house on his neighbor's lot, which is only three inches from the division line, and it is reasonably certain that such excavation will weaken his neighbor's foundation and injure his house. But he must give his neighbor due notice of his purpose to make such excavation, and make it in a reasonably skillful and prudent manner so as to occasion no unnecessary injury to the neighbor's property.

4. *Same*—While it is the neighbor's duty in such case to take the necessary precaution to prevent damages to his own house, yet if the adjoining lot owner voluntarily undertakes to do so by underpinning the neighbor's foundation, he must do so in a skillful and careful manner and is liable for the damages resulting for his negligence or want of care in such work.

5. *Same*—The neighbor can not recover more than nominal damages for removal or displacement of the three inches of ground that rested against

Digitized by Google

his foundation, unless this was the proximate and independent cause of the damages to his building, and if such earth was removed with his consent he can recover nothing therefor.

6. *Evidence—Husband and wife*—In a joint action by a husband and wife, who are joint owners of a house and lot, for damages suffered by the excavation of a foundation and cellar by the adjoining lot owner, either the husband or the wife, but not both, may testify for the plaintiffs.

W. A. Byrne and O. P. Schmidt for appellants.

J. F. & C. H. Fisk for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

Appellees, Frederick and Elizabeth Geyler, husband and wife, being joint owners of a lot of land on Main street, Covington, erected thereon a brick dwelling-house, the north wall of which was three inches from their line and under which was a cellar seven feet in depth, though dug only five feet below the surface of the ground.

Subsequently, appellant, the city of Covington, being the owner of an adjacent lot, made a contract with appellant, Eisile, for construction of an engine-house thereon, under which was to be a cellar seven feet below surface of the ground and excavated up to the north line of the appellee's lot.

Appellees brought this action against them jointly for damages, it being stated substantially in their petition that Eisile, under direction and supervision of the agents, employes and officers of the city of Covington, in excavating the cellar for said engine-house, wrongfully and with willful negligence and without knowledge of appellees, dug below and along their wall the entire length of the north edge of their lot, undermining the foundation of their house, and, for a long space of time, left the excavation uncompleted, whereby their north wall settled and the whole house dropped and leaned northward, the walls being cracked, window sills broken, &c.

The first question naturally arising on this appeal is, whether the city of Covington can be made liable at all.

In Robinson, &c. v. Webb, 11 Bush, 464, where the action was like this for damages on account of injury to adjacent lot against the owner and building contractor jointly, the general rule was thus stated: "When the relation of an independant contractor exists as to the use of real property and the party employed is skillful in performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting, not from the fact that the work is done but from the negligent manner of doing it by the contractor or his servants, the owner can not be made to respond in damages."

It is not stated in the petition in this case that Eisile, the contractor, was unskillful in performance of the duty he undertook, nevertheless, it seems to us, his relation to the city of Covington can be hardly regarded that of an independent contractor. For it is not only alleged that he was under direction and supervision of the agents, officers and employes of the city of Covington, but it was, in terms, stipulated in the contract between them that the work was to be done by him "under direction of the committees of the fire department and public buildings representing the city council of said city, who shall have entire control over the *manner* of doing or shaping all and every part of said work."

Digitized by Google

Moreover, it was made cause of complaint that the excavation was extended beyond division line of the two lots and the strip of three inches between the wall and line, removed without consent of appellees, which act involved a trespass that the city of Covington, as well as Eisile, acting under its direction and authority, would be *prima facie* liable for to the extent of nominal damages at least.

It is well settled that the owner of land has no right to remove or disturb even his own soil so as to withdraw the natural support of adjacent land belonging to another. But where, by erection of a building thereon, the natural condition of one person's land has been changed and the lateral pressure upon adjacent land increased that rule does not apply.

On the contrary, as said in Oniel v. Harkins, 8 Bush, 650, "a landowner can not, by changing the natural condition of soil, take away from his neighbor the right to the use and enjoyment of his land to the full extent he might have enjoyed it had no such change been made, and if he does he can not recover damages for any injury he may sustain by reason of the exercise by his neighbor of any of his original rights, unless they be exercised in an unskillful, careless or negligent manner, or unless, being reasonably certain that injury would result from his acts, such neighbor failed to apprise him of his intention or to afford him an opportunity to use proper precaution."

Applying to this case that rule, which is obviously just, there can be no question of the right of the city of Covington to excavate the cellar under the proposed engine building to the depth of seven feet below the surface and extend it to the division line of the two lots, although it was reasonably certain the north wall of the appellant's house would he endangered thereby because resting upon a foundation only five feet below the surface. It is also clear that it was the duty of appellees, upon being notified of the purpose to excavate the cellar in the manner mentioned, to use necessary appliances to protect their own building from the threatened injury; the city of Covington being simply required, after giving due notice to appellees, to exercise the right of appropriating its property in a reasonably careful and prudent manner.

The means used to save the north wall of appellee's building was to underpin it to the depth of the engine-house cellar, the wall being braced at the same time. But before it was underpinned and the foundation of the engine-house was built high enough to support it the wall was cracked and injured.

The person who undertook to underpin the north wall of appellee's building was not appellant, Eisile, but a stone mason, and it is a material question whether he was employed by them or by the city of Covington. For while, as already indicated, the latter was not bound to assume the expense or risk of underpinning or bracing the wall of appellees, still if it undertook to do so it was bound to use reasonable skill and care, and if, on account of negligence or want of skill on the part of the person employed for the purpose, the injury to appellee's building occurred, it is liable to the extent of damage thereby done.

Whether the building was injured by reason of the want of reasonable skill and care on the part of the person who undertook to underpin and brace the wall, or resulted from the character of the ground, which was somewhat sandy, is, therefore, a question of fact, affecting appellants only in case the undertaking to protect the wall in the manner stated was by the city of Covington or its employes.

Digitized by Google

It appears that appellees conveyed to the city of Covington the three inches of ground, the consideration or inducement being the building of the engine-house wall against and as support to the north wall of their building, which was finally done, but whether the proposition to convey was before or after the building was injured does not appear. But it was alleged in the rejoinder of the city of Covington that whether the excavation was made up to appellee's wall, including the three inches, before or after their proposition, such excavation was made with their consent and understanding the city would be asked to accept a conveyance of the three inches for the purpose mentioned. But that allegation was, we think, erroneously stricken out, for surely there could be no pretense of right of appellees to recover even nominal damages for entering on and removing the three inches of land if it was done with their consent.

The damages which appellees would be entitled to recover on account of removal of the three inches of land, even if done without their consent, would be manifestly inconsiderable, unless such removal or displacement was the proximate cause of the wall dropping or settling, followed by cracking and injuring the building.

It is manifest that appellants could not have excavated their cellar up to the division line, which they had a right to do, without a portion of the three inches beyond becoming displaced, and it is extremely doubtful whether appellee's wall would have stood firm with only three inches clay and sand for a lateral support, and, therefore, the jury should be instructed more definitely than was done on the trial that they are not authorized to find damages for injury to the building on account of removal or displacement of the three inches unless they believe such removal was both the proximate and independent cause of the wall sinking and giving away.

Another ground for reversal, urged by appellant, is that both appellees were permitted to testify as witnesses on trial of this case. At the common law, one but not both of them might have testified, and, consequently, if both husband and wife may now testify in an action brought against them jointly or, as is this case, brought by them jointly, the right exists in virtue of section 605, as qualified by section 606, Civil Code. The latter section provides that "neither a husband nor his wife shall testify even after the cessation of their marriage concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other except in action for lost baggage or its value against a common carrier, an inn-keeper or a wrong-doer, and in such action either or both of them may testify; and except in actions which might have been brought by or against the wife if she had been unmarried, and in such actions either *but not both* of them may testify."

It seems to us very clear that to permit both husband and wife to testify in an action like this would be in direct conflict with both the language and manifest meaning of section 606. For, while they have an equal and undivided interest in the lot and the injury to the building thereon of which they complain affected them jointly and equally, still the testimony of either in this case would be testimony for the other. In our opinion, therefore, it was error to permit both appellees to testify in this case.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

Digitized by Google

TYLER V. TYLER, &C.

(*Filed May* 26, 1892—*Not to be reported.*)

Sale of infants' real estate—Parties to action—In this action by the statutory guardian of certain infants to sell for re investment their undivided interest in certain unprofitable real estate owned jointly with others, the proceedings and sale were regular and proper in all respects and the purchaser acquired a good title which he should be compelled to accept. It was proper to make the other co-owners of the property joint defendants with the infants.

Abbott & Rutledge for appellant.

Richards, Weissinger & Bakin for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The Louisville Trust Company, as the statutory guardian of Morris B. Nash and George Nash, infants under the age of fourteen years, filed this petition in the Louisville Chancery Court for the sale of the interests of the infants in certain described real estate in the city of Louisville.

These infants own an undivided twenty-fifth interest in five lots, one on the east side of Third street, between Jefferson and Green streets; No. 2, on the northeast corner of Third and Green; No. 3, on the south side of Market, between Second and Third streets; No. 4, on south side of Main, between Third and Fourth streets; No. 5, on the north side of Walnut, &c.

The infants take this property under the will of John I. Jacob and were, at the institution of this action, the owners in fee of the undivided twenty-fifth interests in each of these lots.

The object of the petition is to sell and re-invest the proceeds in more remunerative property.

The other co-owners of the realty are made defendants with the infants and the latter, the infants, represented by a guardian *ad litem* with the proceedings in proper form, were before the court. There is no question, from the pleadings and proof, but that a sale of the interests of the infants in this realty would redound to their benefit, the fact also appearing that the adult devisees of Jacob have sold their interest and that no advantage has been taken of the infants, but a sale asked for in good faith and with a view of benefitting the infants.

We think it was proper to make all the parties in interest defendants that they might be in a condition to assert their rights, and particularly where the interests of the infants, whose guardian is seeking this sale, is in property that is indivisible.

Subsection 2 of section 489 authorizes a sale of the interests of these infants and there is no prohibition of such sale where the realty is indivisible. The question is, is the chancellor satisfied that a sale of the interests of the infants for investment would be beneficial?

The price paid seems to be a full equivalent for the property, and the fact that the adult owners have accepted the same price conduces to show that full value has been paid or agreed to be paid by the purchaser.

We understand that this petition is alone for a sale of the property that the proceeds may be invested. This is, in effect, the judgment and the guardian has no power to make expenditures for education

Digitized by Google

or board without seeking further the aid of a court of equity. We see no reason why the purchaser should not be compelled to accept the title.

The judgment below is affirmed.

WILSON, RECEIVER, &C. V. LINVILLE, &C.

(*Filed May* 28, 1892—*Not to be reported.*)

Validity of sheriff's county levy bond, executed before county judge during adjournment of county court of claims—A court of claims assembled on October 14, 1889, and after passing on many claims against the county, adjourned until the 3d Monday of February, 1890, on which day they fixed the county levy for the year. On December 16, 1889, the sheriff executed his county levy bond before the county judge. *Held*—That the bond is valid, having been executed during the term at which the county levy was made, and the county judge being authorized to accept and affirm it.

Ross & Owens, Hanson Kennedy and J. J. Osborne for appellants

Winfield Buckler for appellees.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Pryor.

The court of claims for the county of Robertson assembled on the 14th of October, in the year 1889, its regular time for meeting, and, after passing on many claims against the county and making the allowance therefor, adjourned to meet again on the third Monday in February, 1890. They met on the day to which they had adjourned and, making an additional allowance of a few dollars against the county, again adjourned, after making a levy to meet the county indebtedness.

On the 16th of December, 1889, the county judge alone took the county levy bond, at a session of his county court, that was never approved by the magistrates associated with him as a levy court. It is claimed that the county judge had no power to take the bond, and, if the right existed, that the bond was invalid because executed before the levy was imposed.

In the case of Mayward v. Commonwealth, 80 Ky., 587, the county judge took the bond of the sheriff before the meeting of the court of claims and before any allowance of claims against the county had been made. There was then neither a liability to any one on the part of the county nor an obligation on the sheriff to collect. That case also plainly indicated that the sureties offered on the bond may become liable, although the levy is laid after the bond is executed. If executed when the court of claims meet, they can then ascertain by the allowances made or by inquiry as to the liability of the county what responsibility they are assuming, and if the sheriff chooses to give his bond at or during the term the court that is being held there is no reason why the *sureties'* bond should not be held valid.

The court of claims had met, ascertained, or nearly so, the indebtedness of the county, and the sheriff, after the adjournment and before the next meeting, executed his bond, and, having done so, his sureties are liable. Besides, there was but the one term of the court extended from October until February, and during that period

Digitized by Google

this bond was given. The fact that the bond was executed before the levy was actually made does not invalidate it. It was executed during the term and every opportunity afforded the sureties for ascertaining their liability,

A final judgment, rendered by the circuit court, can not be set aside after the expiration of the term upon mere motion, but such a case has no analogy to this case, nor can the circuit court extend the term so as to give the jurisdiction where the extension interferes with other terms of the court in the same judicial district. This was the case of McManama v. Garret, 3 Met., 517, and is no doubt the law, but in this case no such question arises.

Here the court had the right to adjourn over not only one month but longer if deemed necessary. There is no limitation to its power in this regard. It could not, doubtless, adjourn over until the next regular term for making the levy, but this they have not done.

Suppose on the day of the regular meeting in October the sheriff had executed his bond and the amount of the levy was not ascertained until the next day, it could scarcely be held that the bond had no validity, still, if the appellees' theory is correct, the bond is not valid unless executed after the levy is imposed. This meaning should not be attached to the statute. *He shall, at the term of the court when the levy is imposed or any subsequent term*, execute bond, &c. The bond was executed during the term and accepted and approved by the county judge who was authorized to take it.

The judgment is reversed, and remanded for further proceedings consistent with this opinion.

KENTUCKY AND INDIANA BRIDGE COMPANY V. KREIGER, &c.

(*Filed May* 28, 1892.)

1. *Operation of railroad in streets of city—Injunctions*—When the construction and operation of a railroad in a street of a city has been authorized, both by the Legislature and the proper municipal authorities, a chancellor has no authority to impose any arbitrary or unreasonable conditions and restrictions on said railroad as a condition precedent to the construction or operation of the road.

In this case the chancellor enjoined the railroad from constructing more than one track on a street of Louisville and from moving more than a specified number of freight trains over said track per day. The limitation of the number of freight trains to be run per day is held to be an unreasonable restriction and not authorized by the evidence in the record.

2. *Same*—The railroad will not be heard to complain that the order of the chancellor required it to construct its road of a certain guage, when it appears that the railroad intended to use such guage in the absence of such order.

3. *Same*—It was proper for the chancellor to order the road constructed in such a manner as conduced to insure the safety of persons using said street and crossing said railroad track.

Bullitt & Shields and E. F. Trabue for appellant.

Helm & Bruce for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Digitized by Google

Appellees, Kreiger, owner, and Eisman Bros. & Co., lessee of a lot in Louisville, situated between Fourteenth and Fifteenth streets, and extending from Portland avenue to Duncan street, on which was an elevator and mill, brought this action, November 4, 1886, for an injunction, which was granted, restraining appellant, the Kentucky and Indiana Bridge Company, from tearing up Portland avenue, between Fourteenth and Fifteenth streets, and laying any railway track or tracks thereon till further order of court.

November 26 the injunction was, by order of court, modified to the extent of permitting appellant to lay a single track railway in the center of said avenue and in front of the lot of appellee, Kreiger, in the specific manner described in the order so as to be no obstruction to passage of wagons or other like vehicles.

The order contained the following condition: "This modification is made on the condition that freight cars shall not be run in front of plaintiff's property more than twice for and by each road passing over said track during business hours of the day, and the said defendant is restrained and enjoined from allowing freight trains to run in front of plaintiff's property more than twice for each road using said track during the business hours of the day, and for a violation of this order the court reserves the right to order the removal of said track."

June 15, 1887, the case being submitted for trial, judgment was rendered perpetuating the judgment as modified. However, June 27, a motion was made for new trial, which was not disposed of until January 11, 1888. But though the motion was then in terms sustained, and the judgment of June 15 set aside, it was again substantially rendered and entered, except that right was reserved for appellant to apply to the court for further modification of the injunction. And in exercise of that right appellant, May 4, 1888, moved the court to modify the judgment of January 11, perpetuating the injunction by striking therefrom the restriction as to the number of freight trains passing in front of appellee's property during business hours of each day, and asked leave to take additional testimony in support of the motion. But October 24, 1888, the chancellor decided that he had then no power to modify the judgment, except upon facts arising subsequent to rendition of it, and the evidence of such facts being insufficient, the motion was overruled

We have referred in detail to the various orders and judgments made in this case, because counsel for appellee contends the chancellor had no power under the Civil Code to entertain the motion made May 4, 1888, to modify the judgment of January 11, 1888, which was final in its nature and effect. Whether that position is tenable we need not consider, however, because, according to the statement required by section 739 to be filed with the transcript, the judgments of June 15, 1887, and January 11, 1888, are appealed from, there being no appeal at all from the judgment or order of October 24, 1888. Consequently, we can not review the latter nor consider any evidence taken in support of the motion of May 4, 1888.

But it sufficiently appears otherwise that appellant was empowered by its charter to construct and operate with steam a railway from its bridge over the Ohio river to and upon Portland avenue by consent of the general council of Louisville, which had, by ordinance, been given before commencement of this action. It further appears that two or more railroad companies had made contracts with appellant for use of its bridge in moving their trains from north side of the river to Louisville, and that the most acceptable, if not

Digitized by Google

only practicable route, from the bridge to respective yards or depots of these companies, is along Portland avenue, between Fourteenth and Fifteenth streets.

One of the conditions of the use of that street prescribed in the judgment is, that the road shall be of a certain guage. But as that guage is the one intended by appellant to be adopted, we do not see how it has been injured.

The particular mode of laying down the rails prescribed in the judgment was intended to secure, as far as practicable, safe passage over appellant's track of vehicles owned and used by others, and as it does not appear compliance therewith will, in any degree, hinder free and safe movement of appellant's trains, it can not justly complain of that part of the judgment, which simply requires it to so use its own as not to hurt others.

The main question is, whether the chancellor properly restricted appellant in respect to the number of freight trains that may pass in front of appellees property during business hours of each day.

As early as the case of Lexington & Ohio Railroad Company v. Applegate, 8 Dana, 289, a railroad operated by steam power within a city was recognized as entirely consistent with the purposes for which a street may be properly used, and when authorized by municipal power, conferred by the Legislature, it is not an encroachment upon the public property or individual rights, because neither the local public, nor proprietor of an abutting lot, has any right or property in a street, or any other legal interest in it than that which is common to all the people. And such may be now considered the settled doctrine of this State, having been often and uniformly affirmed and applied since that case was decided. In fact, the judgment of the lower court permitting appellant to lay down a single track and operate its road upon Portland avenue amounts to a distinct recognition of the doctrine and could not be upheld otherwise.

As, then, both State and municipal authority was given to appellant to construct and operate its road upon Portland avenue, and the judgment necessarily and logically involved right of appellant to occupy and use the street jointly and in common with others, arbitrary restrictions or conditions of the exercise of such right can not be justified, but restrictions must be imposed in such case, if at all, only for the purpose and to the extent of preventing the exclusion by a railroad company or unreasonable hindrance of others from the proper use or enjoyment of the street, who have an equal right to such use and enjoyment.

The right of appellant to occupy and use the street for transaction of its particular business being conceded, there would seem to be no more power in a court to arbitrarily prescribe the precise number of freight trains it may move over its track during the business hours of a day, than to fix upon the number of wagons appellee may have driven from Duncan street through his building on to and across Portland avenue during the same period.

No other lot owner on Portland avenue, between Fourteenth and Fifteenth streets, besides appellee, Kreiger, has sought to prevent construction or to restrict operation of appellant's road, and, consequently, the effect of limiting the number of trains is simply to defer to what the evidence in this case shows to be altogether unreasonable and useless exaction on the part of appellee. Unquestionably there would be a remedy against an unreasonable obstruction or hindrance of others using the street for their business by reason of too frequent passage of trains, but as a state of case has not been

Digitized by Google

shown by this record making a restriction upon appellant as to the number of cars it may move over its track, necessary or proper, we think the judgment was, in that respect, erroneous. Whenever appellee or any other person has been hindered or obstructed by the unreasonable use by appellant of its road, the remedy may be afforded if applied for, but a restriction or hard condition can not be justly put upon the business of appellant in anticipation of a wrong or injury to appellee that may never occur. While, therefore, a railroad company may be enjoined from purposely stopping, switching or making up trains on a public street, which is not legitimate use of the street, and besides unnecessarily and improperly obstructs the business and endangers personal safety of others, a court has no power to prescribe, as a condition precedent of the occupation and use of a public street by a railroad company, the number of freight trains that may pass over its road, for that would be an unreasonable obstruction of its business, nor in any case to control its business in that respect, except when frequent passage of trains operate to exclude others from use of the street, or unreasonably obstructs them in its use.

The evidence in this case does not show any necessity for a double track on Portland avenue, which is only forty feet between curbstones. In fact the testimony of appellant's engineer shows the contrary, and the court did not err in confining appellant to a single track.

But for the error indicated the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

SPREEN V. RUTH, &C.

(*Filed May* 28, 1892—*Not to be reported.*)

Construction of contract—Appellees, on June 24th, 1887, entered into an agreement with appellant by which they agreed to exchange their farm for his tobacco plant, located in Cincinnati. On June 28th, 1887, appellees executed a conveyance for the land, which they delivered to appellant on July 2d, 1887, at which time appellant signed a contract by which he guaranteed the tobacco plant to sell for not less than $11,000—and agreed to make good to them any amount it sold for under said sum and by which he was to have one-half of any excess over that sum for which it might sell. The plant sold for much less than $11,000, and in this action on the guaranty to recover the deficit. *Held*—That the agreement of June 24th, the deed of June 27th and the guaranty of July 2d all evidence and are parts of the contract and appellant is liable on the guaranty of July 2d for the difference between $11,000 and the fair value of the plant sold as a whole.

Collins & Finley and Morris & Peak for appellant.

Wm. Carroll and J. W. McCain for appellees.

Appeal from Trimble Circuit Court.

Opinion of the court by Judge Pryor.

The appellees, C. D. & E. H. Ruth, being the joint owners of a tract of land in the county of Trimble, entered into an agreement with the appellant by which they sold or exchanged him this land for his tobaccco plant, located in building No. 18, public landing, in the city of Cincinnati, the plant including the lease, the machinery,

Digitized by Google

fixtures and stock necessary to its operation. The agreement evidencing the exchange was signed by the appellant, Spreen, on the 24th of June, in the year 1887. On the 28th of June of the same year the appellees executed a conveyance to Spreen of this land, reciting the consideration to be $11,000 in hand paid, and on the 2d of July following delivered to Spreen the deed and took from him this writing:

"CINCINNATI, July 2, 1887.

"This agreement, entered into this day between F. W. Spreen and C. D. & E. H. Ruth, witnesseth: That the said F. W. Spreen guarantees and agrees that the entire tobacco plant, located at 18, public landing, Cincinnati, Ohio, when sold as such shall net not less than $11,000, he agreeing to make good to said C. D. & E. H. Ruth all under that sum. It is further agreed that all sums that the property shall bring over and above the $11,000 shall be equally divided between the two parties. Signed:

"F. W. SPREEN,
"C. D. & E. H. RUTH."

This writing is the subject-matter of controversy, the appellees instituting the present action in equity, alleging that the tobacco plant sold for only $1,329.80, and seeking to recover under the agreement the deficit, amounting to $9,660.20, and to enforce its payment by a sale of the land, upon the ground that the agreement and sale of the tobacco plant constituted the consideration for the conveyance of the land. It is alleged that the tobacco plant was placed in the hands of agents at Cincinnati for sale, and that those agents were selected at the instance of the appellant, or at least recommended by him; that every effort was made to sell the plant as a whole, and failing in this it was sold by the piece, under a subsequent agreement with the appellant, and by his consent, and sold in this way for the best price that could be obtained. It is further alleged that the appellees were farmers and ignorant of the value of such machinery and had not even seen it; that the appellant represented the plant as worth exceeding $13,000.

The appellant, prior to the sale, had made an inventory of his machinery and stock, affixing a value to each piece of machinery that showed its value to be greatly in excess of $11,000, the price to be paid for the land. This inventory the appellant admits he exhibited to the appellees, but made no representations as to value, but believed it was worth as much as $13,000.

The principle ground of defense, and all that will be noticed is, that the appellees made a sacrifice of the plant by selling it in separate parcels and not as a whole; that he never made an agreement to sell by the piece or had any knowledge that such a course was being pursued by the appellees; that the writing sued on formed no part of the consideration for the sale and conveyance of the land; that it was executed after the contract had been executed, and for the consideration that a division of the excess the plant brought over $11,000 was to be divided between the grantors and grantee. It is insisted that the appellees bought with their eyes open after examining the plant, and that if the plant had been sold as a whole it would have brought $13,000.

It is manifest from the testimony that the writing of June, signed by Spreen, did not contain the full contract between the parties, and that the *guaranty* was executed at the time the conveyance was delivered to the appellant in order to secure the full consideration to be paid for this land, which was $11,000. The transaction between

Digitized by Google

the parties needs no reformation by the chancellor or pleading for that purpose, as the writing of the 24th of June, the deed dated the 28th of June and delivered on the 2d of July (the day on which the guaranty was executed) and the guaranty all evidence the contract between the parties and must be treated as one agreement. This also appears from the parol proof in the case, and while no explanation is required as to the purpose for which the guaranty was executed, it is plain that the consideration set up by the appellant, viz., that he was to have half of the excess over $11,000, or the other party was to have half, is inconsistent with every practical view in which this case can be considered. We think it also plain that the appellant knew the mode in which this plant was being sold. He was present when the agents, to whom appellees had been referred by the appellant himself, was making these contracts, was more vitally interested than any one else but the appellees, and not until he saw the consequences that must follow from the prices that were being obtained for this machinery did he make known this complaint. He lived near the agents of the appellees. They were business men and intrusted with the disposition of the property by the appellees, who were strangers, at the appellant's instance, and to adjudge that the latter knew nothing of what was transpiring, with reference to the sale of this property, would be to determine that he was perfectly reckless as to his own interests.

We do not think it material, however, to determine upon the facts before us whether the appellant was or not ignorant of the manner in which this property was being sold. The learned chancellor below examined carefully the facts and reached such a conclusion, but as we differ from him, not so much in result as to the grounds upon which the appellees should have a judgment, it may be proper to state our reasons why the judgment below should be affirmed. There is no controversy about the price the appellees were to receive for this land. The appellant was upon it, rode over it, and while the soil is not rich its chief value consisted in the fruit trees upon it; that by reason of its locality gave it a value that would not attach to poor lands in other localities.

There is no reason for determining the value of the land or the price agreed to be paid for it, and we shall assume that he bought it with his eyes open, and that the appellees made their purchase of the tobacco plant in the same way, and while the evidence conduces to show an effort perhaps on both sides to obtain an advantage that would have troubled the conscience of a fair minded man, treating the parties as dealing at arm's length, we see no reason for complaint on the part of the appellant.

He had agreed by the written guaranty of July 2 that the tobacco plant when sold should net not less than $11,000. He then had to make up the deficit if it sold for less. He says, however, that it sold by the piece and that he did not give his consent or agree to the sale in that mode. Then what was its value as a whole? It has all been sold, notwithstanding the decoy letter written by the appellant, or at his instance, making inquiry of appellees' agents as to whether they had certain machinery for sale answering the description of that sold the appellees by the appellant. While one of the agents writes that he had, it turns out that it was machinery that belonged to the appellant, as the other agent states, and of which fact his partner, who wrote the response, was ignorant. But whether this is so or not these agents swear it was all sold, and there is no reason to disregard their statements. They have no interest in this controversy, and were entire strangers to appellees when they agreed to sell this

Digitized by Google

property. Assuming then that appellees had no right to sell by the piece, then what was the fair value of the tobacco plant as a whole? These agents swear they could not sell it in that way. No offer was made for it, but still it is now disposed of, and if in an improper manner what was the plant worth? We can only fix the value by what the witnesses say, and making an average of the estimate placed upon it by eight witnesses, and its value was $8,500, although the appellees obtained a little over $1,300 for it when sold by the piece, and by reliable agents.

It is evident that the plant was not worth more than the sum fixed, for that character of machinery and outfit, worth, as a whole, as appellant contends, exceeding $13,000, would certainly have sold by the piece for over $1,300, unless there was fraud or great neglect on the part of the agents selling, and this is not shown. This whole case is one of fact. No legal question is involved in it. The appellant agreed to pay $11,000 for the farm in this machinery, and if the plant failed to bring the $11,000 he was to make up the deficit. Taking, therefore, the value of the plant, $8,500, from the price to be paid for the farm, $11,000, and there is $2,500 owing the appellees.

There is no cross-appeal, and this sum approximates the relief given by the court below, and that judgment is affirmed.

McDONALD, JUSTICE, &C. V. JENKINS, &C.

(*Filed May* 28, 1892.)

1. *Forcible detainer—Traverse bond*—Where a tenant proposes to traverse the finding of the jury in a proceeding of forcible detainer he must execute a traverse bond with sufficient surety to answer for all the costs of the proceeding and all damages that might result from the withholding of the possession. And this embraces all damages that may result from the withholding of the possession during the pendency of the traverse in all courts to which the case may be taken, and the reasonable expense of defending it.

2. *Mandamus to compel justice of the peace to approve traverse bond*—A justice of the peace acts judicially in determining whether or not he will approve and accept a proffered traverse bond, and, therefore, mandamus does not lie to compel him to approve a bond which he has rejected because in good faith it did not seem to him to be sufficient.

D. W. Lindsey, Frank Chinn and Jno. B. Lindsey for appellants.

Wm. Lindsay for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Holt.

This petition for a mandamus was filed in the Franklin Circuit Court to compel the appellee, McDonald, as a justice of the peace, to approve a traverse bond in a proceeding upon a writ of forcible detainer, that had been tried before him.

The Code of Practice provides that bond shall be given with sufficient surety, to be approved by the justice, for the costs of the proceeding and all damages caused by the traverse.

It is not admitted that the surety offered was sufficient. That is now, and has been all the time, in issue.

No such abuse of discretion is shown as, according to some decis-

Digitized by Google

ions, authorizes the issual of the writ, and the question is presented, whether the writ will issue where the justice has, in good faith and in the exercise of his discretion, refused to accept the surety upon the ground that he is not, in his opinion, sufficient, but the superior tribunal, that is asked to issue the writ, is, from the evidence before it, of a different opinion.

As there is some contrariety of decision it may help to guide us to a correct conclusion to briefly notice some general and elementary principles of the law upon this subject.

The use of this writ is confined to cases where the person has a clear legal right and no other adequate remedy.

It can only be invoked where, without it, there will be a failure of justice.

If the act to be done be a mere ministerial one, commanded by law, if its performance be a mere ministerial duty, a mere incident of the office, then, whether the person who should do it be a judge or a strictly ministerial officer, the writ will lie to compel performance. In other words, it does not follow that an act is judicial because done by a judge.

For instance, a justice acts as his own clerk, and where he is required by law to do an act which, in its nature, is ministerial and involves no exercise of judgment, the writ will lie to compel performance in case of refusal.

Where, however, the act may or may not be done in the discretion or judgment of the party against whom the order is sought it can only be invoked to set him in motion and not to control his discretion.

It may be used to compel action by a judge but not to control the discretion of his judgment.

It is often difficult to draw the line between those acts which are purely ministerial and those which partake of a judicial character. The nature of the act must be considered.

Its character must determine whether the writ will lie. Is it in its nature judicial or *quasi*-judicial?

It is said that, in this case, when a justice had decided the case his judicial functions ended and that the taking of the bond was a mere ministerial act. He was required, however, to take a sufficient bond, one that would cover the costs of the proceeding and all damages that might result from the traverse. This embraced whatever damages might result from withholding the possession during the pendency of the traverse in all courts to which the case might be taken, and the reasonable expenses of defending it.

He had not only to exercise his judgment as to the solvency of the surety, but in estimate of the probable damages.

He had to hear and weigh evidence upon these subjects and then exercise his best judgment.

It is a general rule that where an officer has a discretion it will not be controlled by mandamus. Swan v. Gray, 44 Miss., 393.

This rule is necessary to the safe and pure administration of justice. If, in cases where he is required to exercise his judgment, he were constantly liable to suit, resulting in orders to do different, his independence would be destroyed and that public confidence in official action, which is so necessary in the State, would cease to exist.

If, looking to any hardship that may arise, it be said that an individual may sometimes suffer by his error, yet this liability exists in all official action.

If he acts corruptly or designedly abuses his authority he is liable to action, but, being a disinterested party, he should not be liable to

Digitized by Google

the costs of a suit where he errs in judgment when he is required by law to exercise this judgment. Usually if a litigant can give security, which is in fact sufficient, he can give such security as will satisfy the doubt of the officer who is required to judge of it.

The approval or disapproval of the bond requires of course the exercise of discretion and judgment.

The act is, in its nature, judicial. If, in such a case, he may be ordered against his own judgment to accept the bond his discretion is taken away and the judgment of another is substituted in its place. The law, in one breath, would tell him to exercise his judgment, and, in another, it would take it away from him.

After not only giving him the right to exercise his discretion and requiring him, at his peril, to do so, it would take it away from him and order him to do that which, in his opinion, he ought not to do.

It would subject to slavery his judicial opinion and compel him to err in his judgment. This is contrary to reason and the law does not require it.

The writ will not lie to correct the erroneous judicial or *quasi*-judicial action of subordinate officers or tribunals.

It has been held that the action of a clerk of a court in approving a bond, where he is required by law to judge of the solvency of the sureties, is *quasi*-judicial and the exercise of the power will not be controlled by mandamus. McDuffie v. Cook, 65 Ala., 430; Mobile Mutual Insurance Company v. Cleveland, 76 Ala., 321.

It was the duty of the justice to take a sufficient bond. This necessarily required the exercise of discretion and judgment. There was no admission that it was sufficient, which would have obviated the need of an exercise of his judgment.

The action was at least *quasi*-judicial, and, therefore, mandamus does not lie.

The judgment is reversed with directions to dismiss the petition.

LEE, &C. V. PENDLETON COUNTY COURT, &C.

(*Filed May* 28, 1892—*Not to be reported.*)

1. *Injunction by tax-payer to enjoin a county court from purchasing a poor-house for the county*—A court of equity will not, on petition of the tax-payers of a county, enjoin the county court of such county from purchasing a farm to be used as a county poor-house, in the absence of an allegation of fraud or corruption on the part of the members of the court, since the authority to determine what are the wants and necessities of matters pertaining to the government and control of county affairs is expressly conferred on the county courts, and the exercise of their discretion as to such matter can not be limited or destroyed by the writ of injunction. Nor does the fact that the county already owns one poor-house authorize the granting of the writ by the chancellor.

2. *The county court can not appropriate money collected under a statute directing its application to the payment of a particular debt*, to the payment of other debts or for other purposes.

Leslie Applegate for appellants.

R. W. Holland and Jno. H. Booker for appellees.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Pryor.

Digitized by Google

The object of this action is to enjoin the county court of Pendleton county from executing a contract made with one Albert for the purchase of a tract of land for a poor-house, and from paying for it out of money collected by taxation, to be applied by special enactment to the payment of particular debts owing by the county, it being alleged in the petition that this money was about to be misappropriated.

The chancellor below enjoined the county court from making payment out of the fund set apart for other purposes and dismissed the petition in so far as it sought to enjoin the county court from purchasing a poor-house.

The appellants, who are citizens and tax-payers of the county, have appealed from the judgment refusing an injunction as to the purchase of a poor-house, and the county court makes no complaint as to that part of the judgment enjoining them from making payment out of a particular fund. They answered in fact and denied any such purpose.

The only question, therefore, is as to the right of these tax-payers to go into a court of equity for the relief they now maintain should have been given them by the court below.

The question is one of easy solution. The county court alone is to judge of the necessity for this expenditure, and when we say the county court we mean the county judge and the justices. They control the fiscal affairs of the county and as a court are specially authorized to make such appropriations as are necessary for county purposes and it is the imperative duty on that tribunal to provide for the poor within its jurisdiction.

The power to purchase and receive a conveyance of land for a poor-house and to make the necessary improvements is expressly given by statute. General Statutes, chapter 86.

The testimony in this case shows that they had and now have a tract of land with improvements upon it, used and owned as a poor-house and that no sale or disposition of it was made before the purchase from Albert of his farm.

The testimony for the court in this case shows that the farm now owned by the county and used as a poor-house is utterly unfitted for that purpose, while that for the tax-payer shows that it is sufficient for all purposes.

It is not necessary to determine the weight of the testimony on this issue, because it is well settled law that such tribunals are alone to determine the wants and necessities of matters pertaining to the government and control of county affairs, and so long as they act within their jurisdiction no one can interfere, unless there is fraud or corruption or some individual right is to be affected by their action. In the performance of these duties the mode of its exercise and the discretion connected with it is with the court and not the tax-payer.

Here the tax-payer says, in his opinion (and in it he may be sanctioned by every tax-payer in the county but the members of the court), a new poor-house is not wanting and that no purchase should be made until the old one is sold, still if the county court orders differently its discretion must prevail.

It is authorized by law to make such appropriations and the tax-payer is not, and if the discretion of a county court is to be questioned in a court of equity by the tax-payer, in regard to appropriations within the scope of its authority or as to the wants of the county, it would be impossible for that tribunal to discharge the duties and obligations imposed on it by statute.

Digitized by Google

It may, in the opinion of the county court, be impolitic to sell the poor-house premises already owned by them until accommodations are provided elsewhere, and while the location of a poor-house may not be desirable in any neighborhood in such a country as ours, it must of necessity be located adjoining some one, and the good accomplished by it will greatly overbalance the inconvenience and annoyance resulting to those living in its immediate vicinity.

The offer to file an amended petition setting up the fact that the poor-house was then a nuisance and would so continue was properly refused.

The judgment is affirmed.

HOME INS. CO. V. ALLEN, &C.

LIVERPOOL AND LONDON AND GLOBE INS. CO. V. ALLEN, &C.

(*Filed June* 2, 1892.)

1. *One may have an insurable interest in property*, although the conveyance under which he claims is without consideration and, therefore, fraudulent and void as to the grantor's creditors.

2. *Assignment of insurance policy—Concealment of material facts*—When the holder of an insurance policy assigns it with the consent of the company, the assignment constitutes a new contract between the company and the assignee of the policy, and it is the duty of the insured and the assignee to make known to the company all facts material to the risk as they exist at the time of such assignment.

3. *Same*—A husband, being heavily involved in debt, conveyed his farm, with the buildings thereon, to his wife, for no valuable consideration. On the day of the conveyance an attachment was levied on said land by a creditor of the husband, and thereafter the creditor attacked the conveyance to the wife as fraudulent. After the institution of the suit the husband assigned an outstanding policy of insurance on said buildings to his wife, with the consent of the insurance company, without disclosing the above facts concerning the suit and the attachment. *Held*—That the failure to disclose such facts, which were material to the risk, was a fraud on the company, which vitiates the policy.

Fairleigh & Straus for appellants.

James S. Pirtle and Wilkins G. Anderson for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

G. Baylor Allen, being the owner of a farm in the county of Shelby, had two policies of insurance on the buildings, the one issued by the Home Insurance Company and the other by the Liverpool and London and Globe Insurance Company.

The two policies expired on the 20th of August in the year 1885, and had been issued and the premiums paid for several years prior to the date at which the insurance terminated. On the 26th of January, 1885, the insured, Baylor Allen, conveyed this land to his wife, Anna M. Allen, the deed being lodged for record on the next day. On the day the deed was filed with the clerk Mrs. Merriwether, a creditor of Baylor Allen, instituted an action against him for a large sum of money, and had an attachment levied on this

Digitized by Google

land upon which the buildings stood, and in a few days thereafter, by an amended petition, assailed the conveyance to the wife for actual fraud. On the 26th of March, 1885, the husband, by the consent of the insurance companies, assigned and transferred to his wife, Anna, all his right, title and interest in and to those policies, and in the month of June following the property insured was destroyed by fire. On the hearing of the case between Mrs. Merriwether, as plaintiff, and Allen and wife, defendants, the conveyance to the wife was held fraudulent and the land subjected to the payment of the husband's debts.

The defense in the court below was presented in several paragraphs. The first. That Mrs. Allen had no insurable interest in the property. Second. That the policies became void because it was stipulated that if the interest of the assured in the property be any other than the entire, unconditional and sole ownership thereof, for the use and benefit of the assured, the policy should be void. Third. That the consent of the companies to the assignment of the policies was procured by fraud in the concealment from them of facts material to the risk.

That one may have an insurable interest in property, although under a fraudulent conveyance, was held in the cases of Phœnix Insurance Company v. Mitchell, 69 Ill., 43, and in Lewis v. Wilmather, trustee, 9 Allen, 382. These decisions proceed on the idea that such deeds are good *inter partes* and the title passes as to all except the creditors of the grantor.

The creditors may not assail the conveyance, and, besides, in a court of equity, a conveyance by the husband to the wife might well be sustained upon the ground that it was based on both a legal and equitable consideration and still be void as to creditors. A promise by the husband to convey his land, in consideration of what moneys or estate he had theretofore reduced to possession and belonging to his wife, would, if executed by a conveyance, be upheld in a court of equity, and while the facts might not avail the wife as against the creditors of the husband, as between the husband and wife, the conveyance would be held valid. It seems, however, in this case, from the answer of the defendants, and this is being considered upon the demurrer, that the wife and the husband failed to make known to the defendants the circumstances under which this transfer was made, and the fact that the creditor at that time had an attachment levied on the property with a view of subjecting it to the payment of a large debt.

The attachment created a lien on the property. The husband was much involved, and the effect of the assignment of the policy to the wife was to give to her, regardless of the claims of the creditors, the benefit of this insurance in the event the property was destroyed. It was a new contract between the companies and Mrs. Allen, by which she became the assignee of the policies, and it was her duty, or that of the husband, when procuring the assignment, to make known to the insurers all the facts material to the risks. "Any change," says Mr. May in his work on Insurance, "in state of health of the person, or condition of the property to be insured, pending the negotiations, if such changes would naturally have any influence on the judgment of the insurers must be made known, as the state of facts existing at the time of the completion of the contract will be deemed to have been the basis of the contract."

Here is not a mere renewal of the policies but an assignment to a third person, who becomes, if entitled to recover, the sole beneficiary to the exclusion of the husband and his creditors. The land

Digitized by Google

upon which the buildings stand and the buildings are liable to the husband's debts as against any claim of the wife, but to place the wife in a condition where she may have a part of his realty against any creditor's claim, the husband causes the policies to be assigned to the wife, when all the property, including the buildings, would not satisfy the demands of the creditors. The only way then in which the wife can reap the benefits of the assignment is by the destruction of the property, and while no such motive is attributed to the parties in this case, it is manifest that an insurance agent of ordinary business capacity, upon such a state of fact presented to him, would hesitate to issue a policy or consent to its assignment to the wife. Whether the mere levy of an attachment constitutes such a lien as to effect an insurance, obtained otherwise in good faith, is one of doubt, and we are inclined to think it would not, but in a case where the wife is the assignee of the policy, and the debts of the husband are sufficient to take all the estate conveyed to the wife, and are, in fact, asserted against it where the policy is assigned to the wife, it seems to us a concealment of these facts, or a failure to disclose them must prevent a recovery on the policy.

It was the duty of the insured to make full disclosure to the companies with whom they were contracting of every fact material to the risk, and that was unknown to the insurer. In our opinion the demurrer should have been overruled as to the third paragraph of the answer.

The judgment in each case is reversed, and remanded for proceedings consistent with this opinion.

HARPER V. COMMONWEALTH.

(*Filed June* 14, 1892.)

1. *Criminal law—Gaming*—The evidence in this case authorized the conviction of the statutory offense of setting-up, conducting and carrying on a game of cards, called poker, for compensation or commission, whereby money was won and lost.

2. *Same—Instructions*—The instructions in this case followed the language of the statute, except that after the word "compensation" the court added the words "in any form whatever." This was not erroneous or prejudicial to appellant, since the instruction conveys only the meaning intended by the statute.

3. *Same—Cruel and unusual punishment—Constitutional law*—The penalty denounced by the statute (General Statutes, chapter 47, article 1, section 1) of a fine of $500, and confinement in the penitentiary not less than one nor more than three years for said offense of gaming, is not such "cruel" punishment as renders the statute void.

Crooke & Cobb for appellant.

W. J Hendrick for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted of the statutory crime of setting-up, conducting and carrying on a game of cards, called poker, for compensation or commission, whereby money was won and lost.

Digitized by Google

The court's instruction followed the language of the statute in reference to the acts necessary to constitute the crime charged, except after the word "compensation" the court added the words "in any form whatever."

It is contended that the addition of these words was not authorized by the statute. But it seems to us that the additional words are not in conflict with the language used in the statute, but the language, compensation, reward or commission, means "in any form whatever."

But it is said that the evidence does not conduce to show that the appellant was guilty of the crime charged.

Upon that subject the proof is, that the room in which the game was played was fitted up for a gambling room, and persons resorted to it when they wished to play; that the appellant was generally present and without the request of any one took charge of the game and acted as banker, and issued and sold chips and cashed them at the close of the game, and sometimes took a hand himself; that he took out a chip whenever pairs, threes, &c., were played; that the take-out went to pay for the drinks, cigars, lights and cards. But it does not directly appear that the appellant received the take-out that must remain after the payment of these expenses as compensation or commission. But we think the jury had a right to infer from the facts proven that he did receive compensation or commission. For it is not at all probable, but highly improbable, that the appellant, not being an idiot or feeble-minded, would devote his time to running that game as it was run for mere pastime or accommodation; but the jury had the right to infer that he received compensation, reward or commission in some form.

But the appellant contends that the punishment denounced by the statute is "cruel," and violates section 17, article 13 of the old Constitution, which prohibits "cruel" punishments, &c.

It is the duty of the Commonwealth to promote and protect the peace and good order and happiness of its citizens by enacting adequate laws for the punishment of vice and crime, and prevent any practice that leads to vice and crime. There is no doubt that gambling is a great social and moral evil, that leads to crime and dissipation, and wrecks fortunes and brings poverty and misery upon the helpless and innocent. And it is certainly not only the duty of the Commonwealth to enact such penalties against the gamblers themselves, as will deter them, but to enact such penalties against such persons as hire themselves out to set up or carry on the gambling hells. And if it requires confinement in the penitentiary and disfranchisement to prevent or check the practices, the Legislature has the constitutional right, and it is its duty to enact such a law. That body is necessarily the judge of the adequacy of the penalties necessary to prevent crime. The court has no right to say that the punishment is cruel and unconstitutional, unless it clearly manifestly so appears, which we can not do in this case. On the contrary, we think the Legislature was clearly within the exercise of its constitutional power in enacting the law.

The judgment is affirmed.

Digitized by Google

UPTON V. COMMONWEALTH.

(*Filed June* 4, 1892—*Not to be reported.*)

1. *Indictment—Charging of two offenses*—The offenses of grand larceny and of receiving stolen goods may be alleged in the same indictment under section 127. Criminal Code.

2. *Criminal law—Verdict sustained by evidence*—In a criminal case, if there is any evidence whatever to support the verdict, it will not be set aside on appeal as without evidence to support it.

In this case the evidence is sufficient to support the verdict convicting the appellant of grand larceny.

Jesse R. Eskridge and David R. Murray for appellant.

W. J. Hendrick for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Chief Justice Holt.

The indictment charges the appellant, Charles Upton, and James Garrett with grand larceny in stealing some clothing. It also contains a count charging Upton with receiving the property from Garrett knowing it to have been stolen.

The two offenses may, under section 127 of the Criminal Code, be united in the same indictment.

It is not necessary to consider whether two persons can, in the same indictment, be charged with grand larceny, and then one of them singly with receiving the property, knowing it to have been stolen, because no objection was made to the indictment, and it certainly charges the accused in proper form with the offense of which he has been convicted.

His counsel admit, and properly so, that the appeal presents no legal question, but it is earnestly contended that the verdict is entirely without evidence to support it.

It is a settled rule of practice in this court that if, in a criminal case, there be any evidence whatever to support the verdict it must stand. It need not of course be positive evidence by an eye witness of the guilt. If circumstances are shown, tending to support the finding of the jury, it will be upheld, although the court may think the weight of the evidence is the other way.

The questions of fact are for the jury. It is clearly shown that the clothing was stolen and that the accused was found in possession of it. It is suggested that as it is not expressly proven all of it was taken at the same time from the store where it was kept for sale, and as the articles separately are worth less than the value necessary to constitute grand larceny, a case was not made out. It did not appear, however, that the articles were taken at different times, and the jury had a right to presume they were all taken at once, especially as they made up a single suit of clothes and were, therefore, the more likely to be the object of theft at one and the same time.

It is claimed the accused accounted beyond question for his possession of the property. He testified that Garrett gave him all the clothing except the overcoat, which he purchased from him, and that he did so in return for the accused staying at Garrett's house with his family for a short time while Garrett was confined in jail as a punishment for carrying a concealed deadly weapon. Garrett and his wife testified the same way, but when Garrett was asked

Digitized by Google

where he got the clothing he replied, from a man whose name he would not give.

It is evident all three of the parties were quite intimate, and all of the testimony, which it is claimed accounts for the possession of the stolen property, came from a doubtful quarter.

The accused and Garrett's wife were arrested at the same town in another State, but it is true there is evidence for the accused tending to show he had gone there upon advice that he could get work there. He testifies, however, that when Garrett gave him the suit of clothes, called him into the house, where they both then lived, and made him a present of them without telling him how he came by them or how he got them and that he did not ask him. It is probable from this he was a party to the getting of them, and although he did not conceal them, yet the circumstances shown are such as to constitute at least some evidence that the accused was a party to the larceny, and the verdict must, therefore, be sustained.

Judgment affirmed.

HORNSBA V. COMMONWEALTH.

(*Filed June* 11, 1892—*Not to be reported.*)

1. *Criminal law—Verdict supported by evidence*—Appellant was charged in the indictment with the murder of his child by whipping it, and the verdict of the jury, finding him guilty of killing the child, is fully sustained by the evidence.

2. *Same—Evidence*—Although the indictment alleged that the accused had killed the child by whipping and beating it, evidence showing that he had sent it a distance of eighteen miles on a cold, rainy day, thinly clad, after beating it, was competent to show malice towards the child.

3. *Instructions not prejudicial*—The errors, if any, in the instructions, were not prejudicial to appellant's substantial rights, since the evidence establishes his guilt beyond all doubt.

J. B. White for appellant.

W. J. Hendrick for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was sentenced, upon conviction, to the penitentiary for the term of five years for killing his child. He has appealed.

The appellant is charged with having murdered his child by whipping it.

Clara Field testifies that, about two or three weeks before the appellant sent the child to Clay county, it was severely whipped and switch marks were upon it, and "blood was slightly drawn above the penis;" that its privates were swollen "as large as a goose egg." Also, that the child, at the time, was sick and weakly; that its bowels were disorderly.

Fred Adams testified that, about the time referred to by Clara Field, he heard licks and a noise at appellant's house like some one whipping another, and he heard the appellant's voice and saw him come out of the house; that, after that, he saw the child and it had switch marks upon it; that, some days afterward, he examined the child and there were numerous marks

Digitized by Google

upon its back and "above its privates and penis, and the testacles were swollen;" that the appellant requested the witness to take the child to Clay county to its grandfather's, but he refused to do so "because of the weakly condition of the child and its severe whipping," &c.

Mrs. Adams testified that she saw the child before it was taken to Clay county; that "it had been terribly whipped," &c.

Nancy Young testified that she "saw the appellant, a few days before the child was taken to Clay county, take the child out of the house and take a switch as large as her finger and whip the child with it twenty or more licks;" that the whipping caused the child to fall down; that it was whipped "because it had befoulded its bed;" that it was sick and weakly and was afflicted with "diarrhœa;" that "the whipping was very hard;" that "afterwards large whelks raised on the child."

W. B. Bullock testified that about three days before the child was sent to Clay county he and Dr. —— examined it; that they counted twenty-two marks on its body, one above its privates; that the child was swollen.

Dr. Breeding testified that he examined the child with W. B. Bullock; that they discovered about twenty switch marks on the child's body, &c.; that "the shock caused by a severe whipping might be dangerous to a weakly and sickly child; that such a shock, acting on the nervous system, might produce instant death, or it might cause gradual decline;" that the child was "badly whipped and the bruises were sunk to or near the loins of the child. It was then sick and feeble and had diarrhœa."

The Commonwealth introduced evidence showing that the appellant sent this beatened and sick child, and thinly clad, to its grandfather's (where it died in a few days), a distance of eighteen miles, on a cold and rainy December day, and the appellant objected to this evidence because it was not included in the allegations of the indictment. But it was competent as bearing upon the question of malice.

The appellant's excuse for whipping his child is that he wished to break him from the habit of befouling his bed. But, it seems to us, that this habit could not have been avoided by the sick and afflicted child of only six six years of age. It also clearly appears that the child was cruelly, inhumanly, brutally whipped by a brutal father, which caused its death, and he has great reason to rejoice over the fact that he escaped the death penalty.

The error complained of in the instructions, if it be an error, in view of the facts in the case, was not prejudicial to the substantial rights of the appellant.

The judgment is affirmed.

BOYER V. COMMONWEALTH.

DEVLIN V. SAME.

(*Filed June* 11, 1892—*Not to be reported.*)

1. *Criminal law—Verdict sustained by evidence*—The evidence clearly shows that appellant forcibly broke and entered a railroad car of the Chesapeake & Ohio R. R. Co., with the intent to steal therefrom property of value, and the verdict of the jury was, therefore, sustained by the evidence.

Digitized by Google

2. *Same—Evidence*—The jury had the right to assume that the goods taken were of value, from the fact that they were in the car.

And the fact that the car was one of a train on the Chesapeake & Ohio Railroad was sufficient proof of the ownership of such car.

3. *Same*—Although the car may have been broken into before the train reached Bracken county, still the fact that the opened car was first observed in Bracken county, together with other evidence, authorized the jury to conclude that the crime was committed in that county.

R. K. Smith for appellants.

W. J. Hendrick for appellee.

Appeal from Bracken Criminal Court.

Opinion of the court by Judge Pryor.

The appellants were convicted in the Bracken Circuit Court of forcibly breaking and entering a railroad car of the Chesapeake & Ohio railroad company by breaking the seal and opening the door and entering the same with intent to steal therefrom property of value, &c.

It is not certain, from the testimony, where the car was broken into, but it is shown that, when in the county of Bracken, the door of the car was open, the head of a barrel of whisky knocked out, boxes of goods broken open, &c.

The appellants were stealing a ride on this road and, according to their statements, were concealed in a car loaded with cattle, but left that car on account of the cold and found their way to this car that they both say was, at the time, broken open and in the possession of a drunken, boisterous set of men.

They seem to have enjoyed the drinks with those who had taken possession of this particular car and, when through with their revelry, returned to the cattle car.

Their own story has but little plausibility in it, and there is no doubt that they broke the car and entered it with a felonious intent.

The car was evidently broken into after it left Covington, and may have been forced open before reaching the county of Bracken, but still there was ample proof authorizing the jury to say that offense was committed in Bracken county.

One of the accused pleaded guilty before the examining court but did so, as he stated on the trial, when drunk and in the absence of counsel to advise him. They both state they were not in the car together and never saw each other until arrested at Vanceburg. This is another remarkable statement and their own testimony warranted the conviction.

That the goods in the car were of value the jury had the right to assume, and the fact that the cars were on the road of the C. & O. company and a part of its train was sufficient evidence of ownership. The instructions were proper and, if erroneous, the proof is so convincing as that no prejudice could have resulted to either defendant.

They were convicted for two years; were both in the cattle car and still never saw each other until their arrest; were each in the car broken open, and still were not together and never saw each other until reaching Vanceburg. Hats similar to those in the broken boxes were found in Vanceburg after the arrest or shortly before, and, if not, these appellants convict themselves and have no right to complain of the verdict.

Judgment affirmed.

Digitized by Google

GREEN V. COMMONWEALTH.

(*Filed June* 16, 1892.)

Criminal law—Costs in Court of Appeals—A defendant, who appeals from a judgment convicting him of a felony, is liable for his costs in the Court of Appeals, though he is successful in that court and the judgment below is reversed.

Stone & Sudduth for appellant.

Appeal from Bath Circuit Court.

Opinion of the court by Chief Justice Holt.

George F. Green was convicted of a felony in the lower court. Upon appeal to this court the judgment was reversed, and he claims that he is not liable for his own costs in this court. In other words, although its clerk rendered him service at his request, he now says he is not liable to pay him for it, because he succeeded upon appeal. The State can not be made to pay it. No judgment can go against it in the appellant's favor for his costs.

Section 6 of chapter 26 of the General Statutes, says: "If the Commonwealth shall be unsuccessful in any case prosecuted in her own right no judgment for costs shall be rendered against her." If, therefore, the appellant, owing to his success, is not bound to pay his own costs, the clerk must lose it.

Let us see if this apparent injustice exists under the law. If a defendant in a prosecution, whether for a felony or a misdemeanor, be defeated upon an appeal a judgment for costs may be rendered against him under chapter 26, section 11 of the General Statutes and section 361 of the Criminal Code.

The latter was held, in Peoples v. Commonwealth, 88 Ky., 174, to embrace a case of felony. It is said, however, that this is so because where the defendant is unsuccessful he is of course in fault and his own conduct causes the cost. In such a case, however, he is, by judgment, made to pay the costs of the other side, while the question now presented is whether he shall, where he is successful, merely pay his own costs. It is urged that to compel him to do so would be unjust and that it is against public policy to permit the State to prosecute one of its citizens, and then to compel him to pay even his own costs when he is not in fault and there is a failure to convict. The services are, however, rendered at his instance. He gets the benefit of them. The officers of the court have no interest in the matter, and as between him and them he should certainly be the loser. If it involves a hardship to him it is one that is incident to his citizenship. If he accepts the benefits accruing to him from government he must bear the necessary burdens, and the right to examine and investigate the conduct of its citizens is vital to proper government.

If, however, the law does not authorize the collection from a defendant in a criminal case of his own costs where he succeeds, then of course this motion to quash the clerk's fee bill must prevail.

Section 1, article 1, chapter 41 of the General Statutes, says: "Hereafter the clerks of the Court of Appeals, circuit courts, equity courts and county courts (so far as the same will apply) shall receive the following fees for the services performed by them." The fees for the different kinds of service are then enumerated at length, and the fees now in question are among them. This provision applies to both civil and criminal cases.

The officer rendering the services must, of course, look directly to

Digitized by Google

the party for whom they are rendered, and as the State, for the most part, pays no costs, unless it be collected from the defendant, the officer is compelled as to the State to render much *ex officio* service for which he receives no pay. When it requires services in its behalf of its officers and no remuneration is, by law, provided it is *ex officio* and no charge can be made. Wortham v. Grayson County Court, 13 Bush, 53.

The chapter above cited provides: "Similar fees for similar services shall be allowed in all cases in the name of the Commonwealth when a fine is assessed and collected."

An act amendatory of it and which is copied into the General Statutes, page 625, also provides that the circuit court clerks shall receive as their compensation in Commonwealth cases ten per cent. of all fines and forfeitures collected from the judgment defendants not exceeding, however, $750 per annum.

Section 1, article 18 of the same chapter, says: "No fee bill shall be made out or compensation allowed hereafter for any *ex officio* services rendered by any officer;" and section 7, article 20: "No officer shall be entitled to any fee in a proceeding for a misdemeanor unless the same is recovered and collected from the defendant, in which cases the fees allowed and to be taxed shall be the same as for similar services in civil cases."

It is urged that these provisions show that a defendant in a prosecution is not liable to the officers for his own costs if he defeats it, but manifestly they relate only to the judgment of the costs upon the part of the State, and for which the accused is of course not liable unless he is convicted.

Although a defendant may succeed upon an appeal or be acquitted it is not only equitable but in conformity to statute that he should pay his own costs incurred for services rendered by the officers of the court at his request.

The motion to quash the fee bill in this case is overruled.

KENTUCKY SUPERIOR COURT.

ECTON V. CITY OF LOUISVILLE.

DAVIS V. CITY OF LOUISVILLE.

STEELE V. CITY OF LOUISVILLE.

WALTON V. CITY OF LOUISVILLE.

(*Filed Nov.* 4, 1891.)

1. *Appellate practice*—Although it was agreed in the lower court that the answer in another case then pending in that court should be taken as the answer of the defendant in this case, and that the evidence in that case should be read as the evidence in this case, yet as neither the answer nor the evidence is embraced in this record, they will not be considered, although the record, of which they form a part, which is on file in the Court of Appeals, has been sent out with the record in this case.

Digitized by Google

2. *Pleading*—As the petition shows that the plaintiff is not entitled to the relief sought, this court can not assume that the answer cured the defects in the petition.

3. *Pleading legal conclusion*—An averment that an ordinance was in force is a mere legal conclusion and is not equivalent to an averment that the ordiance was passed by the general council.

4. *Validity of assessments*—The case of Slaughter v. City of Louisville, 12 Ky. Law Rep., 61, is conclusive of the questions raised in this case as to the validity of assessments by the city for the years 1881 to 1884, inclusive.

But that case is not conclusive of the validity of such assessments for the year 1885; and if the averments of the petition in this case be true, the assessment by the city for 1885 was regularly and properly made, and the tax for that year is valid.

Lane & Burnett for appellants.

Laf Joseph for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Barbour.

These four actions were instituted by the city of Louisville for the recovery of taxes alleged to be due from the respective defendants. They were heard together and will be disposed of in one opinion.

In each of three of the cases the record shows that it was agreed in the lower court that the answer in the case of the City of Louisville v. Slaughter, then pending in that court, should be taken as the answer of the defendants in these cases, and also that the evidence in the Slaughter case should be read in each case. Neither the answer nor evidence is embraced in any of the records before us, but as the Slaughter case was appealed to the Court of Appeals the record on that appeal has been sent out to us, and we are asked by appellants' counsel to consider it in the determination of these cases. This we will not do, for, aside from the objection of appellee's counsel, we are not disposed to establish a rule which may impose upon us the labor of examining records between other parties (though they are in our court) for the purpose of determining the issues involved in the case before us. Therefore, the cases must be determined upon the petitions alone.

The case against Ecton is for the recovery of taxes for the years 1881, 1882, 1883, 1884 and 1885, and presents substantially all the questions made in the other cases.

The case of Slaughter v. City of Louisville, 12 Ky. Law Rep., 61, seems to us conclusive of the questions raised.

As to the taxes for 1881 and 1882 the petition fails to allege that the ordinances were passed by the general council of the city, the averment that they were in force is a mere legal conclusion. Nor does the petition allege that the ordinances were published as was required by the charter. It further appears from the petition and the various acts of the General Assembly therein referred to that there were fatal defects in the levy and assessment of the taxes for the years 1881 and 1882 and it is not alleged that there was any re-assessment as provided by the curative statute. Therefore, no right to recover the taxes for these years is shown. 12 Ky. Law Rep., 61.

As to the taxes for 1883 and 1884 the petition shows that the levy and asssessment for those years was illegal, and, though the act of April 19, 1884, provided for a re-assessment, it does not appear that the board of equalization provided for in this act was in session the time required, but, on the other hand, the allegations show that it

Digitized by Google

was not. As held in the Slaughter case this invalidated the acts of the board.

The act of May 12, 1884, which was in force when the tax for 1885 was imposed, required that the board of equalization should hold their sittings at the city hall in Louisville and give notice of their first sitting by publication in one or more daily papers of the city of Louisville.

The petition does not show that there was any notice given of the time of the sitting of this board and, therefore, upon the authority of the Slaughter case, the tax for 1885 was not legally imposed.

The taxes claimed in the Walton case are for the years 1881 and 1882, in the Steele case for 1882 and 1883, and in the Davis case for 1882, 1883 and 1884. What we have said as to the allegations of the petition in the Ecton case for those years applies to these cases.

It is suggested that the answer might have cured the defects in the petitions, but this we can not assume, when, as in this case, the petitions show that the city was not entitled to the relief sought.

The judgment in each case is reversed, and each cause remanded for proceedings consistent with this opinion.

(Modified opinion—*Filed Feb.* 3, 1892.)

In the opinion delivered herein on the 4th of November, 1891, we were controlled by the case of Slaughter v. City of Louisville, decided by the Court of Appeals and reported in 12 KY. LAW REP., 61; that opinion starts out with the statement that the case involves "taxes alleged to have been assessed against the property of the appellant by the appellee for the years 1877 to 1885 inclusive." But we find from an examination of the record in that case that this statement of the appellate court was made under a misapprehension as to the true state of facts. While the petition of the city did seek to recover taxes for the years named, so much of the petition as asserted any claim for taxes for the year 1885 was dismissed, and the only taxes involved in the appeal were those for the years 1877 to 1884, inclusive, and a critical examination of the opinion shows that the court only passed upon the validity of taxes for those years.

Mislead by the opinion, however, we referred to section 3 of article 3 of the act of May 12, 1884, which required that the board of equalization should hold its sittings at the city hall and give notice of its first sitting by publication in one or more daily papers, &c., as a necessary prerequisite to the imposition of the taxes for the year 1885, when that section, and in fact the whole of article 3, referred to the re-assessment of taxes held to have been improperly imposed for the year 1884 and several years preceding.

The taxes sought to be recovered of Ecton for the year 1885 were taxes assessed that year and not re-assessed taxes, and are controlled by the 1st and 2d article of the act of May 12th, 1884.

Section 3 of article 2 provides that the assessor shall, before the 1st of November in each year, or as soon thereafter as practicable, make and return not less than four assessment books, &c. And section 7 provides that the assessment books in the 3d section named shall remain open in the assessor's office from the 15th to the 30th of November, and any one who thinks that his lands or improvements have been assessed beyond their value may, before the last-named day, file with the assessor his complaint, which shall forthwith be investigated by the board of equalization, which shall, according to the justice of the case, approve or reduce the assessment. Other portions of the statute provide for the election of the board of equalization, their qualification, &c.

Digitized by Google

The petitions allege a full compliance with all the provisions of the statute in the imposition of the taxes, the assessment, the return of the books, that they remained open in the assessor's office the required time, the election and qualification of the members of the board of equalization and that they had their sittings and performed their work during the time at the assessor's office.

No notice of the sitting of the board was required, and in view of the statute it would have been superfluous. We are of opinion that the city was, upon the petition, entitled to judgment against appellant, Ecton, for the taxes for 1885.

The opinion heretofore delivered is modified, and so much of it as relates to the taxes for the year 1885 is withdrawn and this opinion is substituted for that part. In other respects the opinion is adhered to.

SUPERIOR COURT ABSTRACTS.

CROMWELL v. TRUSTEES OF COMMON SCHOOL DISTRICT, NO. 44, FRANKLIN COUNTY.

Filed June 8, 1892. Appeal from Franklin Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Tax to repair school-house*—In levying a tax to repair a school-house no assessment other than that made by the assessor of the county for the current year is necessary. Macklin v. Trustees, 88 Ky., 597.

The case of Davidson v. Sterrett, 13 KY. LAW REP., 266, does not conflict with this conclusion.

2. *Same*—It is no objection to such a tax that the title to land on which the school house is built is not in the trustees. The trustees may, in their discretion, lease land upon which to build a school-house.

3. *Same—Injunction*—In a suit to enjoin the collection of such a tax an allegation in the petition that the cost of the repairs could not exceed "$80," when the trustees have levied a tax to raise "$170," is not, in the absence of an averment of fraud or oppression, sufficient to authorize the injunction. The averment amounts merely to the expression of a difference of opinion.

William Cromwell for appellant; W. J. Hendrick and T. B. Ford for appellees.

MCGILL'S ADM'R v. MCGILL'S ADM'R, &c.

Filed June 6, 1892. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

Disposition by married woman of her separate estate—Trust—Where personal property of a married woman, which was her separate estate, and which her husband had conferred upon her the power to dispose of as she might

Digitized by Google

choose, was placed by her, before her death, in the hands of a friend for distribution among her nieces and nephews, a trust for their benefit was thereby created, and, therefore, the husband's claim to the property upon the ground that upon the wife's death it passed to him under the statute of descent and distribution must fail, even conceding that the property, although separate estate, would have passed to him if it had not been disposed of by the wife before her death—a question which is not determined.

S. H. Bush for appellant; J. C. Poston, J. D. Irwin and J. H. Vanmeter for appellees.

TUNNELL'S MILL AND SIMPSON'S CREEK TURNPIKE ROAD COMPANY v. SELECMAN.

Filed June 8, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Subscription to turnpike road—Parol testimony to explain writing*—One who has signed a writing making a subscription to the capital stock of a proposed turnpike road company may show by extrinsic evidence which of two proposed roads of that name was intended. In such a case there is a latent ambiguity which parol testimony is competent to explain.

2. *Same—Contracts must be mutual*—In a suit upon such a writing it was error to instruct the jury that if they believed "the defendant subscribed to plaintiff's road upon the condition or understanding on the part of defendant that it was to be located over the way nearest to defendant's residence the law is for defendant." In all contracts there must be a mutual understanding, there is no such thing as a contract dependent solely upon the understanding of one of the parties.

John S. Kelley for appellant; W. E. Selecman and George Fulton for appellee.

GOOSE v. LEONARD.

Filed June 8, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. *Sale of stock of goods with agreement not to engage in like business*—Where a firm engaged in the general grocery business sold that stock of groceries and transferred to the purchaser their lease on the house, agreeing not to engage in the same or like business within two squares of that house, the contract will not be construed as an agreement on their part to abandon the business of manufacturing brushes and mops and selling them, together with brooms, buckets and wooden wares, at wholesale and retail, which business they then carried on in an adjoining house, for while such goods are almost universally sold in groceries, persons who sell such things exclusively are not grocers. And while the failure of the purchaser of the grocery business to complain of the selling of the brushes, &c., for near four months does not operate as an estoppel, it is persuasive evidence against his interpretation of the contract.

2. *Same*—Contracts of this character are not to be enlarged by construction. And the contract in this case must be construed in the light of the circumstances attending its execution.

W. O. Harris for appellent; Kohn, Baird & Speckert for appellee.

BOURMAN v. COMMONWEALTH.

Filed June 15, 1892. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Liquor selling—Sale by agent*—Upon the trial of appellant, under an indictment for selling liquor to G. in violation of the prohibition law of Hardin county, the appellant testified that he took G.'s money and with it bought for him the whisky, and that he made nothing whatever by the

Digitized by Google

transaction, had no interest in the whisky and merely procured it as a matter of accommodation for a friend. *Held*—That the court erred in refusing to insruct the jury that if defendant, in good faith, "acted for an accommodation to his friend," in procuring the whisky for him and had no interest in it, they should find for him.

2. *Same*—If defendant acted as agent for the seller he is guilty, whether he made a profit or not.

Hobson & O'Meara for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

N. N. & M. V. Co. v. WALKER.

Filed June 15, 1892. Appeal from Livingston Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Contributory negligence*—In this action to recover damages for personal injuries not resulting in death, it was error to instruct the jury that if defendant was guilty of willful neglect, they could not consider the question of plaintiff's contributory neglect. But as the jury was so instructed without objection or exception on the part of defendant it can not complain of the error.

2. *Measure of damages—Excessive verdict*—When the facts do not warrant the giving of punitive damages the measure is the actual loss the plaintiff has sustained from his injury, If he has been thereby deprived from attending to his ordinary business and occupation, he is entitled to be compensated for the time so lost, and the jury, in estimating the amount of damages to be given, may take into consideration the bodily injuries sustained, the mental and physical pain endured, the expenses incurred for medical services, medicine and nursing and finally his loss of capacity to perform the kind of labor for which he is fitted, this depending upon the calling in which he was engaged, the amount of money he was able to earn therefrom and the regularity of his employment.

In this case, taking into consideration the circumstances of the accident and the extent of the plaintiff's loss of time, suffering and capacity to labor, the court is of the opinion that a verdict for $1,250 for the loss of one joint of the right thumb is so excessive that it should be set aside, the plaintiff not being entitled to punitive damages.

P. H. Darby and Hendrick & Grayot for appellant; J. W. Bush and J. C. Hodge for appellee.

L. & N. R. R. Co. v. LAW.

Filed June 15, 1892. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Excessive verdict—A verdict for $2,000 for the loss of the end of plaintiff's left thumb is so excessive as to authorize a reversal, no circumstances of aggravation being shown.

Dulaney & Mitchell for appellant; B. F. Proctor, Thomas H. Hines and Edward W. Hines for appellee.

DAVENPORT, PETERS & CO. v. RULE & CO.'S TRUSTEE.

Filed June 15, 1892. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Sales of personal property—Passing of title*—Appellants made advances of money to R. & Co., with the understanding that they would be repaid in such lumber as they should, from time to time, order to be delivered to them on the cars at Frankfort, billed as they should direct. They were to be charged with the lumber as it was ordered and delivered. For the purpose of supplying the anticipated orders of the appellants, R. & Co. bought logs which would supply the kind of lumber experience had shown would be required for the purpose, and when the logs were converted into lumber they,

Digitized by Google

in anticipation of the orders from appellants, piled it in ricks and marked the ricks: "Sold; D., P. & Co.," but from the ricks thus marked R. & Co. sold to other parties at their will. R. & Co. having made an assignment for the benefit of their creditors, in this contest between their assignee and appellants as to the title to the lumber thus set apart, *Held*—That the title was still in R. & Co. at the time of the assignment and, therefore, passed to their assignee.

2. *Right to file amended pleading*—The court did not abuse its discretion in rejecting an amended answer asserting a lien, as it was not offered until after the case was submitted upon the issue as to ownership.

3. *Lien*—A promise by a debtor to pay his creditor out of particular property does not give a lien. Therefore, the amendment would not have availed any thing if it had been filed.

W. J. Hendrick and Reid Rogers for appellants; D. W. Lindsey for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. SEPTEMBER 15, 1892. No. 6

KENTUCKY COURT OF APPEALS.

BATES v. COMMONWEALTH.

(*Filed June* 14, 1892—*Not to be reported.*)

1. *Criminal law—Evidence*—On a trial for murder, it was error to admit evidence concerning the clothing and other insignia of a peace officer, worn by the deceased at the time of the homicide, which conduced to show that he as marshal was endeavoring to arrest the accused, it appearing that deceased at that time was not in fact a peace officer and not authorized to arrest the accused without a warrant.

2. *Same—Instructions*—The court should have instructed the jury that the deceased, at the time of the homicide, was not a marshal and had no right to arrest or molest the accused without a warrant.

3. *Evidence—Dying declarations*—The declaration of the decedent, made a short time before his death and not in the presence of the accused, ought not to have been admitted as a dying declaration, because not made in a situation "so solemn and so awful" as is essential to constitute it a dying declaration, although the deceased said at the time he believed he was going to die.

4. *Instructions—Self-defense*—Where the deceased was shot and killed, at a time when, acting in concert with another, with drawn pistol he was assaulting the accused, the latter, on his trial for murder, was entitled to an instruction authorizing his acquittal upon the hypothesis of his having shot the deceased, when he had reasonable grounds to believe he was in danger of loss of life, &c., at the hands of deceased's companion.

Robert J. Breckinridge for appellant.

W. J. Hendrick for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Lewis.

This is the second appeal from judgment convicting Pomp Bates, under a joint indictment against him and George Ward, for the

Digitized by Google

murder of George Wells, though the grounds now relied on are different from those upon which the judgment was reversed on the former appeal.

The facts proved on the last are not, however, essentially different from those found on the former trial and, therefore, it is not necessary to repeat them at length.

It appears from the record before us, as shown by the former one, that the accused was quietly and peaceably sitting down in a room of an eating-house waiting for his breakfast, as were several others of his companions, who were raftsmen on their way home in Clay county, when the deceased, accompanied by another person named Sampson, both being armed, entered the room and approaching one of them, Little, seized, disarmed and carried him to the door of the house, where he was delivered to one Russell, who had accompanied the deceased and Sampson to the house. The two then returned to where appellant was sitting and, as the evidence tends to show, asleep, and also took hold of him, when one of his companions, Ward, with an oath, demanded that he be turned loose. Whereupon Sampson turned his attention to Ward and they commenced firing, there being several shots fired in the room, creating of course a good deal of confusion.

In the meantime appellant and deceased were struggling but do not seem to have been together when the latter was shot and it is not entirely certain who did inflict the fatal wound.

The court permitted evidence to go to the jury showing the kind and color of clothes worn by deceased and also insignia of the office of marshal that he had about his person. Inasmuch as the deceased was not, at the time, marshal, nor, if he had been, was authorized to seize and arrest appellant without a warrant, it was prejudicial to appellant to admit any evidence having the effect to show or indicate to the jury he was invested with authority of a peace officer, especially as the court failed to instruct the jury, as it ought to have done, he was not marshal and had no right to arrest or molest appellant without a warrant.

The testimony of the witness, Helm, was clearly incompetent. What the deceased said to him, without the presence of appellant, a short time before his death, is not competent as a dying declaration, for he was not then, according to the witness's statement, in the situation "so solemn and so awful as is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." It is true he told the witness he believed he was goihg to die, but, manifestly, the statement, as it appears on the record, was not made under a sense of impending death.

The court instructed the jury to acquit appellant upon the hypothesis of his having reasonable grounds to believe he was then and there in immediate danger of loss of life or great bodily harm at the hands of Wells, the deceased, but erroneously refused to give an instruction upon the hypothesis that he had grounds to believe the same danger from Sampson existed.

The deceased and Sampson, both armed, were acting in concert, and together had, with pistols drawn, unlawfully assaulted appellant, and why he should be restricted to the single ground of defense that Wells, the deceased, was about to shoot him, when Sampson was not only present aiding Wells but was actually shooting in the room, we do not see.

For the errors indicated the judgment is reversed for a new trial, consistent with this opinion.

Digitized by Google

STROUD V. COMMONWEALTH.

(*Filed June* 16, 1892.)

1. *An indictment for murder must allege that the crime was committed feloniously*, and the fact that the accused was convicted of voluntary manslaughter only, does not cure the defect in the indictment, since a felonious intent is an essential element of the offense also.

2. *Defect in indictment not waived by entry of plea of not guilty*—The defect in the indictment, by reason of its failure to aver that the crime was done feloniously, was not waived by the entry of the plea of not guilty by the defendant and the swearing of the jury. Even after such plea and the swearing of the jury, the defendant's demurrer to the indictment should have been sustained.

3. *Criminal law—Evidence*—The outcry of one who was a mere by-stander at a difficulty, which resulted in a homicide, is not admissible, on the trial for murder of the survivor of the difficulty, as a part of the *res gestæ*. But if such outcry was made in the hearing of the accused, it may become competent as conducing to show the *bona fides* of the acts of the accused during the difficulty.

S. P. Love, E. Dudley Walker and Chas. Eaves for appellant.

W. J. Hendrick and R. Reid Rogers for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Chief Justice Holt.

This indictment is for the common law offense of murder. It is conceded upon the part of the State that it is defective in not charging that it was done feloniously. The case of Kaelin v. Commonwealth, 84 Ky., 354, is conclusive upon this point and it is needless to again review the authorities.

It does not matter that the accused, in this case, was convicted of voluntary manslaughter only, because it is a felony at common law and must be charged to have been done feloniously. This is an essential in every charge of felony at common law, and centuries of experience have confirmed the wisdom of the rule. A felonious intention is of the substance of every such offense. One can not be convicted of a felonious killing unless it be charged that it was done feloniously.

It is urged, however, that the defect in the indictment was waived by the failure of the accused to demur to it until after he had entered the plea of "not guilty" and the jury had been sworn, and this view the lower court likely adopted in overruling the demurrer.

There is no provision in the Criminal Code forbidding the filing of a demurrer after a plea of "not guilty" has been entered and the jury sworn to try the case.

This plea, by section 175 of that Code, amounts merely to a denial of every material averment in the indictment. It adds nothing to it, and it was expressly held in Ellis v. Commonwealth, 78 Ky., 130, that an objection to it in the form of demurrer, although made after the swearing of the jury, did not come too late.

In answer to a question by the accused a witness testified that immediately at the firing of the first shot by the accused some one said: "Look at Rose (the deceased), he is coming on to Stroud with a knife." This evidence was excluded. It does not appear that it was said by a co-adjutor or a participant in the difficulty.

Whatever is said by a party to the occurrance or a co-adjutor, in

Digitized by Google

cases of homicide, is competent to show the character or quality of the act; but the statement of a by-stander, who is in no way acting in concert with the parties to the transaction, does not constitute a part of the *res gestæ*. Bradshaw v. Commonwealth, 10 Bush, 576.

If, however, the statement was made within the hearing of the accused and just before or as he fired at the deceased, then it was competent as bearing upon the *bona fides* of the act. He was defending upon the ground that the killing was done in self-defense. Whether he had reasonable grounds to believe he was then in danger, whether he acted prudently, in good faith and under reasonably grounded fear of harm to himself were matters in issue, and if the statement was made as above indicated it was competent evidence to illustrate them.

Judgment reversed, and cause remanded for further proper proceedings.

MACKLIN V. COMMONWEALTH.

(*Filed June* 16, 1892.)

1. *Criminal law—Evidence*—Testimony concerning the conduct and conversation of the deceased, two or three hours before he was shot by the accused, and at a place a mile distant from the scene of the homicide and having no relation to or connection with the accused, was incompetent on the trial of the accused for murder.

2. *The statements of the deceased* concerning the homicide were properly admitted in this case as his dying declaration.

3. *Boundary of county along a turnpike road*—The county of Robertson, which was created after, and in part out of, Nicholas county, extends "to the Maysville and Lexington turnpike road; thence along said road," &c. In a case where a murder occurred on said turnpike road, it is held that the whole of said road is within the boundary and jurisdiction of Nicholas county. The division line of the two counties is not the center of said road.

Hanson Kennedy for appellant.

W. J. Hendrick and R. Reid Rogers for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Lewis.

A party of young men, July 5, 1891, being Sunday, went from Mayslick to Blue Lick Springs in a wagon for the purpose of playing base ball, the deceased, George Weisbradt being one of them. They had in the wagon a keg of beer, which was consumed some time before the homicide, and perhaps some of them, including the deceased, drank some whisky, procured at a place about one mile mile beyond the springs.

It appears that the deceased and some others aiding him took from a boy a pistol and removed the cartridges, but, subsequently, returned it to him.

About one o'clock the deceased and his companions had assembled around the wagon, preparatory to returning to Mayslick, when the accused, Macklin, approached, in company with a man named Holland, who said, pointing to the deceased, "there is the man who has your pistol."

There is, as generally occurs in such cases, some discrepancy in

Digitized by Google

the recital given by different witnesses of what was said and done by the parties, but there is no dispute of the deceased saying to the accused, in reply to the question asked, that he had given the pistol back to the young man, and it is also shown that he then offered to return the cartridges he had taken out of the pistol. Thereupon the accused said, "I would like to see any son-of-a-bitch take a pistol from me." Some of the witnesses say the deceased asked what he would have done, to which he replied, he would shoot him.

There is a great preponderance of the evidence of those who witnessed the difficulty that the deceased neither said nor did any thing indicating a purpose to assault the accused, but that, without provocation or demonstration, the accused then drew a pistol and shot him twice, once in his neck and once in his body, and then ran away and was finally arrested in the State of Texas and brought back to Kentucky.

The nearest approach to a demonstration on the part of the deceased, according to the testimony of two or three witnesses most favorable to the accused, was to advance with his hand behind him, stating he was willing to shoot with the accused. But that version of the difficulty can not be true, because both shots struck him on his left side. He was, at the time, without his coat and, an examination showed he had no pistol on his person or other weapon besides a pocket knife. Not long before seeking the deceased the accused had fired off his pistol twice and was heard to make threats of violence against the person who had taken the pistol from the young man referred to.

Counsel complains of the action of the court in excluding testimony in regard to conduct and conversation of the deceased two or three or more hours before he was shot at a place a mile away from the scene of the homicide, and having no relation to, or connection with, the accused, for it does not appear they had ever met before.

We do not see in what way the evidence could have relieved the accused from the legal consequences of his act or in the least degree excused or mitigated his offense.

Objection is also made to action of the court in permitting proved alleged dying declarations of the deceased. There can be no serious question of the deceased being, at the time, in the mental and physical condition necessary to make his statements competent proof as dying declarations, nor do we see wherein that part, which the court permitted to go to the jury, was inadmissible.

But we need not consider the question, because the evidence, independent of dying declarations proved, was so overwhelming and convincing as to leave no room whatever for the jury to reasonably doubt that the accused sought and maliciously took the life of deceased without any pretext of self-defense, although the verdict was only manslaughter and confinement in the penitentiary for 21 years. Nor is there any error to the prejudice of accused in the instructions.

The evidence shows the accused and deceased were, when the shooting occured, both standing west of the center of a turnpike road that constitutes the boundary line between the counties of Nicholas and Robertson, but the deceased was, immediately after he fell, removed to a house east of the road, where he died the next day. And counsel now argues that as the dividing line is the center of the road, and the shooting occurred west of the line or in Robertson county, the Nicholas Circuit Court had no jurisdiction of the offense.

In the case of Trustees v. Landon, 8 Bush, 679, cited by counsel,

Digitized by Google

it was held as a general rule that "where land is sold bounded by a highway or upon or along a highway the thread or center line of the same is presumed to be the limit and boundary of such land, in strict analogy with the case of a stream of water not navigable, and the same rule applies to a private street as well in the city as in the country, opened by the grantor upon which he sells house-lots, binding upon it."

The reason for thus describing the boundary of land bordering on a highway or public street is, that although the land may be thus dedicated to public use the original owner retains the fee and right of property not incompatible with the public use, and when abandoned by the public, use and possession of the land revert to him; and, consequently, as between subsequent vendees and owners of land on each side of such highway or street the division line is assumed to be the center thereof. There may, however, be such clear and precise description in a deed or will as to restrict even the title of the grantee to the edge of a highway or street. But it will be observed that the public has the actual possession and use of such street, and the control and jurisdiction of it is in the county or town or city, notwithstanding the fee may be in the original owner or his vendees.

The rule laid down in the case cited does not nor should apply in fixing the boundary line of a county, there being no reason for it, and, consequently, the division line between two counties must be determined by the actual description given in the legislative act or according to actual survey made in pursuance of the statute.

So far from there being any reason for assuming the center of a public highway as the dividing line between two counties, contrary to the actual description of it, there is a public necessity for the highway to be wholly within and under jurisdiction of one or the other of such counties.

The county of Robertson was created after and in part out of Nicholas county and the boundary, according to the calls, to begin "at the bridge on Licking river" where the Maysville and Lexington turnpike road crosses said river; thence down said river and, according to calls mentioned, "to the Maysville and Lexington turnpike road; thence with said turnpike road to the beginning."

It seems to us, as the boundary line of Robertson county, as thus in terms described, extends only to the turnpike, it can not be fairly regarded as including any part of it, but the whole must be treated as within and under jurisdiction of Nicholas county, where it was before Robertson county was created, for the line of Robertson county can not be fixed at the center of the road, consistently with either the language used, properly construed or public policy.

As, therefore, in our opinion, the shooting, as well as the death, occurred in Nicholas county the circuit court of that county had jurisdiction.

MATHEDY V. COMMONWEALTH.

(*Filed June* 16, 1892—*Not to be reported.*)

1. *Criminal law—Dying declarations*—The statements made by the deceased at the time he requested some one to go for a physician, ought not to have been admitted as dying declarations, although he stated at the time he was going to die. His desire to have a physician indicates that he was not at

Digitized by Google

the time under such a solemn expectation of impending dissolution as is necessary to render the statements admissible as dying declarations.

2. *Evidence—What dying declarations are competent*—Dying declarations are admissible only when they consist of statements of facts, concerning which the deceased, if living, would be permitted to testify; when such declaration is a mere expression of opinion, it is not competent.

On the trial of appellant for murder by poison, the dying declaration of deceased that the accused had poisoned him was a mere expression of opinion and, therefore, not admissible.

3. *Evidence*—On the trial of appellant for murder by poisoning the deceased, it was error to admit evidence concerning threats made against deceased by one with whom the appellant had no connection, and evidence of the purchase of arsenic by such person, of which appellant had no knowledge, was incompetent.

4. *Instructions*—It was error to refuse to instruct the jury that if deceased caused his own death, and not in any way through the agency of the accused, they should acquit the accused, and that to convict the accused of the crime of poisoning the deceased, they must believe he gave the wine to the deceased to drink, with a knowledge that it contained poison.

J. W. S. Clements, W. E. Selecman and John W. Lewis for appellant.

W. J. Hendrick, C. B. Butner, Finley & Shuck and Reid Rogers for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted in the Washington Circuit Court for the murder of Jeff Holliday, the offense said to have been committed by putting arsenic in wine that was drank by the deceased at the instance of the accused. He was convicted and sentenced to be hanged.

The facts show that George, Vest, a son of Cal. Vest, was killed by one of Holliday's sons, and that Vest (the father) when informed of the fact stated *that it was not Holliday's son that did the killing but Jeff Holliday himself, and that he intended to get him for it, and if he failed to get him one way he would another.*

It seems that about six weeks prior to the death of Holliday, Cal. Vest sent his son, Merrill, to Harrodsburg for arsenic to cure, as was said, some diseased hogs. A brother of the appellant went with Merrill. This brother purchased the arsenic and handed it to young Vest, who took it home.

The testimony fails to connect the appellant with the knowledge even that arsenic had been purchased, and the only evidence of any relation between the accused and the Vest family is, that Vest had loaned the appellant his gun and also his cart at one time, but nothing appears from the testimony that would make the appellant the particular friend of Vest or his family.

The statements of Vest were permitted to go to the jury for the purpose of showing a motive on the part of the appellant for taking the life of Holliday, and whether or not competent will hereafter appear.

The conviction was had in this case upon the statements made by the deceased shortly before his death, that went to the jury as dying declarations. The deceased, a short time before he died, stated that he met the accused in the highway and was given a drink by him out of a bottle containing wine; that after he drank the ac-

Digitized by Google

cused put the bottle to his own mouth but drank nothing, letting the bottle fall on some rocks that broke it into several pieces; that the wine was very bitter and he was burning up immediately. His muscles were contracted, had convulsions and something like tetanus.

He stated at the time he was suffering that the accused had given him poison and requested those present to go for a doctor and notify his family that he was going to die. Where he says he drank the wine is about six hundred yards from the house in which he died, and not more than fifteen minutes elapsed from the time he drank the wine until he was a dead man. The witnesses describe his muscular movements as violent—a constant jerking all over, rigidity of the limbs and a clattering together of his teeth when an attempt was made to give an antidote. He evidently had lock jaw from the intense suffering produced by what had been taken internally. Physicians to whom the symptoms were detailed pronounced it strychnine that had been taken by him, but a chemist of high repute, analyzing the contents of the stomach, said it was arsenic.

The deceased had been addicted to drink for a long time; was very dissipated and there is some testimony conducing to show that he was subject to these *jerking spells* as stated by the witness, but it is, nevertheless, evident from the testimony of the learned chemist, that arsenic had been taken by him, and whether death could have resulted in so short a time from that poison is a question to be more readily answered by the chemist than this court, although it is manifest that the rapid progress of the poison in producing the fatal result leaves the matter in doubt.

The testimony of the Freemans and the Calvins as to what was said by the deceased should have been excluded from the jury. They were not dying declarations, as his desire to have a physician sent for indicates clearly that the deceased had hope of living, although he stated at the same time he was going to die. The statements were not made under a sense of impending dissolution, that, under the well-recognized rules of evidence, are necessary to make such statements competent.

In this vital issue between the Commonwealth and the accused the latter has made a statement perfectly consistent with the theory of the defense, and to turn the scale in favor of the State by the declarations of the deceased, made at a time when there was no opportunity to cross-examine, or to elicit any thing from him that might be beneficial to the defense, the court should be satisfied that the statements fall within the rule making such statements competent. Other witnesses made proof of his statements when no hope of recovery seems to have been entertained, and that proof was properly admitted, except that part of the statement made to the effect that *the accused had* poisoned him. That should not have gone to the jury. If living, the witness would not have been allowed to make the statement.

The facts occurring at the time, and the suffering of the deceased soon after the drink was taken, were competent, but that the accused poisoned him was a mere matter of opinion. The law is well settled that the declarations of the deceased are admissible only to those things to which he would have been competent to testify when sworn as a witness, and must relate to facts and not to mere opinions. 1 Greenleaf, 159; 59 California, 640.

There is, however, a more fatal objection to this conviction, as it now appears, than the admission of the statement that the accused had poisoned him. It appears from the uncontradicted state-

Digitized by Google

ments of witnesses that the accused and the deceased were on friendly terms, and that no motive existed for his taking the life of the deceased, and the argument for conviction must have been had on the fact that Vest had hired or induced the appellant to commit the offense. In arriving at such a conclusion we enter the field of speculation, and must assume, without proof, that because Holliday's son killed Vest's son that, therefore, Vest employed the accused to take Holliday's life. There is no testimony that the accused had espoused the cause of the Vests, or that he had any knowledge that arsenic had been purchased. He was as friendly with the one side as the other. Vest had loaned him his cart, and perhaps his gun at one time, but this throws no light as to the manner in which the crime was committed, nor did it connect the accused with its commission or make him a party to this family quarrel. In permitting, therefore, the statements of Vest to go to the jury as to what he intended to do with the deceased, and the proof of the purchase of the arsenic of which accused had no knowledge, laid the foundation for assuming that Vest must have employed the accused to take Holliday's life.

The testimony was clearly incompetent, and the fact that Vest proposed to aid the accused in his defense is to be attributed to his hostility to Holliday, and as the natural result of his feeling towards the partisans of the deceased, and not to the fact that the accused had carried out any purpose of Vest to take Holliday's life.

The accused may be guilty of this horrid crime, but if so he should be tried and convicted upon competent testimony. Again, we think the court should have told the jury that if the deceased caused his death by his own act, and not in anywise through the agency of the accused, they should acquit, and that to constitute the accused guilty of poisoning the deceased they must believe that he gave the wine to the deceased to drink and with a knowledge that it contained poison. This is in substance contained in instructions A and F offered by the defense and refused. In our opinion the appellant is entitled to a new trial.

Judgment reversed and remanded for that purpose.

BAKER V. COMMONWEALTH.

(*Filed June* 18, 1892.)

Criminal law—Self-defense—One rightfully in the possession of his own land is not required by law to retreat when a trespasser enters upon the premises with the avowed intention of forcibly dispossessing him. Such owner may "stand his ground" and use such force as is reasonably necessary to protect his person and property.

While the owner of land is not justified in taking the life of a trespasser to prevent a mere trespass; yet if the trespass is forcibly committed, with the intention to kill the owner or to do him great bodily harm in case he resists, the owner may resist such trespass and kill the intruder, if he has reasonable grounds to believe this to be necessary in order to protect his own life.

James N. Brafford, Wilson & Rawlings and Knott & Edelin for appellant.

W. J. Hendrick and R. Reid Rogers for appellee.

Appeal from Knox Circuit Court.

Digitized by Google

Opinion of the court by Judge Bennett.

The appellant and his father had had a law suit with David C. Baker, in which some real estate, belonging to the appellant and John W. Baker, was sold and purchased by David C. Baker.

The circuit court held that David C. Baker was entitled to said land and put him in possession of it. This court reversed that decision, holding that the appellant and his father were entitled to the land. Thereupon upon the return of the cause to the circuit court, that court caused, by proper writ, the appellant to be put into the possession of said land, except the house and about two acres and a half of land which the appellant and David C. Baker agreed that the latter might hold until the end of that year as tenant.

The evidence tends to show that after the year had expired David C. Baker concluded to regain and hold, by force, the land that the appellant had been put into the possession of. David C. Baker's brother, Wm. Baker, knowing that said land had been restored to the possession of the appellant by order of the court, joined with him to enter upon said land and take forcible possession of it and fence it up. They induced others to join them in the enterprise. And they did, pursuant to said purpose, enter upon said land and commenced fencing it up.

The crowd thus engaged, or the most of them, went upon said land, armed with pistols, guns and rifles. The evidence tends to show that they proposed to take forcible possession of the appellant's land and to kill the appellant and the tenants of the appellant if they attempted to resist their entry.

This condition, as appears from the record, caused the appellant and his tenant to arm themselves to protect themselves against what appeared to them (and, we think, with reason) to be a trespass upon the appellant's property with the felonious intention of killing them if they attempted to resist the entry.

On the morning of the killing the deceased, Wm. Baker, and others went upon said land, the most of them being armed with pistols, shot guns and rifle guns. The evidence tends to show that the appellant and Ferguson saw them coming as they approached within a hundred yards of appellant's stable, to which they were apparently coming. The appellant and Ferguson then took shelter in the stable, armed with guns. When the trespassers, Wm. Baker being in the lead, had approached to within forty yards of the stable the appellant, as the evidence tends to show, ordered them to stop, and Wm. Baker refused and started forward toward the stable and, as he did so, reached for the gun that Patterson was carrying, Patterson being close by. Just then the appellant shot Wm. Baker from from the stable and then a general firing from both sides commenced.

The lower court's instruction to the jury upon the subject of self-defense fails to tell the jury that appellant, being on his own premises, was not bound to retreat, but had the right to stand his ground and use such force as was reasonably necessary to repel the forcible entry upon his premises.

The rule upon that subject, as applicable to this case, is, that a person is not bound to retreat when upon his own premises, but may stand his ground and defend his person or property, but he is not justified to take the life of a mere trespasser or do him bodily harm to prevent the mere trespass. But if the trespass is committed with the intention of killing or doing the owner of the property great bodily harm, if he resists the trespass, in such case the trespass is

Digitized by Google

committed with felonious intention against the owner and he has the right to stand his ground and kill the felonious trespasser if he has reasonable ground to believe that it is necessary to protect his life or to prevent great bodily harm at the hands of the trespasser.

According to the facts appearing in this record the instructions upon the subject of conspiracy should not have been given.

The judgment is reversed, and the cause is remanded with directions to grant a new trial and for further proceedings consistent with this opinion.

RICHARDSON V. THE MUTUAL LIFE INS. CO. OF KY.

(*Filed January* 21, 1892.—*Not to be reported.*)

1. *Life insurance—Non-payment of premiums—Conditions precedent and subsequent*—Where a policy of life insurance provides that in case of default of payment of the annual premium on the day it falls due, the policy shall then become void and the insurance shall cease; the payment of the premiums on or before the day they were due was a condition precedent to the continuance of the risk, default in which terminated the policy.

2. *Same—Forfeiture—Waiver*—The fact that the insurance company very frequently indulged its policy-holders by accepting premiums within thirty days after they became due and continued the insurance in force in the meantime, creates no obligation on the part of the company to waive a forfeiture incurred by default in prompt payment of the premium; and where such default continues for nine days and the insured dies, the company will not be required to accept the past due premium from the beneficiary of the policy.

3. *Same—Rebates*—A policy provided that after the payment of two annual premiums the insured could use the accrued rebate as a credit on the third premium or to extend the policy for a definite time. After the payment of *one* premium on a policy the company offered to credit a rebate on the second premium, but notified the insured that if such premium was not paid when due, the policy would be terminated, &c. The insured made default in payment of the second premium and died nine days thereafter. *Held*—That the amount of rebate did not prolong the period of insurance, and the policy was forfeited by the failure to pay the second premium.

W. G. Anderson, Simrall & Bodley and Wm. Lindsay for appellant.

Wm. Mix and Humphrey & Davie for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The appellee issued an insurance policy on the life of E. T. Richardson for the benefit of the appellant, who was his wife. The premium, to be paid each year on or before the 22d of February, was $413. One of the premiums (the first) was paid, and a short time after the second premium became due Richardson died.

He had been notified that the second premium would fall due and that he was entitled to a credit upon it by reason of a dividend of $42.10. He died on the 29th of February, seven days after the second premium should have been paid. He attempted to borrow the money to meet the payment, but failed. His policy was cancelled on the books of the company by reason of the non-payment, and the beneficiary of the policy having tendered the premium to the com-

Digitized by Google

pany after her husband's death, and the company declining to pay the policy, this action was brought to recover the amount of the insurance.

The ground of recovery is, that it was the custom of the company to waive the prompt payment of premiums and to accept them within thirty days after they became due, a fact known to the insured.

Further, that the company had elected not to cancel the policy, and was applying to the premium due the $42 of profits that had been set apart for that purpose.

That the company had indulged its patrons by accepting the payment of the premiums long after they had become due, affords no argument in favor of the recovery in a case like this. Doubtless, if the insured had been a well man, or in good health, at any time within a reasonable period after the premium matured, the company would have received the money and restored the policy; but the mere indulgence to those insured ought not to affect the written contract, or require the company to accept the premium after its maturity, when the insured is in bad health and perhaps in a dying condition. The insured was in bed, sick, when the application for indulgence was made by his agent, Anderson, and died in a few days after.

The fact of his illness was unknown at that time to both Anderson and the company, but it is apparent if Anderson had tendered the money on that day it would have been received, or the policy would have been restored if the insured had recovered his health and made an offer to pay within a reasonable time.

Such indulgence, it seems to us, should not prejudice the company or relieve the insured from the necessity of complying with his contract. What is that contract? It reads: "In consideration of the sum of four hundred and thirteen dollars and — cents, and of the like sum, to be paid on or before the 22d of February in every year during the continuance of this contract, do insure the life of E. T. Richardson in the sum of $10,000 for the term of his natural life, &c., but in case of *default of the payment of any premium* on the day it falls due, the policy shall then become void and insurance shall cease."

This contract was to last during the life of the insured, but was subject to be defeated by a failure to comply with its terms. This court held in effect, in the cases of Gregory v. St. Louis Mutual, 10 Bush, 310, and Montgomery v. Phœnix Insurance Company, 14 Bush, 51, that the payment of the premiums was a condition precedent to the continuance of the risk, and while some of the cases referred to by counsel determine that the payment is a condition subsequent, the non-performance of which may incur a forfeiture, or may not, according to circumstances, we are not disposed to follow them, and for the reason that the contract of insurance by its plain terms ends the liability on the part of the company upon the failure to pay. It is true this provision of the policy, in regard to non-payment, may be waived by the company, but there is nothing in this case showing a waiver, but an effort on the part of the company to enable the insured to restore his lost rights if within his power.

Again, it is provided by this policy, that after the payment of two premiums the assured can use the rebate on the third premium, either as a credit upon it or as extending the policy for a definite length of time. The insured had not paid the second premium, and was not entitled to the rebate; still the company offered to give him the rebate on the second premium, and wrote the insured to that effect, with the notice that "if the premium was not paid on or before the

Digitized by Google

day it matured the policy would terminate, except as provided in the by-laws, after two annual premiums have been paid in cash, and can be renewed only by the consent of the company."

No payment was made, and the policy cancelled on the books of the company. Merriweather testified that the policy was cancelled on the 23d of February, 1888, and this was not a mere opinion of his, *that the failure to pay amounted to a cancellation*," but he states the policy was cancelled on the books of the company.

It seems to us to adjudge the appellee to have been a member of the company at his death, from the facts before us, would be to dispense with the necessity of paying premiums as they became due, and require the company to pay the insurance money, in the face of an expressed stipulation to the contrary.

The judgment below is affirmed.

BOURNE, &C. V. BOURNE'S ADM'R, &C.

(*Filed May* 12, 1892—*Not to be reported.*)

1. *Right of executor to pay fund to devisee holding only life estate in it*—A testatrix directed her executors to sell her entire estate and divide the proceeds among the devisees named by her, to one of whom she bequeathed a share of the proceeds for life, with remainder to his children. The executors paid such fund to the life tenant, and he having died insolvent, the remaindermen seek to recover the principal of the fund from the executors. *Held*—That the will indicates an intention on the part of the testatrix that the life tenant should possess and use the fund bequeathed to him, and, therefore, the executors had a right to pay such fund to him, and are not liable to the remaindermen therefor; they must look to the estate of the life tenant for their legacy.

2. *Action to settle executors' accounts—Res adjudicata*—The remaindermen, having been parties to an action in which the executors' accounts were settled, are concluded by that settlement, although they were infants at the time, and no answer was filed for them. Such judgment as to them was not void, but voidable only.

Thomas Turner and C. Cyrus Turner for appellants.

Wm. Lindsay and Stone & Sudduth for appellees.

Appeal from Bath Court of Common Pleas.

Opinion of the court by Judge Pryor.

Mrs. Nancy Jones died many years since in the county of Bath, leaving a considerable estate in slaves and land. She had no children and left a will by which she appointed B. J. Petitt and Walker Bourne her executors, with the direction to sell all of her estate of every description, and when the money was collected the executors were directed that "the whole be divided equally amongst the children of my brother Walker Bourne, and such as he may hereafter have by his present wife, and the children of my brother Martin Bourne, by his present wife, except three of his sons (naming them), who were to have no interest in her estate." A subsequent clause of the will provided that the interest of William N. Bourne (a son of her brother Walker Bourne), was at his death to go to his two sons, Albert Bourne and Henry Bourne.

The sixth clause of the will provided that if one of the children

Digitized by Google

died without issue his portion was to go to his surviving brothers and sisters, except William, a son of her brother Walker Bourne, who had only a life estate.

The two named as executors qualified and sold the entire estate of the devisor, and settled with all the devisees, and among them William Bourne, the son of Walker Bourne, who had only a life estate, they having paid over to him, or accounted to him in full for his interest, as well as the other devisees.

William Bourne, the life tenant, or who had a life estate in the proceeds of the devisor's estate, having died in the year 1886, insolvent, his two sons, entitled to the remaining interest, the present appellants, instituted this action to recover of the executors the principal of the sum devised to them in remainder, on the ground the executors had no right under the will to pay the principal sum to their father, but that under the will they should have paid him only the income, or, if paying the principal, should have required a bond with surety protecting the interest of the remainderman.

This case is somewhat analogous to the case of Hill v. Harding, decided at the last term of the court on appeal from the Henderson circuit, 13 Ky. Law Rep., 380. It raises the question of intention on the part of the testator as to the disposition to be made of the devise to the life tenant when the executors come to settle In that case cited it was held that the testator evidently contemplated that the life tenant should have the use and possession of the principal as well as the income, and that at his or her death the remainderman must look to the life tenant's estate for his share and not to the executor.

In the case before us the intention of the devisor is equally apparent. There is no allegation of fraud on the part of the executors, or of any fact showing that the executors, or either of them, had any knowledge of the insolvency of the life tenant; but, on the contrary, the facts of the record indicate clearly that the father of these appellants was at the time he settled with the executors, perfectly solvent, and the sole question presented is as to their right to pay the principal to the life tenant.

The will creates no trust on the part of the executors other than such as devolved on them as executors, and that was to sell the estate and divide the proceeds between the children of the brothers of the devisor. They were directed to divide the fund in this way, and had no reason to anticipate the insolvency of the life tenant at a future day, and the loss of the remainder interest. They were not directed to pay the income over to the life tenant, but directed to divide the fund between the children of the devisor's brothers, the life tenant being one of them, and the fact that he had only a life estate with remainder to his children, with such a clause in the will, gave to the executors no reason to believe that his purpose was to convert them into trustees that they might hold this part of the estate in their hands until the death of the life tenant.

The will should indicate, at least with reasonable certainty, that the executors are expected to hold as trustees as well as executors, and in this case it is manifest that the purpose of the devisor was to give to her nephew the use and possession of the estate going to him, although he had an interest for life only.

The duty the executors had to perform was to convert the entire estate of the testator into money and divide it as directed. When the will directs a division, as in this case, by the executors, as soon as they converted the estate into money, with no restriction as to the use of the corpus of the estate of the life tenant, and no trust

Digitized by Google

created by even a fair inference to exist after the discharge of these executorial duties, we are satisfied no liability rests upon the executors to those in remainder, but the life tenant holds in trust for the remainderman and his estate is alone liable.

It also appears that these remaindermen had ample opportunity to have protected themselves against the improvidence of the life tenant in an action instituted in the Bath Circuit Court by these executors for the settlement of the estate and the protection of their interests. In that action the executors were credited in full for their payment to the life tenant. The appellants, although then infants, were parties to that action and served with process in the original proceedings. One of the appellants filed an answer in that case with a view of protecting himself as against the life tenant, and finally withdrew it, and from the testimony in this case both of the appellants declined to interfere for their own protection so as to prevent the use of the corpus of the estate by their father.

It is true the judgment in that case reserved the question as to their interests in the estate, and why this was done does not appear. They were parties to that action, and from the proof were of age when the judgment was entered. And, although no answer was filed for them (they being infants when served), the judgment as to them was not void but erroneous as settled by numerous decisions as to the question of practice at that time. Regardless, however, of that action, which we think was final, because it approved the acts of the executors, it is plain, we think, that no liability exists and that the testator intended the principal to be paid over to the father of these appellants.

Judgment affirmed.

CARTER V. WEST, &C.

(*Filed May* 19, 1892.)

1. *Pleadings—Filing of amended answer*—In an action to set aside a conveyance, on the ground of fraud and undue influence, a decree was entered setting aside the deed, mainly on the ground that the relation of attorney and client existed between the beneficiary of the conveyance and the person at whose instance it was drawn. The decree having, on defendant's motion, been set aside, because there was no allegation in plaintiff's pleading of such relation of attorney and client between the parties, the court permitted an amended pleading to be filed, setting up the relationship, and then rendered the same decree. *Held*—That this was no abuse by the trial court of its discretion concerning the filing of amended pleading.

2. *Attorney and client—Privileged communications*—M., an old woman, having purchased a house and lot, caused the deed to be made to herself for life, with remainder to C.; after her death, her heirs brought suit to set aside the conveyance of the remainder to C., on the ground of fraud and undue influence. *Held*—That in such action the attorney that M. employed, in purchasing the lot, to see that she obtained a good title, &c., could not testify concerning what M. said to him at the time, the relation of attorney and client existing at the time and such statements being "privileged communications."

3. *Same—Burden of proof*—Where it is alleged in such action that C. was the general legal adviser of M., the burden of proof is on him to show that the voluntary conveyance to him was not procured by fraud or undue influence, although M. consulted another attorney, than C., in negotiating the purchase of such property and in having the title examined and the conveyance executed, &c.

Digitized by Google

4. *Same—Pleading*—Where the petition alleged that C. was the general attorney of M. at the time of the voluntary conveyance, an answer by C. denying that he was M.'s attorney in drawing up the voluntary conveyance and which affirmatively set out all the circumstances connected with such conveyance, is but a traverse of the petition to which no reply is necessary.

Samuel McKee for appellant.

O. J. Owen Brewster, R. M. Buckly, C. B. Seymour, J. M. Chatterson and Samuel S. Blitz for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

Milly O'Bannon, a colored woman, over sixty years of age, having drawn a considerable sum of money as a pension, purchased with a part of it a house and lot, the deed being made to her for life with remainder to appellant, Samuel Carter, but in the event he did not outlive her then the fee-simple to vest in her. It recited that he was her nephew, when in fact they were not related. She died childless, and the appellees, who are collateral kindred, brought this action to annul the deed as to Carter, upon the ground that it was secured through undue influence and fraud upon his part. This was in substance the averment of the petition, the particular circumstances of the alleged fraud, as set forth, being that he falsely represented to her he was related to her, and that he had been mainly instrumental in procuring her pension. The court set aside the deed, basing his opinion largely upon the ground that the relation of client and attorney existed between them.

Its attention being called to the fact that this was not averred in the petition, the judgment was, upon Carter's motion, set aside, and thereafter the court, over his objection, permitted an amended pleading, averring the existence of such relation, to be filed.

Waiving the question whether this was necessary to the introduction of testimony upon this point, yet there was certainly no abuse of that broad discretion which, in furtherance of justice, has been wisely given to the trial court as to permitting a party to amend his pleadings. Civil Code, section 134.

An attorney was retained by Milly O'Bannon to see that she got a good title to the property, and he prepared the deed that was made to her. It does not appear that Carter had any direct connection with it save he went for the attorney, but, as he testifies, by the direction of the old lady.

He was not present when the deed was prepared. The testimony of the attorney as to what she then said to him was held by the lower court to be incompetent.

Section 606, subsection 5 of our Civil Code, says: "No attorney shall testify concerning a communication made to him in his professional character by his client, or his adviser thereon, without the client's consent."

This provision is equivalent to the "privileged communication" of the common law, and is in substance merely declaratory of it. The rule exists because it is necessary to the safe and pure administration of justice. Public policy requires it. If it were not the rule no man would dare to consult an attorney. It is not personal to the attorney, but for the protection of the client.

The cases are somewhat conflicting, whether it applies where one is merely called in to prepare a deed, and directions are given by the employer as to how it is to be done. Indeed, it was attempted in

Digitized by Google

England at one time to confine the rule to communications made in the prosecution or defense of a suit either pending or about to be instituted. This was, however, without reason, and it is now the settled rule at common law that if the communication be to one who is at the time professionally employed, and occupies the attitude of a legal adviser, it is privileged and the seal of silence is upon it, subject to be broken by the consent of the client only.

In Crisler v. Garland, 11 Smedes and Marshall, 136, an attorney had been called in his professional character to write a deed, and communications were made to him as to the object of it; and although he declined the retainer, yet he was not allowed to disclose the communications.

The case of the Bank of Utica v. Mersareau, 3 Barbour's Chancery, 528, is to the same effect, and undoubtedly the communication to be priviledged need not relate to the prosecution or defense of a pending or contemplated suit.

It is said by Mr. Greenleaf, in his work on Evidence, volume 1, section 241, that the rule applies although the attorney be consulted as a conveyancer merely, and it seems to us it should, in view of its purpose, have a broad and liberal construction.

If the attorney be applied to for aid in his professional character, the veil of secrecy should be made to cover any communication made to him by the client, subject to be lifted by the client only, and this veil is not removed by the cessation of the employment, or the death of the client. 1 Greenleaf on Evidence, section 243; Bank of Utica v. Marsareau, *supra*.

In this instance the attorney was acting in his professional character. He was the legal adviser of the party, and not a mere scrivener. She was relying on him to see that she got a good title. He was called upon by her in his professional character. What she said to him was in that character, and was, therefore, in its nature private. It was said under the seal of professional confidence and in the absence of her consent was not competent evidence.

The answer to the amended petition, averring the relation of client and attorney between Milly O'Bannon and the appellant, Carter, sets out in the third paragraph the circumstances under which the deed was made, by whom it was drawn, and avers that the appellant had no connection with it. This was not replied to; and it is, therefore, urged that it stands as an admitted fact Carter was not her attorney.

If he in no way occupied that relation to her, then it is merely a question whether the deed was the result of undue influence and fraud upon his part with the burden of showing it upon the appellees.

If, however, he did occupy that relation, then the burden shifts, and in order to uphold the voluntary conveyance it must clearly appear it was free from all undue influence or fraud. Story's English Jurisprudence, section 311.

This is true, although he was not her attorney in the transaction under investigation. It is sufficient if he was her general adviser.

The amended petition did not aver that he was her attorney as to the making of the deed, but that he was her general adviser in his character of claim agent and lawyer. The undenied third paragraph of the answer is but a detail of evidence, and is in substance but a denial of the existence of the alleged relation between them; and if it were necessary to allege it in order to prove it, yet the failure to deny the particular matters of evidence stated in the reply did not render it an admitted fact that the relation of lawyer and client did

Digitized by Google

not exist. The facts stated were not an avoidance of what was charged in the amended petition.

It is shown that Carter claimed in the old lady's presence that he was kin to her. It is certain that he was acting for her in the character of legal adviser as to her application for a pension, and, probably, otherwise.

His own pleadings admit that he wrote letters for her as to her claim for a pension.

To other persons he claimed to have been mainly instrumental in getting her money—whether the pension money, or some bounty money, which was not gotten until after the deed was made, does not clearly appear. Certain it is, she thought his services mainly procured the pension, when they did not, and it is difficult to see how this belief arose, or a desire to say he was kin to her, when he was not, unless by reason of suggestions from him and his influence over her.

Her statements to others, though made subsequent to the making of the deed, that the appellant had in the main obtained her pension, were competent as tending to show the belief under which she had acted; and, even aside from them, the circumstances proven are sufficient to support the conclusion of the chancellor.

She was quite old and wholly uneducated. Her condition made her an easy subject of control. The parties were not dealing at arm's length, but a relation of confidence existed.

The chancellor, who likely knew the parties and witnesses, has found, as a matter of fact, that the deed was the result of undue influence and fraud upon Carter's part, and the finding should not, in our opinion, be disturbed.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

JORDAN, SURV. PART., &C. V. SWIFT IRON & STEEL WORKS.

(*Filed April* 6, 1892.)

1. *Assignment for creditors—Attorney's fees*—An assignee for the benefit of creditors can not bind the trust estate by contracts with attorneys for specific compensation. In settling the estate the chancellor will, notwithstanding such contracts, allow attorneys only reasonable fees.

2. *Evidence as to value of legal services*—In an action for legal services the judgment of witnesses as to the value of such services is not, as a matter of law, to be accepted by the jury in place of their own. And for a much stronger reason is it the province of the chancellor to exercise his own judgment as to the value of such services.

Digitized by Google

Root & Root for appellants.

Geo. Washington, R. W. Nelson, J. C. Wright and C. J. Helm for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Brent.

The issue in this case is between W. E. Jordan, a surviving partner of the law firm of Jordan & Jordan, and the assigned estate of the Swift Iron & Steel Works, represented by Adam Wagner and his associates in the administration of the trust created by the deed of assignment.

Jordan & Jordan appear in the consolidated actions of Adam Wagner, assignee, &c., and John Trapp v. The Swift Iron & Steele Works, brought to settle said trust, asking to be made parties to that proceeding and setting up a claim for the value of legal services rendered said Wagner as assignee.

They ask to have their claim referred to the master, to whom the duty of auditing and passing upon demands against said estate had been committed by some previous orders of the court. They, at the same time, filed a bill of particulars, which they afterwards amended, setting out with some detail and circumstance the nature of the services they claimed to have rendered, and what they assumed to be their value.

The aggregate of that claim was $3,750. This was to be reduced by a credit of $1,000—paid by the assignee before its presentation to the court.

The order of reference asked for was made, proof was taken by the claimants, and a report made by the commissioner. In this report, passing seriatim upon the items of the account stated, he reaches the conclusion that all the services rendered by Jordan & Jordan were not worth more than $750; that they had already received, on account of those services, $1,000 from the assignee, Wagner, and were, therefore, entitled to nothing.

It appears to us that, according to Mr. Isaac Jordan's statement in his deposition (see page 58 of the record), appellants have, in fact, gotten at least $1,200 in fees from the estate in this matter, since they either have gotten or are to get $400 from the Wheeling Steel Works, an allowance for counsel fees made to the Swift Iron & Steel Works in the adjustment of that matter, and which has been, or is to be, paid to plaintiffs and their associate in the transaction, Col. Nelson.

We presume, from what Mr. Jordan says of Col. Nelson's connection with this particular case, this fee will be divided or in some way apportioned between them.

There is no doubt that this case was fully heard upon the reference, report and exceptions. It is certain that no judgment, by regular pleadings and proceedings, was sought or expected, and no steps were taken nor any preparations made by either party looking in that direction at any stage of the matter. This makes it unnecessary for us to go into the questions of the effect of the failure to formally controvert the allegations of the original petition or any other questions raised by plaintiffs of like nature.

The appellants, in asking for a reference to the master to take proof as to nature, character and value of their services, and, by excepting to his report, chose their mode of trial and must abide by their choice.

Digitized by Google

This brings us to the real question before us, which is, whether or not, upon the whole case as presented by the record, we concur in the judgment. We do not think the chancellor erred in refusing to attach any determining weight to the testimony as to definitive contracts between the assignee and Jordan for specific compensation, nor yet—no matter what might be the preponderance of opinion on the part of the professional gentlemen testifying—in exercising his own judgment in arriving at a conclusion as to the value of appellant's services.

In cases of this kind to permit an assignee to make contracts binding the estate to pay whatever he might think reasonable and proper, and that, too, in anticipation of the services to be rendered, would be indeed improvident. We do not think such a practice has ever met the approbation of any court of equity, and counsel certainly never thought of it at first in this case, as is evident from the very terms of their application for the order of reference; they pray that "their claim be referred to the master to take proof in writing as to the nature, character and *value* of said (their) services."

In the case of Head v. Hargrove, 105 U. S., 45, the court says: "In an action for legal services the opinions of attorneys as to their value are not to preclude the jury from exercising their own knowledge and ideas upon the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of the witnesses is *not*, as a matter of law, to be accepted by the jury in the place of their own."

If this be the right of the jury, with what peculiar propriety does it belong to the chancellor, presumptively so much better informed as to the very subject-matter.

Being then of the opinion that the case was prepared and heard in the way appellants had indicated they preferred, that the chancellor, in refusing to be concluded by either the statement as to specific contracts or the opinions of other lawyers as to values, in no way abused his power to try both law and facts, we have proceeded to examine the evidence in the case, and do not think we are justified in disturbing the conclusions assumed by the court below.

As there is nothing novel in the facts and no principle of law involved in which we have not already adverted, we think any elaborate discussion of the considerations which have lead us to this conclusion would be a waste of time to no good end.

The judgment is affirmed.

N. N. & M. V. Co. v. Commonwealth.

(*Filed May* 4, 1892.)

1. *Indictment—Dismissal and re-reference to grand jury*—Where an indictment for a misdemeanor is dismissed and the prosecution re-referred to the grand jury, the defendant, having been summoned to answer the charge, is before the court until the next grand jury acts or refuses to act, and if a new indictment, which shows that it is a continuation of the former prosecution is found, another summons is not necessary.

2. *Same—Limitation*—A new indictment found by a grand jury to which a prosecution has been re-referred, can not be regarded as a continuation of

Digitized by Google

the former prosecution, so as to avoid the statute of limitation, unless it alleges the facts as to the former indictment, its dismissal, &c., and thus shows clearly upon its face that the prosecution was intended to be a continuous one.

3. *Same*—Ordinarily the offense must be laid in the indictment within the time fixed by the statute of limitation. Where, however, the statute does not impose an absolute bar the prosecution may lay the offense outside the statute and prove without averment that the defendant was within the exception. But wherever a statute exists limiting the prosecution within fixed periods the indictment should state the time correctly and then aver the exceptions.

G. W. Stone and P. H. Darby for appellant.

Wm. J. Hendrick and J. C. Graham for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Presiding Judge Yost.

At the September term, 1889, of the Grayson Circuit Court, the appellant was indicted for maintaining and permitting a public nuisance in the town of Clarkson, in that county, within the twelve months before the finding of the indictment. At the September term, 1890, a demurrer to this indictment was sustained, it was dismissed and the prosecution was re-referred to the next grand jury.

On the 30th of March, 1891, that body returned into court another indictment, charging the appellant with the same offense committed within twelve months before its finding. Upon this indictment a summons was issued and served upon the appellant, citing it to appear and answer the charge. Upon a trial a jury found a verdict against the appellant, fixing its fine at $500, and from the judgment rendered thereon this appeal is prosecuted.

On the trial all the evidence introduced by the Commonwealth went to show the appellant guilty of maintaining a nuisance during the summer of 1888. There was not a word of testimony before the jury tending to show that it had committed such an offense during the twelve months preceding the finding of the last indictment. At the conclusion of this testimony the court refused to peremptorily instruct the jury to find for defendant.

The question before us is, was the latter indictment a continuation of the prosecution begun under the indictment dismissed by the court? We think not. There is nothing in the last indictment to put the appellant upon notice that it was a continuous prosecution. There is not a recital found therein referring to the prior indictment or any of the orders of the court made in that prosecution. The appellant is charged with committing a public nuisance. When? Not within twelve months prior to September, 1889, but within twelve months prior to the 30th of March, 1891.

The gravamen of the offense was, that the appellant had permitted ditches, holes and ponds to be dug upon its right of way, in which stagnant water had so long remained that, as the indictment expressed it, "divers, hurtful, pernicious, injurious and unwholesome smells, *on the day aforesaid*, did and *do* arise, and the air and atmosphere was, *and is yet*, greatly corrupted," &c.

The appellant could not be presumed to have known that this was a continuous prosecution, and that it was to be tried for an offense committed during the twelve months preceding September, 1889, when the indictment returned on the 30th of March, 1890, charged

Digitized by Google

it with suffering stagnant water to remain in certain ditches and ponds, within twelve months before that day, from which, as it was alleged, "injurious and unwholesome smells *do* arise, and by which the air is yet greatly corrupted."

What more could have been said to induce the appellant to believe that this was a new prosecution for another offense? Appellee's counsel contends that the appellant was before the court under the charge until the matter was acted on by the grand jury, to which the prosecution was re-referred, and, therefore, required to take notice of the fact that the same witnesses were recognized and examined before the next jury. We are inclined to agree with counsel that appellant was before the court until the next grand jury acted on the matter. When a prosecution has been re-referred the defendant, if in custody, must be remanded to jail, or if on bail the bail shall be liable for his appearance to answer a new indictment, if one be found, and we see no good reason why a defendant, indicted for a misdemeanor, who has been summoned to answer the charge, is not, under such circumstances, before the court until the next grand jury acts or refuses to act.

This being true, it may well be asked if the Commonwealth intended this indictment to be a continuous prosecution, why issue a summons to bring the appellant before the court when, by the order re-referring the first prosecution to the grand jury, it was already before the court to answer a new indictment if one was found?

It seems to us conclusive that this indictment must be regarded as a new prosecution, charging the appellant with a similar offense committed at another and a later time.

Prosecutions by the Commonwealth to recover a penalty for a violation of any penal statute or law shall be commenced within one year after the right to such penalty accrued.

At the time of the finding of the last indictment this limitation barred any prosecution againt the appellant for the offense charged in the first, unless the prosecution was a continuous one. Ordinarily the offense must be laid in the indictment within the time fixed by the statute of limitation.

Where, however, the statute does not impose an absolute bar, the prosecution may lay the offense outside the statute and prove without averment that the defendant was within the exception. But wherever a statute exists limiting prosecutions within fixed periods the more exact course is to state the time correctly in the indictment, and then aver the exceptions, and this mode of pleading is now generally required. Wharton's Criminal Pleading and Practice, section 318; 1 Bishop on Criminal Proceedure, section 405.

This was the practice in the case of Tully v. Commonwealth, 13 Bush, 154, cited by counsel for appellee. Tully was indicted, tried and convicted. The judgment was reversed by the Court of Appeals, and, acting under its mandate, the circuit court dismissed the indictment and re-referred the prosecution to another grand jury. The second indictment set up fully all the facts, showing the first indictment, the trial, conviction and reversal, and thus showed clearly on its face that it was a continuation of the first prosecution.

The peremptory instructions ought to have been given, and the judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

Digitized by Google

THE SUPREME LODGE K. AND L. OF H. V. OWENS, &C.

(*Filed Sept.* 21, 1892.)

1. *Distribution of trust fund—Discretion of trustee*—A court of equity will interfere with a trustee's discretion only when there is a failure or incapacity on the part of the trustee to act, or when there has been some abuse of power.

2. *Same*—Where, in response to a "Distress Call" made by the chief officer of a benevolent society, contributions were made for the relief of the members of a subordinate lodge and their families, who were suffering on account of a cyclone, the money thus contributed constituted a trust fund of which the sufferers referred to in the call were the beneficiaries, and this fund was to be distributed among those entitled to relief according to the discretion of a relief committee named in the call. Therefore, if that committee, in good faith, decided upon a plan of distribution, having for its object the relief of the persons indicated in the call, and in like good faith carried it out, their action was final, and the plaintiffs' claiming to be the beneficiaries can not question the right of the Supreme Lodge to hold the fund. The fact that the committee may have been ignorant of the amount of the fund in the hands of the secretary, subject to their order, is immaterial if they in fact did not limit themselves through fear of exhausting their means.

Humphrey & Davie and J. A. Beattie for appellant.

L. N. Dembitz and E. S. Watts for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Brent.

The Supreme Lodge of the Knights and Ladies of Honor, a mutual benevolent society chartered by the Legislature of Kentucky, has connected with it divers subordinate lodges.

The cyclone which passed over the city of Louisville, in March, 1890, demolished the building in that city in which was located the hall where were assembled the members of one of the subordinate lodges, known as Jewel Lodge, No. 2, and a number of other persons who were there on business relating to the order and the meeting. Of those so assembled some nineteen or twenty were killed and many others more or less seriously injured.

Thereupon the Supreme Protector of the Order, Jno. T. Milburn, issued, addressed "To the officers and members of the Grand and Subordinate Lodges of the Knights and Ladies of Honor, wherever existing," what is styled a "Distress Call."

The storm occurred on the evening of the 27th of March and on the 29th this call was issued; the nature, and what was then supposed to be the extent, together with some of the details of the calamity, were graphically and pathetically portrayed as they, at the moment, appeared to the writer. The event showed that the number of those killed and injured was considerably overestimated.

The call says: "I can safely say with the committee whom I appointed, composed of Supreme Trustee Check, Supreme Representative Lawson, Supreme Representative Sister Maria L. McCoy and Past Protector Capets, of Jewel Lodge, that no less than forty members have been killed and nearly as many injured, leaving many families and members in sore distress, which can be materially comforted and relieved by prompt assistance. I, therefore, place before you briefly the foregoing facts without attempting to give the

Digitized by Google

details, as it would require more time and space than the circumstances in this shape would permit, and I call upon you for aid and assistance to relieve the suffering of our brethren, their families and dependents. This matter is one that is addressed to your sympathy and fraternal love. * * * The committee before referred to will be continued. * * * Send all remittances to the Supreme Secretary, C. W. Harvey, at Indianapolis, Ind., who will acknowledge receipt of same in the next number of the Intelligencer, and, upon proper order, the same will be turned over to the proper committee for disbursement among the members and their families in distress."

The members of the order throughout the United States responded to this call by contributing and forwarding to the secretary at Indianapolis in the aggregate, and, including $250 advanced by the Supreme Lodge, the sum of $4,540.70, of this $250 was repaid the Supreme Lodge, $1,471.20 was distributed by the committee and the remainder turned over to the treasurer of the Supreme Lodge. There was also contributed and sent to Mr. Check, of the committee, some $666, which was all also distributed by the committee.

After the final distribution $22.37, which remained in the hands of the committee, was remitted to the Supreme Treasury, which thus received and still holds of the fund thus collected $2,841 87.

Some months after the committee had made its final distribution and considering itself *functus officio* had disbanded, the plaintiffs brought suit in the Louisville Law and Equity Court, seeking to have this $2,841.87 paid into conrt and distributed amongst them and to others in like case upon some plan or in such manner as said court, or a trustee appointed by it, might determine.

It seems clear that the call and resulting contribution created a trust fund of which the members of the order and their families and dependents, suffering from the calamity at the hall, were the beneficiaries. It appears also clear, and it seems to be agreed by both parties to the controversy, that this fund was to be distributed among those entitled to relief according to the discretion of the named committee; that if the committee, in good faith, decided upon a plan of distribution, having for its object the relief of the persons indicated by the call, and, in like good faith, carried it out, that was final.

It appears to us that this committee was to judge as to how the fund was to be distributed, both as to manner and amount; that the beneficiaries acquired no vested right as to the fund, but could only claim such relief as the committee, acting in good faith, determined they were entitled to.

We think the pleadings allege sufficiently facts showing the plaintiffs are the persons, if there are any others than the donors, who have a right to question the Supreme Lodge's possession of this fund.

But, as said by the Court of Appeals in the case of the Attorney General v. Wallace (quoted by appellees), 7 B. M., 620: "But, in such cases (referring to the control of a trustee's discretion), the court will only interfere when there is a failure or incapacity on the part of the trustee to act or where there has been some abuse of power."

Now it appears from the proof in this case very clear that the committee which was appointed to, and did, undertake the trust, neither failed to act, abused its trust, nor was lacking in capacity, but has acted intelligently and in good faith. That it did not know it was entitled to draw upon the secretary for a much larger sum than it used in distribution and could, without exhausting the contribution, have used a much greater amount of money is true, but the testi-

Digitized by Google

mony as to what was done, when they proposed to make the last distribution, shows they did not limit themselves by any apprehension of exhausting their means, but, without regard to what might be in the hands of the secretary subject to their draft, determined, reviewing all the cases needing relief, the amount which, in their opinion, ought to be given, considering their needs, aggregated the amounts so fixed, drew for, got and distributed it.

Had they, being in ignorance of the amount in the hands of the secretary, subject to their order, and believing it to be less than it was, stinted the relief and given less than, in their opinion, the person entitled to it needed, then there would have been a question as to whether they could be said to have really exercised any intelligent discretion. As it was, their ignorance of the amount of the fund was a matter of indifference as they were in no way hampered or influenced by it.

We are, therefore, of the opinion that the trustees, the committee, having, in good faith, passed upon and determined the amount of relief to which they were entitled and given it to them, the plaintiffs have no further interest in this fund, and, of course, no right to ask to have it paid into court or have the chancellor frame plans for its distribution.

Wherefore, the judgment of the court below, ordering the appellant to pay the $2,841.87 into court, is reversed, and cause remanded with directions to dismiss the plaintiffs' petition.

SUPERIOR COURT ABSTRACTS.

Kahn Brothers v. Simons.

Filed June 15, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *A contract must bind both parties* or it will be void for want of mutuality.

Under a contract between plaintiff and defendants, whereby defendants agreed to furnish plaintiff coats to manufacture "in the way usual between merchant tailors and their shop foreman," plaintiff agreeing to make up all coats furnished to him by defendants, "not exceeding one hundred each week," plaintiff was bound to hold himself in readiness to make one hundred coats each week, and, therefore, defendants were bound, in good conscience, to furnish him in that time as near that number as their trade would justify, and the court properly so told the jury.

2. *Instructions to jury—Prejudicial errors*—As the contract bound plaintiff to furnish a "high order of workmanship," it was not proper to instruct the jury that they must find for plaintiff if they believed he had furnished a "reasonably high order of work," as courts should never interpolate a word in a contract. But the interpolation of the word "reasonably" was not prejudicial, as the contract could have meant nothing else than a reasonably high order of work, and the jury were not misled by being so told by the court.

Digitized by Google

3. "*End of contract*"—If the defendants failed and refused to furnish plaintiff with work according to the terms of their agreement the contract was at an end, and the plaintiff was entitled to recover the amount retained by defendants out of plaintiff's earnings as security for the faithful performance of his duties, which they were to hold "to the end of the contract."

4. *Burden of proof*—Defendants, by their answer, denied the allegations of plaintiff's petition, as to his employment of a sufficient force of workmen to manufacture one hundred coats per week, &c., and alleged that, by reason of the inferior grade of workmanship done by plaintiff they were compelled to refuse to furnish him work according to the terms of the contract. *Held*—That the court properly ruled that the burden of proof was upon plaintiff and that his attorney was entitled to the conclusion of the argument to the jury.

Lewis N. Dembitz, M. A., D. A. & J. G. Sachs for appellants; Kohn, Baird & Speckert for appellee.

Haywoeth Co. v. Haldeman.

Filed June 15, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Discharge of employe—Measure of damages*—An employer can not discharge a servant hired for a definite term without a good and sufficient cause, and in an action by the servant to recover damages for being discharged arbitrarily and without right, he is entitled to the full sum he could have earned under the contract, less the amount he has earned or might have earned in other business by the exercise of ordinary diligence.

2. *Same—Excessive verdict*—In this action by plaintiff, who had been employed by defendant for one year as a traveling salesman, to recover what he would have earned under his contract if he had not been discharged, the court properly instructed the jury that if they found for plaintiff they should deduct from his salary the expenses he would have incurred in selling, it being a part of the contract that he was to pay his own expenses. But as it is manifest from the amount of the verdict that the jury failed to make any deduction on account of expenses the verdict should be set aside upon the ground that it is for a greater sum than was authorized by the evidence, the expenses being estimated by plaintiff in his testimony.

O'Neal, Phelps & Pryor for appellant; Kohn, Baird and Speckert for appellee.

Rodman v. Moody, &c.

Filed June 15, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

1. *Liability on supersedeas bond*—Where the obligors in a supersedeas bond bind themselves to "satisfy and perform" the judgment superseded "in case it shall be affirmed" they are liable, in the event of an affirmance, for the full amount of the judgment and not merely for the damages actually resulting from the supersedeas.

2. *Same*—Although by the judgment superseded an attachment was awarded and the time fixed for the return of the attachment had passed when the supersedeas was issued, it can not be said that nothing was superseded by the order. The judgment was still in force and the appellee was entitled to all the coercive final process in the power of the chancellor for its enforcement. By reason of the supersedeas his right to these remedies was ended until the appeal was decided.

3. *Same—Estoppel*—As a general principle whenever a party seeks the aid of a court of justice to enforce his rights, and submits his case and objections to the decision of a court, and invites it to decide on them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision and the proceedings taken thereunder.

Digitized by Google

One who has prosecuted an appeal with supersedeas, resulting in an affirmance of the judgment, can not, in an action upon the supersedeas bond, insist that he is not liable because the order granting the appeal, not being made within the time allowed by the statute, was void.

4. *Same*—It is not necessary that an order of supersedeas should be served as a summons. The only requirement is, that supersedeas shall issue.

5. *A debtor can not dictate to the creditor how he shall pursue his remedies.* Therefore, the fact that there is a fund in court to which the plaintiff might resort for the satisfaction of his judgment does not entitle the defendant to require him to do so.

D. M. Rodman for appellant; Geo. B. Eastin for appellees.

City of Louisville v. Nevin.

Filed June 15, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Brent, reversing.

1. *A city is not liable for an error or mistake committed in the performance of a legislative duty* or one requiring the exercise of judgment and discretion, as the defining by ordinance of the territory liable to assessment for the cost of a street improvement.

2. *Steeet improvements—Error of city in making apportionment—Interest*—In this suit on a street apportionment warrant in which a judgment for plaintiff was reversed because of a mistake in the apportionment, which, upon the return of the case, was corrected, and judgment again rendered, interest being allowed only from the date the apportionment was properly made, it was error to render judgment against the city for interest from the date of the original apportionment to the date when the mistake was corrected, upon the ground that plaintiff had been damaged to that extent by the mistake of the city in making the apportionment. If the city could, in any event, be made liable for such a mistake it was error to render a judgment in this case, there being no pleading authorizing such relief.

H. S. Barker for appellant; Lane & Burnett for appellee.

Belt Electric Line Co. v. Creason.

Filed June 15. 1892. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *A borrower may maintain in action against a stranger to recover damages for an injury to the thing loaned.* Possession is sufficient without title to give a right of action against the wrong-doer.

2. *Negligence—Instructions to jury*—In this action against a street railway company to recover damages for injuries resulting from the collison with one of defendant's cars of a buggy in which plaintiff was driving, the court properly instructed the jury that if they believed that defendant's employes in charge of the car saw defendant's dangerous position, or could, by the exercise of ordinary care, have seen it, in time to have stopped the car or checked its speed and thus avoided the collision, the law was against the defendant.

Bronston & Allen and Breckinridge & Shelby for appellant; T. T. Forman for appellee.

Hinkson, &c. v. Commonwealth.

Filed June 15, 1892. Appeal from Harrison Criminal Court. Opinion of the court by Judge Barbour affirming.

Bail—Where the accused is held for trial by an examining court and discharged on bail, the sureties in the bail bond undertaking that he will appear in the circuit or criminal court at its next term, the failure of the grand jury to indict at the first term does not release the bail. It is only upon the dismissal of the prosecution by the grand jury, or upon its failure

Digitized by Google

to indict at the second term, that the bail are released. Nor is it necessary in order to continue the liability of the bail to the second term that the court should make an order continuing the prosecution.

Ward & Kimbrough for appellants; M. C. Swinford, W. J. Hendrick and Reid Rogers for appellee.

FOURNIER, &c. v. BROWN.

Filed June 15, 1892. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Landlord and tenant—Lien for supplies furnished*—The landlord is entitled to a lien on the crop raised by the tenant for the money and supplies advanced to the tenant to enable him to raise the crop. And where the landlord indorses for the tenant to enable him to borrow money to raise the crop and the money borrowed is so used, the landlord in effect furnishes the money, and is entitled to a lien on the crop.

2. *Unlawful preference—Mortgage of exempt property*—Where an insolvent debtor mortgages to his creditor property which is exempt from debt, the mortgage is not an unlawful preference.

John L. Dorsey and S. B. & R. D. Vance for appellants; W. P. McClain and Edward W. Hines for appellee.

MCGOODWIN, &c. v. WILLIAMS, &c.

Filed June 15, 1892. Appeal from Cumberland Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Release of surety—Property mortgaged to secure debt of another*—Where property of any kind is mortgaged or pledged by the owner to answer for the debt or default of another, such property occupies the position of a surety or guarantor, and any thing which would discharge an individual surety or guarantor who was personally liable will, under similar circumstances, discharge such property.

2. *Mortgage released by renewal of debt*—While the general rule is that a mortgage secures a debt or obligation and not the evidence of it and that no change in the form of the evidence or in the mode or time of payment can operate to discharge the mortgage, that rule does not apply where the property of one person is mortgaged to secure the debt of another. In such a case a renewal of the evidence of the debt releases the lien.

3. *Consideration for mortgage*—Where one mortgages his property to secure a debt of another, which has already been incurred but which is not due, and there is no agreement to extend the time nor any alteration by the mortgagee of his condition on account of the mortgage, and the mortgagor derives no sort of advantage by reason of its execution, the mortgage is without consideration.

W. E. Settle and W. P. Sandige for appellants; M. O. Allen for appellees.

CENTRAL PASSENGER RAILWAY CO. v. ROSE.

Filed June 15, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Negligence in getting on moving street car—Question for jury*—The question whether one getting on or off a street car while it is running at a slow rate of speed is guilty of negligence is one of fact for the jury, and this rule applies to both electric and horse cars.

2. *Punitive damages*—If the plaintiff's version of the way in which he was injured was true—and the jury have so said—he was entitled to punitive damages, and the instruction authorizing such damages can not be complained of.

3. *Instructions to jury—Failure to follow physician's directions*—The court properly refused to instruct the jury that "it was the plaintiff's duty to use ordinary care and prudence in following the directions of his physicians,

Digitized by Google

and that he can recover no damages for any injury, so far as the same has been aggravated by the failure of the plaintiff to so obey the reasonable directions of his physicians." The instruction not only gives undue prominence to the evidence of the physicians, but, in effect, makes the opinion of the physicians conclusive upon the question as to whether plaintiff took proper care to avoid permanent injury to his knee.

Humphrey & Davie for appellant; J. M. Chatterson for appellee.

LONG v. BOWEN.

Filed June 15, 1892. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Vacancy in office*—When a public officer is adjudged a lunatic there is a "vacancy in office" within the meaning of section 1 of article 6, chapter 23, of the General Statutes.

2. *The county judge has the power to determine when a vacancy exists in the office of assessor* and to appoint a successor or order an election to fill the vacancy. And when he, in a case coming within the reason and spirit of the statute, declares the office vacant and appoints or orders an election his judgment, until it is reversed or annulled, should be treated as conclusive.

The plaintiff who held the office of assessor having been adjudged a lunatic the county judge declared the office vacant and appointed defendant to fill the vacancy. It turned out that plaintiff was only temporarily insane and that he was restored in time to make the assessment for the current year. He now sues, alleging that defendant has usurped the office and seeks to recover the fees received by him. *Held*—That the judgment declaring the office vacant was conclusive until reversed or annulled. It can not be said that the county judge should have presumed that the insanity was merely temporary.

Kennedy & Son for appellant; Ross & Owens and Hansen Kennedy for appellee.

CENTRAL PASSENGER RAILWAY CO. v. CHATTERSON.

Filed September 14, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, overruling appellant's motion to strike from docket and appellee's motion to affirm as delay case,

The appellee has the right at any time after the appeal is granted to file the transcript with the same effect as if filed by appellant, and may, therefore, upon a transcript thus filed by him, move to affirm as a delay case.

Humphrey & Davie, Kohn, Baird & Speckert for appellant; Stone & Sudduth, Oneal, Phelps & Pryor and Davis & O'Doherty for appellee.

WARREN DEPOSIT BANK v. BUCKHANNAN, &c.

Filed September 14, 1892. Appeal from Allen Circuit Court. Opinion of the court by Judge Barbour, reversing.

Authority to sign note for another—Peremptory instructions—In this action upon a promissory note, purporting to have been executed by B., C. and W. to L., who indorsed it to plaintiff, bank, the defendants, C. and W. plead that their names were signed to the note by B. without their authority. They concede by their answer, however, that they were negotiating with L. for a joint purchase of a machine at a named price, and that B., with their knowledge and consent, went to get the machine. Plaintiff's evidence shows that defendants, when the note matured, came to the bank and asked to be shown their note, which they had given to L., saying it was given for a machine, and that they ought not to pay it because L. had not furnished the machine they contracted for. *Held*—That it was for the jury, considering the facts admitted in the pleadings, and the evidence before them, to say whether B. had authority to sign the note, and it was error to give a peremptory instruction to find for defendant.

Wilkins & DuBose for appellant; W. L. Porter for appellees.

Digitized by Google

Crow, &c. v. Straus.

Filed September 14, 1892. Appeal from Powell Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Practice—Petition to be made party*—Upon the presentation of a petition by one who seeks to be made a party to a pending action the proper practice is for the court to order the petitioner to be made a party and his petition to be taken as his answer, but after the petition is filed as an answer and the petitioner is afterward, by motions made in the action, recognized as a party, it is then too late to object that there was no formal order making him a party.

2. *Attachment*—The grounds of attachment being controverted by answer the burden was on the plaintiff and the judgment sustaining the attachment, in the absence of any evidence, was erroneous.

J. B. White for appellants; Haggard and Benton for appellee.

Parks v. Union Manufacturing Co.

Filed September 14, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

Lease forfeited by transfer of premises to receiver—A transfer of leased premises by operation of law does not operate as a breach of a covenant in the lease that the property shall not be sublet without the consent of the lessor, but it is competent for the lessor to restrain even such a transfer by an express provision clearly prohibiting it. Therefore, where a lease provides that it shall, at the option of the lessor, be forfeited if the premises shall be "underlet or the term in whole or in part assigned, transferred or set over by the act of the lessee, by process or operation of law or in any other manner whatever, without the written consent of the lessor," the delivery of the possession of the premises to a receiver forfeits the lease at the election of the lessor.

James S. Pirtle and L. L. Parks for appellant.

Peak v. Grover's ex'ors.

Filed September 14, 1892. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Transfer to equity*—Under section 10 of the Civil Code as amended the court may, in its discretion, on motion of either party or without motion, order the transfer of an action from the ordinary to the equity docket "whenever the court before which the action is pending shall be of the opinion that such transfer is necessary because of the peculiar questions involved or because the case involves accounts so complicated or of such great detail of facts as to render it impracticable for a jury to intelligently try the case."

In this action against the estate of a deceased person, in which the plaintiff seeks to recover judgment for his services as financial agent of the decedent during several years, as the plaintiff filed a bill of particulars, presenting a list of nearly two hundred names to whom he alleged he had, as agent, loaned various sums of money, and the answer denied that he had loaned any of the sums as alleged, the consideration of these matters, together with several lengthy settlements pleaded in defense, placed in issue such an array of facts and figures that this court can not say the lower court abused its discretion in transferring the cause to equity.

2. *Claims against decedents' estates for personal services*—Courts are inclined to regard with some suspicion claims brought against a decedent's estate for personal services rendered by members of his family, unless there be clearly proven a contract for the services or a promise to pay the amount charged. And while it is true, as a general rule, that where services are rendered by one person at the request of another, a promise to pay for such services is imputed to the person making the request, there are exceptions to this rule, and one of them is that there is no implied assumpsit to pay for work and

Digitized by Google

labor where the conduct, situation and mutual relationship between the parties shows that it would not be just.

Where a son-in-law borrowed money from his father-in-law time and again without security, and often without interest to maturity, and occupied his father-in-law's houses free of rent for a number of years, it would be unjust, in the absence of a contract, to allow him to charge the father-in-law's estate for services rendered the father-in-law in loaning money to various persons, although these transactions extended through several years and the money thus loaned aggregated a large amount.

Evan E. Settle and Thomas R. Gordon for appellant; Lindsay & Botts for appellees.

York, assignee v. Ferrell, &c.

Filed September 14, 1892. Appeal from Pike Circuit Court. Opinion of the court by Judge Barbour, affirming.

Fraudulent assignment—A general assignment, made with the fraudulent purpose of cheating, hindering and delaying the assignor's creditors, is void and the assignee acquires no interest or right under it.

J. M. York and L. T. Moore for appellant; A. J. Auxier for appellees.

Cole, &c. v. Payne, &c.

Filed September 14, 1892. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Plea of payment not sustained by evidence—In this action to recover judgment on several promissory notes and to enforce a lien therefor on land, in which the defendants pleaded payment in saw-logs, the chancellor's finding that the logs had not been delivered as alleged, which is to be treated as the verdict of a properly instructed jury, is sustained by the evidence.

Galloway & Gaines for appellants; Charles E. Drake and Edward W. Hines for appellees.

Truax v. Commonwealth.

Filed September 21, 1892. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

A razor is a deadly weapon within the meaning of the statute against carrying concealed a deadly weapon upon the person. And one who carries such a weapon upon his person is guilty under the statute without regard to the intention with which the weapon is carried.

H. Kennedy and Ross & Owens for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

Fields v. Commonwealth.

Filed September 21, 1892. Appeal from Letcher Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Punishment of sheriff for speculating in county claims*—Under the provision of the General Statutes, that no sheriff or deputy sheriff shall purchase or speculate in any claim allowed by the court of claims of his county, and that for any violation of this provision the person offending may be punished "in a sum twice the amount so purchased or speculated in," a deputy sheriff who was charged with having purchased for $7.50 a claim allowed by the court of claims for $15, could, in no event, have been fined exceeding $30, and it was, therefore, error to instruct the jury that if they should find him guilty they should fix his punishment "at a fine not exceeding $500, or imprisonment in the county jail not exceeding one year, or both so fine and imprison at their discretion."

2. *Same—Instructions to jury*—As the indictment charged the defendant with the statutory offense of purchasing a claim allowed by the court of

Digitized by Google

claims of Letcher county, it was error to instruct the jury that they might find him guilty if they believed he had purchased a claim against the county without reference to whether it had been allowed or not.

S. B. Dishman for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

DRURY v. MCCRACKEN & CO.

Filed September 21, 1892. Appeal from Breckinridge Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Subscription for stock of corporation—Tender of certificate—One who subscribes for the capital stock of a corporation thereby becomes a stockholder, a formal certificate not being essential to his right. It is, therefore, no defense to a suit to recover the amount of his subscription that no certificate of stock has been tendered him.

James W. Lewis and Fairleigh & Straus for appellant; Wathen & Richardson for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. OCTOBER 1, 1892. No. 7

KENTUCKY COURT OF APPEALS.

TRIMBLE V. PUCKETT, &c.

(*Filed May* 19, 1892.)

1. *Equitable lien, by contract, of one advancing money to vendee to pay for land*—When P. advanced money to a vendee to pay purchase money notes for land, the vendee executed and delivered the following note to him: "On * * I promise to pay P. $489.13 as purchase money furnished by P. and to have the same effect as though the land had been bought from P., it being the farm I now live on." * * * *Held*—that this note, though unrecorded, evidenced a contract by which P. acquired an equitable lien on the land to secure the money advanced by him, and the lien is valid and enforceable.

2. *Liens—Priority—Notice*—The equitable lien of P. is prior and superior to that subsequently acquired by one who purchased the land at a judicial sale with full knowledge and notice of the lien claimed by P.

Wood & Day for appellant.

W. W. McGuire for appellees.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Judge Lewis.

July, 1885, appellant, Trimble, recovered judgment against Dennis Brener on a note for $182.12, given June, 1875, and the land in controversy having been levied on and sold under an execution issued on that judgment he became purchaser thereof at the price of $200, and in April, 1886, a deed therefor was made to him by the sheriff.

In December, 1887, he instituted this action to recover the land of Brener, claiming title and right of possession in virtue of the sheriff's deed.

Subsequently, appellee, Puckett, having been made a party defendant, filed his answer, made counter-claim and cross-petition,

Digitized by Google

in which he denied the validity of the sale and sheriff deed to appellant, and alleged that he had a lien on the land for payment of a note for $489.15, executed to him by Brener September 17, 1874, prior to the judgment in favor of appellant, to satisfy which the land had been levied on and sold. He prayed for judgment, setting aside and cancelling the deed to appellant, and for enforcement of his own alleged lien on the land to pay the note mentioned. And upon final hearing judgment was rendered setting aside the sale under execution, cancelling deed of the sheriff to appellant, and for sale of the land or enough of it to first satisfy the debt of Puckett and of the residue, if any, to repay the appellant $200 bid at the execution sale, and interest.

It appears the land was purchased by Brener from D. W. Hollan who, February 13, 1874, executed a deed therefor, in which it is recited that the purchase price was $1,000, of which $500 was then paid, and for the balance a note was given, payable March, 1874. But Brener, not being able to meet the deferred payment unaided, borrowed from Puckett $489.13 and executed to him the note referred to, which is as follows: "On or before the 17th day of May next, I promise to pay M. W. Puckett $489.13 as purchase money furnished by M. W. Puckett, and to have the same effect as though the land had been bought from M. W. Puckett, it being the farm I now live on this September 17, 1874. This note is to draw 10 per cent. interest from date until paid."

It further appears an action was some time thereafter instituted by the heirs of F. D. Roberts to recover of Brener about fifty acres of the land which was, however, compromised, the plaintiffs, by deed executed July 15, 1885, conveying their interest in the land to Brener in consideration of his promissory note for $62, which, by successive assignments, became the property of Puckett. But as no judgment was rendered on that note, though prayed for by Puckett, nor any complaint is here made of the action of the lower court in reference to it, we need not consider it.

The evidence is such as, in our opinion, to authorize the conclusion appellant, Trimble, had, before he obtained judgment on his note, actual notice of the existence of the note of Puckett, the consideration for it, and that he had, or claimed, a lien on the land to secure payment of it. It is true appellant testifies he had no notice, but Brener, who has no interest in the issue between him and Puckett, testifies that Trimble, before his judgment was obtained, applied to him to give a mortgage on the land to secure payment of his note, which was refused, for the reason then distinctly stated to him that Puckett held the note given to him by Brener for money advanced to pay part of the purchase money, and had a lien on the land to secure its payment.

There is also evidence tending to show that the attorney of Trimble was influenced to bid at the execution sale only $200, not more than one-half of his debt, though the land was worth $1,000, by reason of information that Puckett held a lien on it.

The simple question then is, whether Puckett acquired, in virtue of the written agreement between himself and Brener, a lien on the land that was subsisting and enforceable as to the latter; for if the written contract did have that effect, we do not see why it did not affect Trimble having, as he did, actual notice. The language of the note shows a manifest intention of the parties to create the lien, and if it could be done at all by such contract, it was fully and effectually done.

It has been held by this court that a lien does not necessarily exist

Digitized by Google

in favor of one who advances money to the vendee for payment of part of the purchase money. And furthermore that one, holding by assignment a note given for purchase money, who takes in its stead a new note, does not retain the lien existing as to the first note. But it has never been held by this court that an enforceable contract may not be entered into between the vendee and one who advances money to pay the purchase price for a lien on the land to secure the payment of the money so advanced, even though such contract be not recorded. On the contrary, such a contract has been upheld by this court.

In Bailey, &c. v. Welsh, 4 B. M., 244, it was held that an equitable lien, existing by written agreement with a surety, for the payment of the consideration of land purchased, though not recorded, will not be overreached by an attaching creditor who had notice of that equitable lien. And if the vendee may, by written agreement, create an equitable lien in favor of his surety, who pays the purchase money note for land, that will prevail against creditor with notice, why may not he, in the same way, create a like lien in favor of a person who advances the money to pay a part or all the purchase money?

Section 24, article 1, chapter 65, General Statutes, provides that "when any real estate shall be conveyed and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against *bona fide* creditors and purchasers, unless it be stated in the deed what part of the consideration remains unpaid." But that section was not intended to inhibit or apply to a contract for an equitable lien, such as the one under consideration, and is quoted simply for the purpose of showing that, as plainly indicated and construed by this court, a vendor may have an equitable lien on the land, good against creditors and purchasers having actual notice, although it be not stated in the deed what part of the purchase money remains unpaid.

It seems to us that if a vendee of land may, by written agreement with a person who advances money to pay a part or all the purchase money, create an equitable lien on the land that he could not resist or defeat, it necessarily follows such lien should prevail against a creditor affected with notice before even reducing his debt to judgment.

The case of Reid v. Jackson, 6 Ky. Law Rep., 743, is unlike this and has no application. There the contest was between the vendee and his sureties in a note given to a third person for money borrowed and used to pay for the land. The sureties having paid off that note claimed a lien on the land not in virtue of a written contract between themselves and the vendee, but by way of substitution to the right of the obligor of the note, who never had or claimed a lien on the land under contract or otherwise.

In our opinion the lien of appellee, Puckett, was prior and superior to the execution lien acquired by appellant, and, consequently, was not defeated or affected by the sheriff's sale and conveyance to the latter.

Judgment affirmed.

Digitized by Google

LEWIS V. COMMONWEALTH.

(*Filed May* 26, 1892.)

1. *Criminal law—Verdict sustained by evidence*—The evidence shows that the accused followed the deceased out of a room and shot and killed him without any excuse or provocation sufficient to reduce the crime from murder to manslaughter, and the verdict of the jury is sustained by the evidence.

2. *Same—New trial for newly discovered evidence—Diligence*—There was no excuse offered for the failure to discover and produce the newly discovered evidence at the trial and such evidence was only cumulative; therefore, no new trial should have been granted on this ground.

3. *Same—Instruction as to manslaughter*—In the instruction relating to manslaughter, the court instructed the jury that the heat and passion must have been produced by "considerable provocation" in order to reduce the crime from murder to manslaughter. *Held*—That while it is perhaps best not to use the word "considerable" in such connection it could not have prejudiced the appellant under the proof of the case.

Thos. L. Martin for appellant.

W. J Hendrick for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

This appeal involves a human life. The accused, Nelson Lewis, met the deceased, George Dean, a boy about fifteen or sixteen years old, at a party. Some words passed between them, the character of which is not shown, when the deceased called the appellant "a chinch bug" and left him, going out of the room where they were into the yard and toward the door of another room of the house. The accused followed him and, just as he was about to enter the door, shot him, death resulting almost instantly.

The appellant testified that when he fired the deceased was advancing upon him with a drawn razor. No other witness says so, however, and the statement is shown to be untrue beyond doubt. One witness says a razor was found at the feet of the deceased, but this testimony is not of a satisfactory character. The first person at the body testifies there was no razor there, and there is some evidence tending to create the belief that it was picked up in the house where there were a good many persons.

In any event it is not shown that the deceased had made any demonstration toward the appellant, or that he, at any time, had any weapon in his hands. When he was shot he was going away from the accused, who shot him in the back of the head.

Where there is any evidence tending to show guilt it is a question for the jury, and their finding will not be disturbed. To do so, in this case, would be a groundless and palpable invasion of the province of the jury, because the evidence fully sustains the verdict. It was evidently a wanton and needless killing, destitute of all circumstance of provocation sufficient to reduce it from murder to manslaughter.

Upon the motion for a new trial the affidavit of one Southers was filed to the effect that the razor found upon the premises, where the killing occurred, belonged to the deceased. No excuse was given for the non-production of this evidence upon the trial. Besides it was merely cumulative and not sufficient to authorize a new trial. It is said it was not so, because no testimony was introduced upon the trial to show the ownership. The material point, however, was

Digitized by Google

to show that the deceased had the weapon when he was killed. Testimony to this end was introduced upon the trial.

Evidence of his ownership merely tended to support this claim and it was, therefore, only cumulative. Moreover, the decision of the trial court, upon a motion for a new trial, is not subject to exception and can not, therefore, be ground for a reversal. Criminal Code, section 281.

The court instructed the jury upon the law as to murder, manslaughter and the right of self-defense. It also gave the usual instruction as to the reasonable doubt.

Complaint is made that the manslaughter instruction required the jury, in order to return a verdict for this offense, to find that the heat and passion was produced by "considerable provocation."

The use of the words, "*legal* provocation," in this connection in an instruction, and without being defined, has been properly condemned. Payne v. Commonwealth, 1 Met., 370; Donnellan v. Commonwealth, 7 Bush, 676.

The jury in such a case are left to determine the law. It is said, however, that the use of the word, "*considerable*" is misleading, and calculated to confuse the jury; that while one juryman might think a blow was necessary, another would believe that only an epithet was required, and that this word does not really define provocation.

Manslaughter is the killing of a human being in sudden heat and passion and not in self-defense, and it is true there must be a considerable provocation. The text-writers use this term. Roscoe's Criminal Evidence, 724; Wharton's Criminal Law, section 970.

Every trivial provocation, although it may technically be an assault, as a slight jostle of one upon a crowded street without any circumstances of indignity, will not reduce what would otherwise be murder to manslaughter. Cottrell v. Commonwealth, 13 Ky. Law Rep., 305.

Upon the other hand, provocation sufficient to do so may arise and exist without a blow or a trespass to the person. It may arise although the offensive words may not be succeeded by an assault. It is not necessary that the person aggrieved shall be put in danger of losing his life or of great bodily harm. If so, then it would be a killing in self-defense and not a case of manslaughter.

To reduce the killing from murder to manslaughter the person is not to be restricted to a state of case constituting an excuse for killing in self-defense.

It is impossible to lay down a general rule which will apply to every case, and, as said in Campbell v. Commonwealth, 88 Ky. Reps., 402, citing the language of Bishop on Criminal Law, page 711, the true test is: "Whether the law deems the provocation calculated to excite the passions beyond control; if so, it reduces the offense from murder to manslaughter."

Ordinarily it is, perhaps, not best to use the word "considerable" in defining what constitutes legal provocation or such provocation as will reduce murder to manslaughter. There may be cases, however, in which it is not improper, and we are not prepared to say this was not one of them, conceding an instruction as to manslaughter should have been given.

The use of the word did not leave the jury to determine the meaning of any technical legal term but a matter of fact, to-wit: Whether the provocation was considerable or trivial, and the jury should be credited with sufficient sense to understand the meaning of the term. As already said, however, it would have been better to have told

Digitized by Google

them that the provocation must be such as was ordinarily calculated to excite the passions beyond control.

This, however, seems to us to have been a case of murder and, therefore, an instruction as to manslaughter, even if erroneous beyond question, could not avail. It is an unpleasant duty to affirm a death sentence, but feeling can not be consulted and the protection of the living requires the enforcement of the law.

Judgment affirmed.

CONNOR V. GARRARD, &C.

(*Filed June* 11, 1892—*Not to be reported.*)

Deed not procured by fraud—In this action by appellant to cancel and set aside a deed by which she conveyed her estate to a trustee, for her own benefit during life and at her death to go to her issue, and in the event of her death without issue, to her sister or her sister's issue, on the ground that it was procured by fraud on the part of the trustee and the sister, the evidence fails to show that the conveyance was procured by fraud, and the judgment of the chancellor is affirmed.

O'Hara & Bryan and J. T. & C. H. Fisk for appellant.

Hallam & Myers for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, Georgia G. Conner, one of only two daughters of Louisa Ludlow Maxwell, brought this action to cancel and set aside a deed executed by her October 15, 1885, by which she conveyed to appellee, Garrard, her undivided interest in a large number of lots, or parcels of land, near the town of Ludlow, Kenton county, to be held by him in trust, and for the sole and separate use and benefit of the grantor for and during her life, and thereafter to convey in fee-simple to her issue, and, in case of her death without issue, to Helen Bryant, her sister, for life, remainder to her descendants; but if none, then to William Albert Ludlow, child of Albert Ludlow.

The deed is alleged to have been executed under the following circumstances and for the following purposes: It seems her mother had recently died, leaving a will by which she devised, or attempted to devise, a large estate of land, being the lots and parcels mentioned in the deed, owned by her and of very great value, giving to her daughter, Helen Bryant, an undivided half thereof and to her husband, Maxwell, the other half, and charging the estate with payment of $15 per month to her other daughter, Georgia G. Conner, which was all that she devised to her.

She alleges that, intending to contest the will, she was persuaded by her uncle, W. S. Ludlow, brother of her mother, Helen Bryant, her sister, and Garrard to make the deed in question in order to show to the jury on trial of the will contest that she, having only a life estate in the property without power to dispose of it, would not be able to waste and squander it in riotous living in case the will was set aside; that the deed was executed for no other purpose, and she was told and induced by appellees to believe that, as soon as the will was set aside, which it appears has been done, the absolute title and control of the property could and would be restored to her. But that the representations and inducements mentioned were fraud-

Digitized by Google

silently and falsely made, and held out to her by the three persons referred to for the purpose of cheating her out of the property.

The alleged purpose for making the deed, which, at best, is out of the ordinary course of human conduct, has meaning and significance only upon the hypothesis that appellant's character and reputation was so bad as to prejudice the minds of the jury trying the will case against her and her cause.

It seems to be conceded that for several years prior to the death of her mother appellant's conduct was so immoral and shameless as to effectually destroy her reputation and cut her off from social intercourse with virtuous people. And, therefore, it was, and still is, doubtless true that the absolute ownership and control of the property by her would result in a total waste of it in a short time. In our opinion she, herself, so thought at the time the deed was made; and it may be that her uncle, W. S. Ludlow, and sister, Helen Bryant, would not have encouraged and aided her to contest establishment of the will, which would involve a large outlay of money by them, without an assurance the property, if recovered by her, would not be squandered, for Helen Bryant had really no personal interest in breaking the will.

The evidence does not sustain the allegation of fraud on the part of those against whom appellant makes it. Nor can the plea of want of consideration avail, for the beneficiaries under the deed are, in the first place, her only sister and her children. Besides, by the deed, appellant has secured to her a much more certain and permanent enjoyment of the estate than could be reasonably expected if she had full possession and power to dispose of it at the advice and for benefit of her evil and unworthy associates.

Judgment affirmed.

COMMONWEALTH V. MCPEEK.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

Violation of election law by policeman of Louisville—Indictment—The indictment against appellee, who was a policeman of the city of Louisville at an election, for a violation of section 19, subsection 13 of the act approved February 27, 1890, regulating elections in said city, for the offense of "dereliction of duty as a policeman at an election," is fatally defective because it does not aver that the dereliction of duty therein set out was induced by a corrupt or improper motive upon the part of the officer or that it was without excuse or with knowledge that his failure to act was wrongful.

Wm. J. Hendrick for appellant.

Kohn, Baird & Speckert for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

Section 19, subsection 13 of the law to regulate elections in the city of Louisville, approved February 27, 1890, after enumerating certain acts and omissions by a policeman in connection with an election for which he shall be liable, says: "Or is otherwise derelict on duty at such precinct, shall be dismissed at once from his office and rendered ineligible to such office for three years from the date of conviction."

Digitized by Google

The charge against the appellee, Charles McPeek, is "dereliction of duty as a policeman at an election."

The indictment charges that while he was on duty at a certain precinct, where an election for city officers was in progress, a certain person did, in a threatening manner and in his presence, and in order to intimidate voters, flourish a pistol and use violent and threatening language; and that the appellee failed to arrest him, although then requested to do so by others. A demurrer was sustained to the indictment and the case dismissed.

Waiving the consideration of the various reasons given by the appellee in support of the court's action, it must be sustained, because there is nothing in the indictment charging any improper motive to the officer. It is not stated that his failure was without reason or excuse, nor is any corrupt intention or knowledge of wrong imputed to him.

No technical legal expression even is used from which it can be inferred, conceding that this would have been sufficient.

The indictment is for misbehavior in office; a failure to perform a known and manifest duty, if it was a case which, under the law, required an arrest; and in such a case the indictment should contain some averment of corrupt or improper motive upon the part of the officer, or that he had failed to act, without reason or excuse, or with knowledge that the failure was wrongful. 2 Wharton's Crim. Law, sections 2520-1.

The judgment is affirmed.

COMMONWEALTH V. ELLISTON.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

Indictment for arson—It is sufficient if the indictment for arson aver that the house burned was a dwelling-house and occupied by a certain party. This is equivalent to an averment that it was occupied by such party *as a residence.*

W. J. Hendrick for appellant.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Holt.

This indictment is for arson. It was dismissed upon demurrer. We fail to see in what respect it is defective.

It charges the appellee, J. K. P. Elliston, with burning a dwelling-house, occupied by one White, and store-room and outbuildings occupied by White and the White Brothers, all being the property of W. P. Elliston, but then in the possession of the Whites as tenants, the store-house containing merchandise belonging to them, and that it was done feloniously, maliciously and willfully.

Both the occupancy and the ownership are laid. By the common law an indictment for arson did not have to aver that the house burned was a dwelling, but only that a house had been burned.

The term, "house," imported a dwelling house, and the offense was committed if either the dwelling or an outbuilding within the curtilage and so near the dwelling as to endanger it were burned. The offense is one against the security of the habitation rather than the property.

Digitized by Google

This indictment does not expressly aver that the dwelling was occupied by White as a residence.

It has been held to be arson to burn a dwelling finished for habitation, but, whether it be so or not at common law, yet this indictment charges that the house burned was a dwelling and occupied by White.

This is in substance an averment that it was occupied by him as a dwelling, and in this respect the indictment is undoubtedly sufficient.

The judgment sustaining the demurrer to it and dismissing it is reversed, and cause remanded for further proper proceedings.

WEST V. COMMONWEALTH.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

1. *Criminal law—Manslaughter—Excessive punishment*—The evidence in this case shows that appellant stabbed and killed the deceased, who was without weapons, while both were intoxicated, and that the crime was unprovoked and wanton; therefore, the punishment fixed by the jury of 15 years' confinement in the penitentiary, for the offense of manslaughter, of which accused was found guilty, is not excessive, although perhaps the crime might not have been committed but for the intoxicated condition of the accused at the time.

2. *Incompetent dying declarations—Prejudicial error*—Even if the admission of the statement of the deceased as a dying declaration, to the effect that he did not think of being hurt, and that he had no thought of defendant hurting him, was improper and erroneous, it could not have prejudiced appellant's substantial rights and does not warrant a reversal of the judgment.

3. *Instructions—Practice*—When the court first instructed the jury it attached a qualification to the instruction concerning defendant's legal right of self-defense, but, after the argument of counsel, the qualification was erased from the instruction and it was again read to the jury but special attention was not called to the erasure of the qualification. *Held*—That appellant was not prejudiced nor could the jury have been mislead thereby.

4. *Practice in criminal cases*—The fact that the court, in the presence of the jurors, who subsequently tried this case, rebuked other jurors for the very small amount of fine imposed in another case, can not be presumed to have influenced the jurors on the trial of this case in fixing the amount of the punishment.

C. W. Lester for appellant.

W. J. Hendrick for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

Appellant being indicted for murder of Wilbur Hamilton was convicted of manslaughter and sentenced to confinement in the penitentiary for fifteen years.

It appears from the evidence that deceased proposed to appellant and others accompanying him to his dwelling-house to have some fun out of one Hatfield and another, who were carrying water from the spring, by kicking the buckets out of their hands; and, accordingly, it was done, but during the scuffle appellant struck Hatfield on the head with an empty bucket and hurt him. Upon arrival at the house Hatfield, who was in employment of deceased, went into

Digitized by Google

the kitchen and being drunk stated that he would kill the son-of-a-bitch who struck him with the water bucket, if he knew who he was.

The threat was repeated, accompanied with flourish of a knife and fork in his hands. Appellant, who, besides others, was in another room of the house, finally stated loud enough for Hatfield to hear, that he was the son-of-a-bitch who struck him. Thereupon deceased came from the kitchen to the room where appellant was and said to him, "shut your damned fool mouth and get out of here." Appellant then went out of the room by a side door, but instead of going directly to his own home went to the kitchen door and again said to Hatfield he was the man who struck him, adding that if he (Hatfield) wanted any thing he could get it. Hatfield, when he first spoke about having been struck, was seated in a chair, another person being in his lap, and so continued. But Hamilton, after addressing appellant in the manner mentioned, returned to the kitchen and met appellant, when he came up to the kitchen door and them commenced a struggle that ended in a mortal stab by appellant with a pocket knife, which he had open in his hand, but had been before concealed.

According to the testimony of some of the witnesses, when Hamilton met appellant at the kitchen door, he ordered him away from the house, stating he wanted no racket there, and also told him to shut his damned fool mouth, and after a reply from appellant either caught him by the throat or struck him, and was in the struggle stabbed and died therefrom in a few hours.

The first ground relied on for reversal is, that the punishment inflicted is excessive.

The evidence shows that Hamilton was owner of a saw-mill and had sent Hatfield off for whisky with which to treat the men assembled at his dwelling-house, and at the time he, Hamilton, as well as Hatfield was intoxicated, and it is evident his death resulted from the whisky. But the injury done to Hatfield by appellant was unprovoked and wanton, and the latter must have known he was in no immediate danger from injury at the hands of the former. Nevertheless though ordered away from the house of Hamilton, manifestly because he was seeking a fight with a drunken and irresponsible man, appellant improperly went to the kitchen door with the purpose of bringing on a fight with Hatfield, having a knife opened and concealed, which would have given him an undue advantage of the drunken Hatfield, as it did, in fact, give him, of Hamilton, who was both intoxicated and without weapons, and not greater than appellant in size or strength. Instead of the punishment being excessive, as argued by counsel, it seems to us the crime of appellant has all the elements of murder.

It seems that the wife of Hamilton, who was not present at time of the difficulty, coming home hours afterwards, was permitted by the lower court to testify to a statement made to her by her husband as a dying declaration, in substance, that he did not think of being hurt; that he had no thought of appellant hurting him. But conceding the statement as made to and testified by her to be incompetent as a dying declaration, still it did not prejudice the substantial rights of appellant, and, consequently, is not a sufficient ground for reversal, because it is amply proved by other witnesses that appellant engaged in the conflict with a long bladed pocket knife that was open and concealed, and, therefore, Hamilton could not have anticipated being stabbed by him.

The third instruction had, as originally drafted and read to the

Digitized by Google

jury by the court, a qualification of appellant's legal right of self-defense, in substance, that he did not, by his own wrongful act, make harm or danger to himself, necessary or excusable, on the part of Hamilton. That qualification was, however, subsequently erased, and, at conclusion of the argument of counsel, the court again read to the jury all the instructions, including the third as amended. But it is contended the court failed on the second reading to call special attention of the jury to the fact the objectionable part of the third instruction had been stricken out. We do not see how the jury could have been misled by the alleged neglect of the court, because the instructions were carried by the jury to their room, and they could see for themselves the erasure had been made.

Another ground for reversal is, that upon the return of the verdict of a different jury, in different and preceding cases, the court rebuked that jury for the very small amount of fine imposed. It is very clear the jury in that case deserved the rebuke given by the court, but we do not see how the action of the court in that case could be fairly presumed to have unduly influenced the jury in fixing the amount of punishment in this case.

The instructions given by the court contain all the law applicable to this case, and are rather more favorable to the appellant than they were required to be.

Perceiving no error of law in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

ROBERTS V. COMMONWEALTH.

(*Filed October* 1, 1892—*Not to be reported.*)

Criminal law—Evidence—On the trial of the accused for murder he had a right to ask one witness for the Commonwealth if he had not been indicted for robbery and if he had not admitted that he committed such robbery and to ask another if he had not been indicted for conspiracy, &c.; such questions were competent and the court should have required the witnesses to answer them for the purpose of determining the credibility of the witnesses.

J. J. C. Bach and J. B. Marcum for appellant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and sentenced to confinement in the State penitentiary for life, for the murder of J. D. Bowman.

It is urged that the indictment is defective because it fails to charge that the killing was feloniously done. But the indictment does charge that the killing was feloniously done. The evidence for the Commonwealth is clear and explicit to the effect that the appellant, without cause, shot and murdered J. D. Bowman. On the other hand the evidence is equally clear and explicit to the effect that Bowman, at the time the appellant killed him, was trying to murder the appellant, and that the appellant killed him in self-defense. The jury, under the rulings of the lower court, resolved this conflict of testimony in favor of the Commonwealth. It will be seen that, in view of this conflict of evidence, it was all important that all competent evidence offered by either party, that would throw

Digitized by Google

light upon the credibility of the witnesses, should have gone to the jury and been considered by them.

One important witness for the Commonwealth was asked, upon his cross-examination by the appellant, if he was not indicted in the Breathitt Circuit Court for robbery; and if he had not sworn or admitted that he committed the robbery. Another important witness for the Commonwealth was asked, on his cross-examination, if he did not stand indicted for conspiracy, &c., and if he had not offered to swear for the appellant if his friends would assist him to get rid of the charge; and another was asked where he lived, &c. The Commonwealth objected to these and other similar questions being answered, and the court sustained the objection.

The appellant made known to the court that said questions would be answered affirmatively. Now the question is, was that evidence competent to be considered by the jury in determining the credibility of the witnesses relative to whom it was offered? The case of Burdette v. Commonwealth, 13 KY. LAW REP., 960, is decisive of the admissibility of the evidence, *supra*, as bearing upon the credibility of the witnesses.

The question to the witness as to his having been indicted for robbery, and his having sworn or admitted that he did commit the robbery, was designed to affect his credibility as a witness, and it was competent for that purpose. The question put to another witness as to his having been indicted for conspiracy, &c., and his having proposed to the friends of the appellant to swear for him, if they would help him out of his trouble, was competent for the same reason. The question to another witness, as to with whom he was living, was competent as showing the surroundings of the witness, and how far he might be influenced by them; and so as to other similar questions.

For the reasons indicated the judgment overruling the motion for a new trial is reversed, and the cause is remanded for further proceedings consistent with this opinion.

DUCKWORTH V. HISLE, &C.

(*Filed June* 4, 1892.)

1. *Weight given judgment of chancellor on appeal*—While much weight should be given to the judgment of the chancellor on a question of fact, yet where the preponderence of the evidence is clearly against the conclusion reached by him, his decision should be reversed on appeal and such is the established rule of the Court of Appeals.

2. *Evidence sufficient to show existence of partnership*—In this case it is admitted that appellant and appellees were partners in the buying and selling of tobacco for the year 1886, during which time they incurred a decided loss, but the appellees deny that appellant was a partner in said business for the year 1887, during which year large profits were made by them. The court holds that the evidence shows that the partnership existed for both years, notwithstanding the finding of the chancellor to the contrary.

W. M. Beckner for appellant.

Haggard & Benton for appellees.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Pryor.

Digitized by Google

This action was instituted in the common pleas court by the appellant for a settlement of a partnership between the appellant and the appellees, in the purchase and sale of tobacco for the years 1886 and 1887.

It is admitted by the appellees that a partnership existed for that purpose for the year 1886, but averred that none existed for the year 1887, the partnership by its terms lasting for one year only. It appears from the testimony that the appellant was an experienced handler of tobacco and a man of means, while the appellees had but little experience in the handling of tobacco, and but small pecuniary means to conduct such a business.

The partners for the year 1886 met with a loss of a sum exceeding $3,400, and no settlement was ever made between them for that year's business. They sold their tobacco at the Farmers' Tobacco Warehouse in the city of Louisville, under the firm name of W. H. Hisle & Son, for the year 1886, and the amount of the loss, $3,432, was carried over on the books of that warehouse as a balance due by the firm to the warehouse, and formed a part of the account for the sales of the produce in the year 1887. From the purchases and sales made during the last year there was a considerable profit, more than enough to pay the balance due the warehouse from the venture of the year 1886, leaving that balance to be divided between the partners. Hisle and his son both swear that the partnership ended after the year 1886, while Duckworth, the appellant, swears that it was continued for the year 1887, or rather that no limit was fixed as to its duration, but that the firm continued for the last year as it did the first. If the decision of this case is to be controlled alone by the testimony of these partners as to when it ended it would result in affirming the judgment below, as all three are equally positive in their statements, and the weight of the testimony would be with the defendants (appellees).

It satisfactorily appears that the Farmers' Warehouse, through its members, recognized the appellant as a member of the firm, and the loans of money obtained from that corporation was on his credit. The business was conducted in the same manner, the account kept in the same way and no notice given the warehouse of the dissolution, or that the partnership continued for the one year only. The parties were then selling the crop of 1887; the appellant and one of the appellees consulting as to the rejection of tobacco that was thought had been sold for less than its value, and nothing occuring that induced the warehousemen to believe that Duckworth was no longer a partner.

One of the appellees said to Shaw and others that Duckworth was a partner, but whether he alluded to the former year or not is uncertain, still every fact conducing to show a partnership applied as well to the year 1887 as to the year 1886, and nothing but the testimony of the two Hisles conduces to show a different state of case. There are circumstances connected with this case, however, that in our opinion are conducive of this question.

Duckworth was a man able to meet his pecuniary engagements, and while the appellees may have been in the same condition their condition in life was not such as to justify such liberality on their part as giving, or intending to give, to the appellant his part of the loss. It never was demanded of Duckworth, and no intention to give expressed, until Duckworth desired a settlement, when it transpired that as these appellees had made money in the business of 1887, they concluded not to demand of Duckworth what he owed them on account of the loss for the year 1886. The appellant was not related to

Digitized by Google

them; had performed less labor than they had in the partnership business, and they were under no moral or legal obligation to pay his debts, and particularly when they were less able than Duckworth to satisfy such demands.

Such a course of conduct is both unnatural and unreasonable with business men, and it is manifest that if the profits of 1877 had not overbalanced greatly the loss of 1886 the appellant would have been called on by the Farmers' Warehouse, and, doubtless, by the appellees, to pay his part of the loss, nor would there have been any escape from liability except through the liberality of the appellees.

Again, it appears that the appellees made out and sent to the appellant the account of the business for the two years, showing the loss of the one year and the profit for the other year, with a detailed statement of the transactions of the partnership. This was certainly useless as to the last year if the appellant had no interest in the partnership during that period. The appellees, or one of them, explains this by saying that he heard the appellant was about to sue him and he desired to inform him fully as to the state of accounts for each year that he, the appellee, might not have any advantage. Such an explanation is by no means satisfactory and inconsistent with the conduct of litigants who are adverse to each other as to the subject-matter involved.

If the appellees are entitled to the whole proceeds, or profits from the purchases of 1887, there is no reason why the chancellor should not compel the appellant to pay his part of the loss for 1886. The mere intention to give, or the declaration by the appellees, or one of them, that he did not intend to assert such a claim was not binding on him, and his right to recover, if there was no partnership in 1887, is unquestioned.

It appears also that where sales of tobacco were being made at the warehouse in Louisville, the appellant took much interest in the sales of Hisle & Son, and why he should have done so was the result of his direct interest in the tobacco being sold. He was a silent partner under the original agreement, as is clearly shown, and this rendered him less active than he would have been if he had been given the entire control of the partnership as the two appellees seem to have had.

The decided weight of the testimony is with the appellant, and while this court attaches much weight to the decision of the chancellor on an issue of fact, where the weight of the testimony is clearly against his conclusion, this court will reverse, and such has been the ruling, although a decision to the contrary may now and then be found.

The judgment below is reversed, and the cause remanded, with directions to refer this case to a commissioner for a settlement upon the basis that the partnership existed for both years.

Judge Pryor delivered the following response to petition for rehearing:

We are satisfied, upon a re-examination of the record, that there has been no misconception of the facts or the conclusion from them as to the cause of Duckworth's becoming a partner in the purchase of tobacco with the appellees. Counsel insists that it was an act of mere liberality on the part of the appellees in admitting the appellant as a partner, induced by the fact that he was a relation and neighbor. That the appellees were willing to do all the work and divide the profits, less the cost attending the purchase and sales, merely because Duckworth was a friend; and, finally, as the

Digitized by Google

appellees had the means, they would sustain all the loss. They form a partnership with an insolvent man, perform all the labor and pay all the losings, for no other consideration than the affection they had for appellant. This is the logical result of the appellee's contention on his petition for a rehearing.

After a careful reading of the record, when first considered, we thought it might be possibly assumed that the appellees were furnishing the money and the appellant only the experience in conducting the partnership business, but this seemed to be inconsistent with the ordinary transactions of men, however liberal and just to their kindred, we concluded from the testimony that it was not only the experience Duckworth had in the handling of tobacco that brought him into the partnership, but his credit with the warehousemen and the sellers of tobacco that gave strength to the firm. It was a fair inference from the facts and from the positive testimony in the case. He handled as much as a half million pounds of tobacco some years on his own individual responsibility; and, as is testified to by the warehousemen, his name gave credit to the firm. This would indicate clearly that he was a man of both means and credit, and, in the absence of any proof in this record to the contrary, it must be assumed to be true else the learned counsel would have introduced testimony showing that Duckworth was insolvent and the appellees were volunteering to extricate him from financial troubles.

If he was insolvent when the partnership was formed, or even before this case went to the chancellor, and the appellees being aware of that fact, were willing to help him, it certainly would have been made known from the testimony; but, as the record now appears, the legitimate inference is that Duckworth was a man of much means and more credit than the appellees when this partnership was created, and to conclude that the appellees were willing to sustain all the loss of the firm, and to transact all the business, but to give the solvent partner no share of the profits, if any, would be inconsistent with a rational view of this case.

Petition overruled.

JONES V. COMMONWEALTH.

(*Filed June* 4, 1892.—*Not to be reported.*)

1. *Criminal law—Instructions*—On the trial of appellant for murder, the evidence was such as authorized an instruction by the court concerning murder.

2. *Same—Examination of jurors*—It was not error in this case for the court to permit the attorney for the Commonwealth to ask the jurors, on examining them as to their qualification, if they would inflict the death penalty, if the proof justified it, after they had previously stated that they had no conscientious scruples against capital punishment.

Alex. Conner, W. S. Gudgell and J. J. Nesbitt for appellant.

W. J. Hendrick for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Oscar Jones, having been convicted of the crime of murder, and sentenced to be hung, has appealed to this court.

Digitized by Google

The facts are briefly these:

On the 25th day of December, 1891, the appellant and his son, George Jones, were in the town of Sharpsburg, and George Jones, the son, was drunk and disorderly. The deceased, Taylor Vice, was acting as the marshal of the town of Sharpsburg; and as George Jones passed Taylor Vice, followed by the appellant, he looked back in the direction of Taylor Vice, and said: "No damned white son-of-a-bitch shall arrest me!" The appellant replied: "Go your route; fall out of the loft. I am with you." Taylor Vice, apparently paying no attention to the speech or conduct of George Jones, a justice of the peace ordered him to arrest George Jones. Thereupon he followed him, and catching up, he laid his hand upon Jones' shoulder to arrest him. Thereupon Jones raised a club something like a baseball bat, which he had, as if to strike Vice.

One witness says he did strike Vice with the club; but it is certain that he did raise the club as if to strike. Vice took the club from him, and struck him with it two or three times. No witness testified that the blows were heavy enough to endanger the life of George Jones, or do him great bodily harm. On the contrary, one witness describes them as "little taps." The blows ceased, and while George Jones and Vice were scuffling for the possession of the club, the appellant, who was all the time in convenient distance, and evidently on the alert, came up, with a large pocket-knife drawn and in thrusting position, and stabbed Vice, which stab killed him.

The appellant then ran away. He was thereafter arrested in Mt. Sterling, Ky. While under arrest he said he would not have killed Vice but for the fact that he was drunk; but the proof shows that he was not drunk. It was drunkenness that, he said, caused the killing, and not the belief that he thought his son's life was endangered by Vice, or that Vice was about to inflict great bodily harm upon him. Nor did the appellant testify that such was his belief. In fact, he did not testify on the final trial.

The record also shows that the appellant and his son knew at the time of the difficulty that Vice was acting as marshal of the town of Sharpsburg.

Now the appellant contends that the court, under the proof, was not authorized to instruct the jury that they might find the appellant guilty of murder. Let us see. Appellant said he killed Vice because he was drunk, and not in the defense of his son. Also, the son was looking at Vice and defying arrest, and the appellant was close by, and saying: "Go your route; fall out of the loft. I am with you," doubtless meaning by the expression that he would stand up to him in his resistance of arrest. And as soon as the arrest was attempted, he had his large knife ready and stabs Vice, and then runs away.

But it is said that appellant and son were leaving town. The proof fails to show that fact. It is also said that the community was greatly excited and revengeful, and that the appellant made some statements through fear and intimidation; but the proof fails to show these facts or any of them. It is also said that the court erred in allowing the Commonwealth to ask the jurors if they would inflict the death penalty if the proof justified it, after they said they had no conscientious scruples upon that subject. The question was a mere repetition, and could not have prejudiced the substantial rights of the appellant.

The proof all considered, we agree with the jury, that the appellant was guilty of foul murder. There is no error in instructions.

Digitized by Google

Vice was marshal *de jure*. But independently of that fact, the appellant was guilty of murder.

The judgment is affirmed.

COMMONWEALTH V. SMITH.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

W. J. Hendrick for appellant.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

The opinion of this court of this date, in the case of the Commonwealth v. McPeek, is decisive of this one. *Ante*, 215.

The indictments in the two cases are similar, save in the other case the averment is made that the officer refused to make the arrest, while in this one it is charged that he failed to make it, although requested by others.

For the reasons given in the opinion in the other case the judgment below, sustaining the demurrer and dismissing the case, is affirmed.

MILLER V. COMMONWEALTH.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

Criminal law—Indictment—The indictment avers that appellant did "willfully, forcibly and feloniously break into and enter" a certain railroad car "with intent to steal property therefrom" and then designates the property stolen, &c. The essence of such charge is the willful and forcible breaking into and entering a railroad car with intent to steal property, &c., therefrom, and the indictment is sufficient in this case.

L. J. Moore for appellant.

W. J. Hendrick for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted in the Fayette Circuit Court, of the crime of feloniously and forcibly breaking into a railroad car of the Cincinnati, New Orleans & Texas Pacific Railroad Company with intent to steal property therefrom.

The essence of the offense charged is the willful and forcible breaking into and entering a railroad car with intent to steal property, &c., therefrom. Boyers v. Commonwealth, *ante*, 167.

The evidence establishes, beyond a doubt, that the appellant willfully and forcibly entered the car mentioned with intent to steal therefrom property, and did steal therefrom the articles charged.

The appellant contends that the indictment is defective in not charging that he entered the car with the intention of stealing property therefrom.

But the indictment does charge that the appellant did "willfully, forcibly and feloniously break into and enter" said car "with intent

Digitized by Google

to steal property therefrom." The indictment then names the property stolen, &c. The indictment is sufficient. There is no error in the instructions. The proof is clear that the offense was committed in Fayette county, Ky.

The judgment is affirmed.

BAILEY V. C, N. O. & T. P. RY. CO.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

1. *Peremptory instruction*—In an action against a railroad company for damages sustained by personal injuries alleged to have been inflicted by the negligence of the company, where there is a doubt whether the proximate cause of the injury was the defendant's negligence or the plaintiff's contributory neglect, the question is one for the jury and a peremptory instruction should not be given.

2. *Same—Neglect—Railroads*—Appellant did not attempt to board the train until it was in motion and leaving the station, when he seized with one hand the railing of the platform of a car and attempted to mount the steps, but failed to do so. He was dragged beyond the platform of the station and, when either his foot slipped or his grasp upon the railing failed, he fell headlong into a ditch and was badly injured. The ditch was being dug for the purpose of supplying water to a tank of the railroad and a rain had forced the workmen to abandon it temporarily and leave it uncovered. *Held*—That the proximate cause of the injury was plaintiff's own act in endeavoring to board the train in motion and a peremptory instruction was proper.

Victor F. Bradley for appellant.

C. B. Simrall and J. E. Cantrill for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, James Bailey, was seriously injured by an accident resulting from his effort to board the train of the appellee, as it passed one of its depots, in the town of Sadieville. He was desirous of going to Georgetown on the train and, while engaged in business with some one in a business house about fifty yards from the depot, was told that the train had reached the station.

The passengers for Sadieville had left the car, the baggage had been placed on the platform and the papers sold by the newsboy and the train was moving off before the appellant reached the depot. He had a bundle of papers in his left hand and, while the train was in motion, he seized the railing with his right hand and attempted to ascend the steps leading into one of the cars, but failed to board the train. He was dragged beyond the platform and his hold upon the railing loosening, or his foot slipping in some way, he fell headlong into a ditch and was badly injured.

This ditch or hole had been dug by the company to set in pipes for the purpose of supplying water to the tank and was left open and uncovered by the hands who were digging it. They had been at work in the ditch but had left it and sought shelter from the rain that had just fallen.

It is insisted by the appellant that the failure of the company or its employes to cover over this ditch was the proximate cause of the

Digitized by Google

injury and, therefore, the court below erred in instructing the jury to find for the defendant.

We can not so conclude from the testimony before us, and, taking plaintiff's own statement, the injury resulted from his own negligence and not that of the company.

The ditch was being dug about ten or twenty feet from the platform of the depot, it was covered up at night and the testimony shows that the work had been temporarily suspended by reason of the rain.

The train was moving off when the plaintiff attempted to get on, and had been moving from the time the plaintiff left the door of the house until he reached it, a distance of fifty yards.

The version of the plaintiff is, that he had gotten one foot on the step and, as he attempted to bring the other foot up, the foot on the step slipped and he fell off into this ditch.

The platform was sufficient to accommodate the passengers and the passengers given ample time to get off and on before the train started. The appellee had the right to dig the ditch that water might be carried to the engines upon its track. The plaintiff was not required to cross the ditch to reach the platform or to go near it, but it was his swinging to the side of the cars that led him over it, an act that was itself negligence, and caused the injury complained of.

The laborers of the company had the right to dig this ditch and but for the rain would have been digging in it when the appellant fell. His own rash conduct in his anxiety to get on the train caused him to be dragged along the platform and over this ditch and was the direct cause of the injury.

If the railing of the car had been defective or the steps so decayed as not to bear his weight there might be some reason for this case going to the jury, but to make the company liable for an injury to a passenger who swings from the outside of the train and meets with an obstruction on the other parts of the road than the regular platform, causing the injury, would be to make the company an insurer against the passenger's own negligence.

The ditch may have been the remote cause of the injury complained of, but the intervening act of the plaintiff himself was the direct and proximate cause of it. When there is a doubt as to to the proximate cause, that is, whether the injury resulted from the act of the plaintiff or of the defendant, then the case should go to the jury.

Here the facts are undisputed and to hold that the injury to the plaintiff was the natural and probable consequence of defendant's negligence would be establishing a rule not sustained upon principle or by any authority. Penn. R R. Co. v. Kerr, 62 Pa. State, 353; McCorkle v. Chicago R. R. Co., 61 Iowa, 555; Chicago N. W. R. R. Co. v. Scales, 90 Ill., 586.

The judgment below is affirmed.

FAULKNER v DUFF.

(*Filed Sept.* 10, 1892.—*Not to be reported.*)

Right to passway—Abandonment—The act of appellee, in closing the gate at one end of his passway over appellant's land, did not amount to an abandonment of his right since he left an opening in his fence about 200

Digitized by Google

yards from the old gate, by which he had access to the passway, and appellee is not estopped now to claim such right of way.

Tyler & Apperson for appellant.

Wood & Day for appellee.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Pryor.

It is manifest from the pleadings and exhibits in this case that the appellee is entitled to this passway over appellant's land unless, by his own act, in closing the gate at X on the plat, he has estopped himself from its use.

The appellee closed the gate at X by erecting a fence in front of it and, when this was done, left an opening in the fence about 200 yards north of the gate. While such a change could not have been made without appellant's consent, still this was not an abandonment of the right to pass. Time had not barred the assertion or the exercise of the right to pass and the appellant is insisting that no such right exists, and, from the testimony, was disposed, in a forcible manner, to make himself the arbiter in the controversy between himself and the appellee. The appellee and his tenant had the right to the use of the passway.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

SCHOLL V. LAURENZ.

(*Filed April* 13, 1892.)

Exemptions—"Family" defined.—A debtor who is a housekeeper is entitled to the benefit of the exemption laws if there resides with him any person whom he is under a natural obligation to support and who is dependent upon him for support.

Where the mother of a debtor's wife, having resided with him during the life-time of the wife, continues to do so after the wife's death, being dependent upon him for a support, he is a housekeeper "with a family" within the meaning of the exemption laws.

Wm. Krieger and Lane & Burnett for appellant.

Kohn, Baird & Speckert for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Presiding Judge Yost.

In February, 1888, the appellee, Laurenz, married and his wife's mother, Mrs. Ann Spoede, then sixty-two years of age, lived with

Digitized by Google

him from that time until the death of his wife, which occurred in 1890, when she acted as his housekeeper and continued so to act up to and after the institution of this action.

On the 23d of August, 1890, the appellant sued out an attachment against Laurenz, which was levied upon certain personal property claimed by him as exempt from attachment on the ground that he was a *bona fide* housekeeper with a family.

The court adjudged that he was entitled to the exemptions and from that judgment this appeal is prosecuted.

It is shown that Mrs. Spoede had lived with the appellee for more than two years and was entirely dependent on him for a support.

The question is, was he under such an obligation to support her as would make her a member of his family in the meaning of the law? The family relation is not one of contract and there must exist either a legal, natural or moral duty on the part of the head of the family to support its members and a corresponding dependence, on their part, on him for a support.

For a long time the rule was that there must exist on the part of the housekeeper a legal obligation to support those living with him before he was entitled to the exemptions given by the law, but the courts have now adopted the more humane rule that a natural or moral obligation to support them would make him a housekeeper with a family.

While such an obligation exists it is a higher and more sacred obligation than such as binds a debtor to pay his debts.

In Brooks v. Collins, 11 Bush, 622, it is said that, when a debtor, being a *bona fide* housekeeper, has living with him his wife or his children, infant or adult, his brothers or his sisters, father or mother, grandfather or grandmother *or those dependent upon him and whom, by reason of his relation to, or connection with, he is under a natural or legal obligation to maintain* he must be regarded as a housekeeper with a family and entitled to the statutory exemptions.

In this case Laurenz, in the life-time of his wife, took her mother to live with him. She was old, indigent and infirm. She depended upon him for a support and he provided for her. Must it now be said that when his wife is taken from him by death this, in itself, not only released him from all natural or moral obligation to support her mother, but that the law, by stripping him of his property, forces him to turn her out from the protection and shelter of his home to look to charity for a support? Far from it. Rather let it be said that the law imposed upon him a duty, sanctioned by every just and generous impulse, to support the mother of his dead wife who was dependent upon him.

We hold that Laurenz was, as the statute puts it, a person with a family, resident in this Commonwealth, and, therefore, entitled to the exemptions set apart by the law.

The judgment is affirmed.

DEDMAN V. NALLY.

(*Filed May* 11, 1892.)

Forcible detainer—Improvements—Res adjudicata—One who has entered upon land under a verbal lease, which is within the statute of frauds, and has made improvements which have enhanced the value of the land, may, in a proceeding of forcible detainer, rely upon his claim for improvements to

Digitized by Google

defend his possession, and if he does so he can not be evicted until the claim is settled. But if he permits himself to be evicted without asserting his claim, that proceeding is not a bar to an action by him to recover for the improvements.

C. H. Thomas for appellant.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Brent.

The pleadings and proceedings in this case are quite inartificial and it is with some difficulty that we have gotten at what appears to be the substance of the controversy. Stated very briefly the facts appear to be about these: In 1887 the defendant, W. H. Nally, put Thomas Dedman, the plaintiff, in possession of some twenty acres of wooded land in McCracken county under a verbal lease. Dedman was to clear, clean up and fence the land and put some sort of a small barn on it. In consideration of his so doing he was to occupy and use it and have all the timber on it except what was necessary to fence it and such as would make rails. After he had been on the place about two years appellee, Nally, by proceedings in forcible detainer, ousted him. To this proceeding, so far as the record shows, plaintiff made no defense. Being out of possession he instituted this action in ordinary alleging that the defendant, by turning him out, not permitting him to enjoy the remainder of his term and failing to pay him for the labor, of which he had received the benefit, had damaged him in the sum of $260, for which he prays judgment.

There are also, in the petition, various statements as to plaintiff having cleared and fenced nine or ten acres of the land, cut barn logs, and having, on the premises, boards and lumber, which last, he charges, defendant had appropriated to his own use.

But plaintiff does not allege that these things enhanced the value of the land. The petition is very indefinite and unsatisfactory, yet there was no objection to it, either by demurrer or motion to make more specific, and defendant answered, traversing its allegations and pleading the forcible entry proceeding as a bar, on the ground that the plaintiff could and ought to have used these as a defense, what he now relies on here as a ground of recovery.

On the trial, after hearing one witness, the plaintiff, the court arrested the proceedings and instructed the jury peremptorially to find for the defendant.

The detainer proceeding was not a bar. The gist of plaintiff's action is a claim to recover for ameliorations. His right to recover for them, if any he has, could, in the detainer proceeding, be relied on only to defend his possession. The question what, if any thing, he was entitled to recover on that account could not be then determined. If plaintiff had a just, unsettled claim for improvements, resulting in amelioration, made under the lease, he could, although being verbal and for four years, the lease was within the statute, nevertheless have used such claim to defend his possession under it in the detainer proceeding, and could not have been evicted until it was settled. This principle is well settled. Oneal v. Orr, 5 Bush, 649; Reed v. Landor, 5 Bush, 22; Findley v. Wilson, 3 Littell, 391.

And this court, in Kadin v. Rufenacht, 6 Ky. Law Rep., 748, has held that a good faith parol purchaser may, even after ouster, recover not only the purchase money but also for improvements to the extent of amelioration.

Digitized by Google

The plaintiff, upon amended pleadings, might have secured a hearing for his claim, if any he had, for ameliorations. His cause of action, as set out, shows work and improvements which, it may be, enhanced the value of the land. In the opinion of a majority of this court, the judgment entered upon the verdict below would be a bar to an action for the amount which such work and improvement may have enhanced the value of the land, and the court should not have submitted the case to the jury with the peremptory instruction to find for defendant.

The judgment is, therefore, reversed, and the cause remanded with directions to set aside the verdict and judgment, and to permit the plaintiff, if he so desires, to amend his petition and for further proceedings.

KLOTZ V. KLOTZ.

(*Filed May* 18, 1892.)

Benevolent societies—Who may be a beneficiary—Under the constitution of the Knights of Honor, a benevolent society, a member may designate as the beneficiary of the fund to be paid at his death any member of his family or any person dependent on him; and the benefit certificate having been made payable to the person thus designated he is entitled to the fund as against all other persons, provided there are no peculiar equities between the claimants. And the member may designate as the beneficiary an adult child, to the exclusion of the widow and infant children.

Andrew A. Hagan for appellant.

Chas. A. Wilson and Geo. B. Eastin for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Brent.

Peter Klotz, sr., appellee's father, was a benefit member of the Knights of Honor, a benevolent society incorporated by the laws of Kentucky and Missouri. To each such member there is issued a certificate which, upon the conditions therein set out, entitles him to nominate a person to whom, at his death, a sum of money, specified in said certificate, shall be paid. The applicant for membership was required to name in his application the person to whom his benefit was to be paid, and the name of the beneficiary was inserted in the certificate when issued.

In the first certificate issued to Peter Klotz it was expressed that his benefit should be paid as he, in his will, might direct. Afterwards, the laws of the order not permitting such testamentary control of their funds, he had this certificate cancelled and another issued, in which Christina, his then wife, was named as his beneficiary.

In May, 1888, Christina died. In August following Peter married Susan, the appellant. In November next following he, complying with the formalities required by the society's charter, surrendered the last-mentioned certificate and had another, the benefit secured by which is the subject of controversy in this case, issued. In this he named his son Peter, the appellee, as the person to whom his benefit should be paid.

It appears that, at the time when this last certificate was taken

Digitized by Google

out, and at the time when his father died, Peter, jr., was adult, independent and living in his own home.

Upon the death of the elder Klotz, which occurred in 1889, appellant, Susan, his second wife, claimed that, by the rules and policy of the society, appellee did not belong to either of the classes out of which beneficiaries could be nominated; that his nomination was, therefore, void, and that she was the person to whom the benefit was payable, if not wholly, then to the extent of one-third.

Peter also asserting his claim, the society declined to decide the conflict, filed its bill, paid the money into court and asked that the claimants be compelled to interplead. The brothers and sisters of Peter were made parties, but they formally declined to litigate and left the matter to be determined between Peter and his step-mother, and what their rights are, under the circumstances, is the only question before us for investigation and decision.

We have above set out the relations of these two persons to the deceased member, to each other and to the certificate contract; and on that subject it is not necessary here to say more than that their pleadings set forth these relations more particularly and put their controversy in shape for adjudication.

The society, in filing its bill of interpleader, had in view its own protection. To secure this it was necessary that the claimants to the fund should be compelled to submit their controversy to authoritative determination. The court was, therefore, asked to take the money into its custody, to exonerate the order from further liability, and to do what it could not, that is, hear their claims and decide as between these parties, which was, on the death of Peter Klotz, sr., entitled to the "benefit."

The ultimate rights of appellant and appellee were in no way altered or affected by the manner in which they were brought into court or the fact that the fund in dispute was in the hands of the court and no longer in the hands of the society.

The rights of the parties, for the purposes of this inquiry, were fixed and are to be determined by their status and relations to each other and the fund prior to and at the time of Peter, sr.'s, death.

That Klotz had always observed his obligations and was in no way disqualified to name his beneficiary; that he had nominated his son, Peter, jr.; that Peter, jr.'s, name had been inserted in the certificate when issued; that he had received and accepted it, and, at the date of his father's death, had in his possession, uncancelled, this formal evidence of his title to the benefit is admitted. If then he was eligible, that is, was such a person as could, in accordance with the laws of the order, be named as beneficiary, it would seem that he is undoubtedly entitled to the fund. Was then Klotz, jr., under all the circumstances, eligible? Upon this question the whole case hinges.

The constitution of the society provides (article 9, section 1): * * * "Each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family or those dependent upon him, to whom he desires his benefit paid, and the same shall be entered upon the benefit certificate according to said direction." * * *

And in the certificate the society agrees, upon conditions set out, to pay to the person named in the application and certificate so much money, in this case $2,000, upon satisfactory evidence of the member's death.

This is, in brief, the fundamental contract, out of which grow the rights of the parties and by which, primarily, they are defined.

Digitized by Google

But this privilege of nomination, it will be at once seen, is not unlimited. It must be confined to the classes named in the application, *i. e.*, members of the applicant's family and those dependent on him. That the member is thus limited, both by the policy of the order, as gathered from the provisions of its organic law and by the fairly interpreted terms of his contract, there can be no doubt.

Was appellee dependent on Peter Klotz or a member of his family? That, though a child, he was in no sense dependent is conceded. But that he was a member of his family within the meaning of that phrase, as used in the application, is, we think, clear.

And here, it would seem, the discussion should end. But our attention is called to the fact that the Court of Appeals, in the case of Leaf v. Leaf, 13 KY. LAW REP., 486, has very strongly intimated that it is extremely doubtful whether a charter member of the order has any right, so long as he has a dependent widow or infant children, to divert from them to an independent adult, even though he would be, under other circumstances, entirely eligible, any part of a fund so evidently intended primarily for their benefit. This question was not, however, for decision in that case, which was, in fact, decided upon equities altogether personal and arising from the conduct of the member, which, the chancellor very justly held, had deprived him of any right to control or have cancelled, as between themselves, to the prejudice of his wife's claims, a certificate which she held and in which she was the named beneficiary; and while the suggestions may indicate which way the court leans they do not go so far as to make it improper for us to say that, in this case, Klotz, having in no way impaired his contract right of selection, and there being no peculiar equities between the claimants, the person named in the certificate, being certainly a member of one of the eligible classes, must prevail in this controversy.

We do not think that declarations in its constitution that the object of an order or society of this kind is to provide for a certain class of persons named in that immediate connection, of itself, and necessarily prefers those first named for designation as beneficiaries so long as there are any of them, to the exclusion of other eligible members of that class. Manerly v. Knights of Birmingham, 115 Penn. State Reps., 305; Marsh v. Supreme Council Am. Knights of Honor, 149 Mass., 512. Various concordant decisions are cited in the A. and E. Encyclopædia, volume 16, pages 47 and 48, note 3.

Judgment affirmed.

BURBA, &C., BY, &C. V. RICHARDSON.

(*Filed Oct.* 5, 1892.)

1. *If a step-father voluntarily assumes the care and support of a step-child* he stands in *loco parentis*, and the ordinary rules governing the relation of parent and child will be held to apply.

2. *Parent and child*—While, as a general rule, a parent is entitled to no compensation for the board and education of his child an exception to this rule is that if the parent is poor and the child has an estate better enabling it to support itself than the parent is to support it, then the parent may assert a claim for maintenance and the court will allow it. But as the step-father in this case not only fell far short of a parent's duty, but required and received from his step-children services which more than compensated him for their support, he is not entitled to any thing out of their estate.

W. H. Marriott for appellants.

Digitized by Google

Hobson & O'Meara for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Presiding Judge Yost.

In 1879 the appellee, Richardson, married Mrs. Burba, a widow with three children, Lillie, Eva and Sarah, then aged nine, seven and five years, respectively.

After the youngest was sixteen years old the United States Government allowed and paid to them a small pension on account of the the services of their father in the army during the war of the rebellion. After this Richardson brought this suit, asking the chancellor for an allowance to himself for their board, clothing and education from the time of his marriage to their mother up to the time each of them arrived at the age of sixteen years.

When the suit was filed only one of the girls was living with him, Lillie and Sarah having been, as the evidence plainly shows, driven from his home.

Parents are under a legal and natural obligation to protect, maintain and educate their children, these duties being required at their hands by positive law as well as by the more powerful and far-reaching law of parental affection. In addition to "obedience during their minority and honor and reverence ever after," as Blackstone puts it, parents are entitled to the services of the child until it is of lawful age. The parent owes the child maintenance and an education; the child owes the parent such services as it is able to render and neither is entitled to compensation for these mutually required duties.

While a step-father is neither entitled to the services nor bound by law to educate, maintain and support his step-children, still, as Schouler, in his work on Domestic Relations, says: If a step-father voluntarily assumes the care and support of a step-child he stands *in loco parentis* and the presumption is that they deal with each other as parent and child, in which event the ordinary rules of parent and child will be held to apply, and neither compensation for board is presumed on the one hand nor for services on the other.

In this case when Richardson married their mother he took their children to his home and thus voluntarily assumed their care and support. He stands, therefore, in the place of a parent to each of them and the general rules of law as to parent and child are applicable.

As we have said, a parent, under this general rule, is entitled to no compensation for the board and education of his child. There is, however, an exception to this rule and if Richardson comes within the exception he ought to be remunerated for his outlay, unless the services, if any, rendered him by the children while they lived with him were enough to pay for such board, clothing and education as they received. The exception is that if the parent is poor and the child has an estate better enabling it to support itself than the parent is to support it, then the parent may assert a claim for maintenance and the court will allow it.

As was held in Chapman v. Moore, 7 Mon., 169, although parents are under a natural obligation to support their children and, therefore, in general, no allowance will be made to a father or mother in capable circumstances out of the estate of a child; yet, to a father in distressed circumstances, a suitable allowance will be made for the support of the child.

Digitized by Google

It may be conceded that while the children lived with Richardson he was a poor man, in needy circumstances. If they had owned their little estate at the time of his marriage and he had applied for an allowance the court would unquestionably have allowed him a suitable amount for their proper maintenance and education. He now, however, asks for a retrospective allowance and the question is, has he earned it? Standing in the place of a parent, did he do a parent's duty? It seems to us that an overwhelming preponderance of the testimony shows that he fell far short of his obligations and that the unusual, unsuitable and onerous services he required and actually received from these girls more than compensated him for any expenses he may have incurred in furnishing their board, clothing and an education.

While the evidence tends to show that the children were often too meanly clad to be, as witnesses expressed it, "respectable," and often too thinly clad to protect them from the inclemency of the weather to which they were exposed while working for Richardson, we will eliminate this question from the case as if the appellee furnished them such clothing as he was able to buy, criticisms would be unjust and ungenerous.

The usefulness of every member of society depends largely upon the training he has received during his childhood. On this account it is held to be the parent's greatest and most solemn duty, in addition to the proper home culture, to see that his children receive the best education his circumstances in life enables him to bestow upon them. Richardson could and certainly ought to have permitted and in fact required these children to attend the common schools taught in his neighborhood, but he did not.

Lillie testified that her total attendance at school would not amount to five months and she never learned to write her name, and the younger children only attended schools very irregularly, a part of several sessions. Lillie lived with him seven, Eva nine and Sarah eleven years before they were sixteen years old. During a part of this time Richardson had two, if not three, of his own children in school and, according to his own testimony, his whole expense and outlay for school books, &c., and perhaps a subscription to one "pay school," did not exceed $7.

What further comment is necessary? Did their services pay him for all this? The evidence tends to show that they did such house work as cooking, washing and ironing and nursed the oft-coming babies. In addition to this, "from the time they were able to handle the hoe," they performed all kinds of farm labor, not only such work as girls are often required to do, but every character of out-door work usually done by men and boys.

Richardson testified that they only did such work occasionally and several witnesses introduced by him swore that they had not often seen them working out. But, on the other hand, in addition to the testimony of the girls, a large number of witnesses, their near neighbors, swore that whenever there was any thing to be done on the farm they saw these girls doing the work. It is in evidence that year after year these girls arose early and watered and fed the stock while Richardson was in bed. They planted, re-planted, thinned, cut and gathered corn, worked in the harvest fields, shocking wheat and carrying bundles, hauled manure from the stables and rocks from the fields to the public road, cut sprouts, cut wood, cleared the underbrush from the "new ground" and one year helped to work, cut and prize a crop of tobacco.

Digitized by Google

Six or seven witnesses, who knew the amount and character of work these girls did, testified that their labor paid for their board, &c.; others that if children *could* pay for their board by work these certainly did. While several witnesses testified to the contrary they put their estimate, first, on the ground that girls of their age could not do enough to pay their way; and, second, upon the hypothetical and, in this case, false premise that they were required to and did do only such work as was customary for girls in their station in life to do.

The concluding chapter in the family history shows that after the girls were sixten years of age Richardson drove Lillie from her home, whipped Sarah and compelled her to leave and struck Eva in the face with his fist for attempting to protect her sister and, as a grand finale, brought this suit to recover compensation for their proper protection, maintenance and education.

During all the time Richardson was furnishing the board, &c., the children were living with him as members of his family. Having had their services he can not now fairly and in good conscience ask other compensation for their maintenance. Swetman v. Swetman, &c., 8 Ky. Law Rep., 266; Hickman v. Ludis, *Id.*, 424; Rowland v. Monnes, *Id.*, 618; Smith v. Rogers, 24 Manus, 140; Lawson's Rights, Remedies and Practice, Gist 810.

The judgment, in so far as it dismissed the petition against Lillie Burba, is affirmed, but the judgment against the guardian of Eva and Sarah Burba is reversed, and cause remanded with instructions to the court below to dismiss the petition as against them and their guardian.

SUPERIOR COURT ABSTRACTS.

Griffith v. Owensboro, &c., Railway Company.

Filed September 21, 1892. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, dismissing appeal.

Appellate practice—As the record of a former appeal in this case, which is necessary to a decision of this appeal, had not been filed with the new record when the case was regularly called upon the docket, the appellee, upon a motion then made, is entitled to a dismissal of the appeal under Rule 5 of this court.

C. S. Walker for appellant; W. F. Browder for appellee.

Russell's adm'r v. Russell's guardian, &c.

Filed September 21, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. *Rights of adopted child*—Where a child, under the control of the Louisville Baptist Orphan's Home, is adopted by another in the manner prescribed by the charter of that corporation the child is, as heir or distributee of the person adopting it, entitled to the same property that a child of such person would be. And the fact that the Home may, subsequent to the death of the person adopting the child, have cancelled the former contract of adoption in consideration of another person adopting the child, does not deprive the child of its rights under the original article of adoption.

2. *Appellate jurisdiction—Validity of statute*—As this appeal was taken to the Court of Appeals, and counsel there assailed the charter of the Louisville

Digitized by Google

Baptist Orphan's Home as being unconstitutional, in that it conferred upon the corporation special privileges in granting to it the power of allowing persons to adopt children in its control and custody, and the Court of Appeals transferred the case to this court, the charter must be treated here as valid, and as not the subject of serious question in the particular mentioned.

3. *Distribution of decedent's estate*—Upon the death of a person intestate the property specifically exempted by statute from distribution and sale at once ceases to be the part of his estate, and vests absolutely in the distributees. It can not, therefore, be taken for the payment of the burial expenses of the intestate.

E. J. Polk for appellant; A. Lincoln Dembitz for appellees; Robert J. Elliott for Pearson & Son.

Kentucky Flour Company v. Smith, &c.

Filed September 21, 1892. Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour, affirming.

A contract based upon an illegal consideration will not be enforced, and, while an illegal agreement will not be raised by implication, it is not necessary, in order to invalidate the contract, that any particular form of words should be used or that the illegality should appear in a contract as written. It can be proved just as any other contract.

Where a company procured the arrest of an employe who had embezzled its funds and afterwards, with the understanding that "the matter was to be kept quiet," took from him and his brothers a note secured by mortgage, and when the case was called refused to prosecute, saying that the matter had been settled so far as the company was concerned, these facts appearing upon the trial of an action upon the note and mortgage, were sufficient to establish the defense that the note and mortgage were executed for an illegal consideration.

Fairleigh and Straus for appellant; Strother & Gordon for appellees.

Neighbors v. Holt.

Filed September 21, 1892. Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Barbour, affirming.

1. *Sale of personal property without change of possession*—When one of two persons living together in the same family sells to the other an article of personal property, executing a deed therefor, the deeds operates as a delivery of the property, and the fact that no visible alteration in the actual possession follows, the deed can not be deemed *per se* fraudulent. It is a fact proper for the consideration of the jury.

2. *Same*—In an action by a wife to recover a horse from one who had purchased it from the husband, the plainliff claiming to have purchased it from her husband prior to the purchase by defendant, the court properly refused to instruct the jury that if they believed the horse was in the husband's possession at the time of defendant's purchase, and that he purchased it in good faith without notice of plaintiff's claim, they should find for him. There may have been a visible change of possession at the time of the sale to plaintiff, and if so the mere fact that the husband happened to have the horse in possession when he sold him to defendant did not deprive plaintiff of her right to the horse.

3. *Same*—While the plaintiff could not have been compelled to perform her agreement to pay the husband's indebtedness, which was the consideration for the sale and conveyance to her of all his property, including the horse, still after she has performed it in part the property conveyed to her can not be taken from her without re-imbusing her, and even if the contract was without valuable consideration the defendant, who purchased the horse after the contract was made and after he had actual notice of it, can not complain.

Lyon, Gocke & McCormack for appellant; John J. McAfee for appellee.

Digitized by Google

QUAINTANCE v. DARNELL'S EX'OR.

Filed September 21, 1892. Appeal from Fleming Circuit Court. Opinion of the court by Judge Brent, reversing.

Compensation of executors—The statute regulating the compensation of executors for their services does not contemplate any allowance except such as is based on the value or amount of the personalty administered upon.

Of an estate, aggregating in value about $59,000, the personalty amounted to $57,000, the remaining $2,000 being in real estate, the title to which vested at once in the devisees without division or the intervention of the executors. In settling the estate the county judge allowed the executors for their services 5 per cent. upon the value of the whole estate, including the land. In this action to surcharge that settlement, *Held*—That, in so far as the allowance was based on the amount of personalty received and distributed, it is not so unreasonable, in view of the prompt and diligent attention of the executors, that this court is called on to disturb the concurrent conclusions of the county judge and the chancellor. But it was error to allow any thing upon the value of the real estate, as it was in no sense received or distributed by the executors.

Cassidy & McCartney and J. P. Cassidy for appellant; Stone & Sudduth for appellee.

GALBRAITH v. ROGERS.

Filed September 21, 1892. Appeal from Nicholas Chancery Court. Opinion of the court by Judge Brent, reversing.

1. *Landlord's lien—Allegation and proof*—In this action by appellant to enforce a mortgage lien, the appellee having, by answer, set up a contract under which he claimed a superior lien, must rely throughout the case upon the contract thus set up in his pleading, and can not rely for any purpose upon a written contract afterward filed with the deposition of one of the witnesses, but never, in any way, made part of the pleadings.

2. *Same*—A landlord, who asserted claims against his tenant for damages for failing to cultivate a part of the land, for improperly cultivating another part, for converting his share of a certain part of the crop, and for using a barn situated on another place belonging to him, submitted his claims to arbitration, which resulted in an award in his favor. *Held*—That the landlord has no lien upon any part of the crop for the amount of the award, as he had no lien under the statute for any of his claims submitted to arbitration. And even if he had a lien for some one of them, yet as he had no lien for all, and it does not appear for which of the claims the award was made, the court would not be inclined to presume that the award was for the claim for which he had a lien.

Kennedy & Kennedy for appellant; John P. Norvell for appellee.

COMMONWEALTH v. CITY OF SOMERSET.

Filed September 28, 1892. Appeal from Pulaski Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Indictment for nuisance—While an indictment for a nuisance must describe the location of the nuisance with certainty, yet an indictment against a city for permitting a nuisance, which alleges that the city permitted a certain street, naming it, to become filled with mud, stones and other material which prevented public travel along said street, &c., is sufficiently specific as to the location of the nuisance, as the fair inference is that the city had permitted the whole street to become a nuisance. Had the indictment charged that the city caused or permitted a nuisance "on" or "near" the street named, without further describing the location, it would have been defective.

W. J. Hendrick, William Herndon and R. Reid Rogers for appellant; Sam M. Boone for appellee.

Digitized by Google

L. & N. R. R. Co. v. ABELL.

Filed September 28, 1892. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Continuance—Prejudicial error*—In this action against a railroad company to recover damages for personal injuries received by plaintiff in leaving a train, as the defendant introduced as witnesses on its behalf the conductor, brakeman, engineer, fireman and baggage-master, who were on and had charge of the train at the time of the accident, as well as other witnesses who were at or near the station at that time, it was not prejudiced by the refusal of the court to grant a continuance asked upon the ground that its attorney had not had a sufficient time since the accident to interview the employes and passengers to ascertain if he could not disprove the allegations of the petition.

2. *Passengers on a railroad train must be allowed a reasonable time to leave the train with safety*, and if, after it has come to a full stop in order to enable passengers to leave it, it is, without notice or signal, suddenly moved, causing injury to those alighting, the company is responsible for the injuries thus caused. And while it was error in this case to instruct the jury that it was the duty of defendant to have stopped the train long enough to allow the plaintiff to alight with safety "and comfort," the addition of the word "comfort" being unauthorized, yet the error was not prejudicial, there being nothing to show that plaintiff unreasonably delayed leaving the train or in any way consulted her comfort.

3. *Damages for future suffering*—In this class of cases a plaintiff may recover damages not only for the suffering which he has endured prior to the commencement of the action, but also all the damages, resulting continuously from the injury up to the trial, or which it is reasonably certain he will suffer in the future. It was, therefore, not error in this case to instruct the jury that in the event they should find for plaintiff to find compensation to her for injuries "which directly resulted or reasonably may be anticipated from her injuries."

4. *Excessive verdict*—As the plaintiff had suffered great pain up to the time of the trial, at which she was not able to be present, and her injuries had caused a curvature of the spine, a verdict for $2,000 was not excessive.

W. J. Lisle, William Lindsay and H. W. Bruce for appellant; Samuel Avritt for appellee.

L. & N. R. R. Co. v. BRUMMETT.

Filed September 28, 1892. Appeal from Whitley Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

Railroads—Killing of stock on track—Duty to passengers—The employes of a railroad company, in charge of a train, upon the discovery of stock upon the track, are required to use only such means to prevent injury thereto as are consistent with the safety of the train, the first duty of a railroad company being to its passengers. And if an engineer is compelled to choose between risking the safety, even of freight upon his train and running over stock on the track, he is justified in choosing the latter alternative.

In this action to recover damages for the killing of plaintiff's stock by one of defendant's passenger trains the court instructed the jury that they should find for plaintiff the valne of the stock killed unless they believed the killing was unavoidable; and, further, that it was "the duty of the engineer to keep a look-out on the train as well as he could do consistent with his duties," and if they believed he could reasonably have seen the stock in time to avoid the accident by checking or stopping the train, they should so find. *Held*—That this instruction was erroneous in that it disregarded the engineer's duty to the train and passengers.

William Lindsay and Hill & Denham for appellant; C. W. Lester for appellee.

Digitized by Google

GLOVER'S GUARDIAN V. COMMON SCHOOL DISTRICT, &c.

Filed September 28, 1892. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *The constitutionality of the statute providing for district taxation in aid of common schools is not an open question*, as the law has been sustained in numerous cases decided by the Court of Appeals. But even if that were not so this court would regard the transfer of the case by the Court of Appeals from that court to this court as eliminating from the case any such question.

2. *The statute is to be liberally construed* for the purpose of carrying into execution the legislative will: and when an election has been held and the tax imposed the burden is on the tax-payer who resists its collection to show that the election is void.

3. *The "object of the proposed tax" is to be determined by the notice*, which is sufficient if in substantial compliance with the statute. An exact correspondence between the order calling the election and the notice of it is not required.

4. *The statute does not require a formal levy by the trustees.* The order for the election, in which the amount of the tax is fixed, and the appointment of a collector with directions to collect the tax after it has been voted, sufficiently indicate the levy.

5. *Assessment*--No assessment or valuation of the taxable property of the district other than that made by the assessor of the county for the current year is required. In Davidson v. Sterrett, 13 KY. LAW REP., 265, the collector adopted an assessment of a previous year.

6. *Right of guardian to fix ward's domicile*--Where both parents of an infant are dead, the guardian, acting in good faith, may select and fix for the infant a permanent home.

In this case the evidence shows that the guardian of the infants, whose personal property is sought to be taxed, has fixed the home of the infants in the district where the tax is sought to be imposed.

F. W. Darby for appellant; Wm. Marble for appellee.

RATCLIFFE, &c. V. COMMON SCHOOL DISTRICT, &c.

Filed September 28, 1892. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Tax to enlarge school-house*—Although the statute which provides for district taxation in aid of common schools provides only for the building of a new school-house, or the repairing of a school-house after it has been condemned, yet, under the spirit of the law, when it is ascertained that a school-house is too small to accommodate the children of the district, the county superintendent can require the necessary addition to be made to it. And in order to do this a notice by the superintendent to the trustees that the school-house is insufficient to accommodate the school children of the district, and a demand that suitable provision shall be made for their accommodation, is all that is necessary.

2. *Failure of collector to execute bond*—The objection that the collector has not executed the bond required by law is not available in this action against the trustees to enjoin the sale of property levied on for the tax.

F. W. Darby for appellants; Wm. Marble for appellee.

WILSON V. BROWN, &c.

Filed September 28, 1892. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Separation of conclusions of law and fact--As this is an ordinary action in which the law and facts were submitted to the court and there was no separation of the court's conclusions of law and fact, and no motion for a new trial, the only question for this court's consideration is, whether the judgment is authorized by the pleadings.

Wilson & Rawlings for appellant; Dishman, McCleary & Tinsley for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. OCTOBER 15, 1892. No. 8

KENTUCKY COURT OF APPEALS.

BECKHAM v. MORRISON.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

Petition for new trial—Unavoidable absence of attorney—Res adjudicata—On the calling of an action of ejectment for trial the defendant moved for a continuance on account of the unavoidable absence of his principal attorney. His motion was overruled, a trial had and judgment for plaintiff rendered. Defendant filed a motion for a new trial on the ground of the absence of such attorney, and this was overruled and time granted him to prepare a bill of exceptions. Defendant, instead of appealing from said judgment, filed this petition for a new trial "for unavoidable casualty and misfortune," in that his said attorney was absent at the trial. *Held*—That the petition should have been dismissed, defendant's remedy being by appeal from the judgment against him and not by petition for a new trial. The matter set out in the petition were all considered and decided on the trial of the action of ejectment, and the determination therein is conclusive on the parties unless set aside on appeal.

Jno. D. Wickliffe for appellant.

Jno. S. Kelley and Lafe S. Pence for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

The appellee filed a petition for a new trial in the court below, in which the court is asked to set aside a judgment at law by which the appellant was adjudged to be the owner of a small strip of land claimed by the appellee. The judgment was set aside and the appellant, who was the successful party in the action of ejectment, has appealed.

We perceive no reason for disturbing the judgment rendered in

Digitized by Google

the trial at law. The main ground relied on for a new trial was the unavoidable absence of the principal attorney for the defense in the original action. It is alleged that the attorney was on his way to the Nelson court, where the case was tried, and was taken sick so as to render it impossible for him to attend, and that his co-counsel, who was present and conducted the defense, was not conversant with the facts and had only been employed to aid the original counsel on the trial when the case should be reached for hearing.

This ground was relied on for a continuance in the common law action and made to appear by the affidavit of the attorney who conducted the defense. He stated that he was not conversant with the facts and that the counsel relied on by the defendant was sick and unable to attend.

The court overruled his motion for a continuance and required him to go to trial, and, after the judgment for the plaintiff (now the appellant), he moved for a new trial on that as well as other grounds, and this motion was overruled and time given to prepare a bill of exceptions.

No appeal was taken but the present petition resorted to, asking relief for no other reason than the error committed by the judge on the first trial in refusing a continuance.

If such facts can be retried and errors, if any, committed by the court, rectified in this mode, there would be no end to litigation. The question made had been decided and, if erroneous, the only remedy was by an appeal. It is true it is alleged that a patent and deed, showing title in the defendant, was not before the court, but it further appears, by the answer of the appellant to this petition for a new trial, that both the patent and deed were in the papers of the case and read to the jury.

There was no testimony to sustain the fact that the papers were not before the court when the judgment was obtained, but the court below, in the absence of any proof except the record upon the first trial, set aside the judgment and ordered the ejectment case to be retried.

Subsection 7 of section 518, Civil Code, authorizes the granting of a new trial "for unavoidable casualty or misfortune," preventing the party from appearing or defending. But here the misfortune of the defense was made known by one of the attorneys and the facts heard on the motion for a continuance and, therefore, the court below, instead of granting a new trial, should have dismissed the petition; nor are we satisfied that the statements of the petition, if undenied, and, in the absence of any proof, presents any ground for vacating the judgment.

It is alleged that some of the witnesses for the defense, hearing of the illness of counsel, failed to attend court. The names of the witnesses are not given or the importance of the testimony made known. It is stated that one of them carried the chain when a survey was being made of the land in controversy, when the old record shows depositions were read in the case and it there appears that one of the witnesses had carried the chain when the survey was made. This may be the same witness whose absence was relied on for a continuance, but whether so or not there has been no case made out for relief.

Judgment reversed and the cause remanded, with directions to dismiss the petition for a new trial.

Digitized by Google

THE HARTFORD LIFE & ANNUITY INS. CO. V. WAYLAND, &C.

(*Filed Sept.* 10, 1892—*Not to be reported.*)

1. *Life insurance—Evidence*—The allegation of the answer that the insured committed suicide and thereby annulled the contract of insurance, was denied in the reply and since such allegation was not sustained or attempted to be sustained by any evidence, it does not avail as a defense.

2. *Same*—The allegation of plaintiffs that they are the widow and children of the insured and the beneficiaries named in the policy was traversed by the answer. The mere fact that plaintiffs had possession of the policy and filed it with the petition established *prima facie* the truth of the said allegation and other evidence of it was not necessary in this case.

M. D. Gray for appellant.

A. G. Dejarnett for appellees.

Appeal from Grant Court of Common Pleas.

Opinion of the court by Judge Lewis.

By terms of the policy of insurance issued and delivered to Israel Wayland, appellant agreed, in substance, there should, ninety days after satisfactory proof of his death, be due and payable by the company $4,000 to his wife, Sallie, and children, Mary E., Maggie B. and Frank Wayland, equally, if living.

This action was brought by the aforesaid beneficiaries, all of them being, as alleged, living, to recover the amount so agreed to be paid them.

It is stated in the answer the assured, Israel Wayland, committed suicide and the policy of insurance became thereby void. But though that statement was denied in the reply, it has not been, nor attempted to be sustained, and, consequently, does not avail as defense to the action.

The allegation of the petition that plaintiffs are the widow and children of the assured, Israel Wayland, and beneficiaries named in the policy was controverted in the answer, and it is now contended that as no proof was made to sustain the allegation it was error to render judgment in their favor. But it seems to us that as the plaintiffs were in possession of the policy and filed it with, and as part of, their petition, they were *prima facie* entitled to recover the amount stipulated by the defendant to be due and payable, and it was not necessary for them to introduce evidence to prove they are the identical persons named in the policy, but the burden of showing the contrary was upon the defendant.

Judgment affirmed.

PRICHARD V. JAMES, &C.

(*Filed Sept.* 10, 1892.)

1. *Construction of conveyance to one and his heirs*—A deed conveying land to *Julia J. and her heirs*, vests a *fee-simple* estate in Julia J. In such deed the word "*heirs*" must be given its natural and legal effect as a word of limitation and can not be considered as if used synonomously with the word children.

2. *Parol evidence to explain grantor's intent*—Parol evidence in such case is

Digitized by Google

inadmissible to show how the grantor intended the words in the deed to be construed or to show how he wished the title to the land to pass.

R. D. Davis for appellant.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Lewis.

Determination of this case depends upon the proper construction and meaning of a deed from John M. James for the land in controversy, which is as follows: "This indenture, made 15th August, 1866, between John M. James, * * Julia James and her heirs, all of the county and State aforesaid, of the second part, witnesseth: That said John M. James, for and in consideration of $110, the balance secured by note, hath granted, bargained and sold unto the said Julia A. James and her heirs all that tract of land, situated in Carter county, Kentucky, on the waters of Tygart's creek, it being part of the land set apart for Margaret James in the division of the estate of George James, deceased, and bounded as follows: * Containing fifty-three acres, together with the appurtenances thereto belonging. To have and to hold the land hereby conveyed unto the said Julia A. James and her heirs and assigns forever. And the said John M. James, for himself, his heirs, &c., the aforesaid tract of land unto the aforesaid Julia A. James, her heirs and assigns, against the claim or claims of all and every person or persons, whatever, doth and will forever warrant and defend the aforesaid tract of land."

Subsequent to execution of that deed Julia A. James and her husband reconveyed the land to John M. James, for what purpose or consideration does not appear. But it is admitted that appellant, Prichard, afterward purchased and received a deed for it, and now claims under and in virtue of conveyance by Julia James and her husband.

This action was instituted by Julia A. James and her children, now appellees, to recover the land of appellant, and while the action was dismissed as to her, her children were adjudged entitled to recover a moiety of it.

In this contest parol testimony, tending to show for what purpose and to whom the deed from John M. James was intended to pass title to the land, is clearly inadmissible, and the question of whether appellees, children of Julia A. James, acquired thereby any title must be determined from the instrument itself.

The deed appears to have been drawn in due form and by a person of ordinary skill and experience and, consequently, it can not be fairly presumed he was unacquainted with the meaning and force of the language used.

The word "heirs" has been, in exceptional cases, and where the language and context of the instrument fully authorized it, been interpreted as intended by the parties to mean "children." But it does not seem to us a court would be authorized to give to the language of the deed in question any other than its natural and legal effect, and that, consequently, Julia A. James took under a *fee-simple* title to the land, the word "heirs" being used as a word of limitation and not at all synonomous with the word "children."

Tucker v. Tucker, 78 Ky., 503, is unlike this case. There the deed was to "Martha Ann Tucker and the heirs of John C. Tucker, their heirs and assigns, forever," which could not be otherwise interpreted than a conveyance to others jointly with Martha Ann Tucker, the

Digitized by Google

first-named grantor, and the word "heirs" was, in that case, plainly intended and had, in order to give proper meaning and effect to the deed, necessarily to be construed as synonomous with "children" of John C. Tucker.

But here the conveyance is to Julia A. James and *her* heirs, not the heirs or children of a different and distinct person.

In our opinion it was error to adjudge the children of Julia A. James entitled to any part of the land, and, therefore, a reversal is ordered, and cause remanded for dismissal of the action.

COMBS V. COMMONWEALTH.

(*Filed Sept.* 17, 1892—*Not to be reported.*)

1. *Verdict supported by evidence*—Although the evidence is conflicting it is sufficient to support the verdict finding appellant guilty of cutting and wounding another willfully and maliciously, &c.

2. *Conviction of felony for third time*—The indictment alleged and the evidence proved that appellant had been twice previously convicted of a felony, the punishment of which is confinement in the penitentiary, therefore, the defendant was properly sentenced to confinement in the penitentiary for life on conviction for this crime, and the instruction of the court in this particular and the verdict of the jury was proper.

W. R. Kinney for appellant.

W. J. Hendrick for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

There is difference in the testimony in respect to the manner in which the cutting and wounding with which appellant is charged was committed. But as there was evidence tending to show it was done willfully and maliciously and not in self-defense, and instruction was properly given upon the less offense of cutting in a sudden affray or sudden heat and passion, we are not authorized to disturb the jury's verdict that appellant was guilty of a felony and punishable accordingly.

It was distinctly and sufficiently charged in the indictment, and fully proved on trial and also found by the jury, that appellant had been twice before the present offense convicted of a felony, the punishment of which is confinement in the penitentiary, and, therefore, the penalty of confinement in the penitentiary for life became, according to section 12, article 1, chapter 29, General Statutes, inevitable, and the court could do no less than so instruct, and the jury, after finding the present offense a felony, was bound to render the verdict in pursuance thereof. The validity of that statute has heretofore been sanctioned by this court and it is now needless to discuss the question.

Judgment affirmed.

Digitized by Google

COMMONWEALTH V. BLACKWELL.

(*Filed Sept.* 17, 1892.)

Instructions concerning manslaughter—An instruction concerning manslaughter, in which that offense is not defined at all and in which the jury is told that "if they have a reasonable doubt as to whether or not the killing was done with malice aforethought, they will find the defendant guilty of manslaughter" is erroneous in that it leaves the jury to determine for themselves, as a matter of law, what the elements of crime of manslaughter are. The offense should be defined in the instruction.

W. J. Hendrick for appellant.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Bennett.

The appellee was indicted in the Webster Circuit Court, charged with the crime of murdering ——— Bodard. The appellee was convicted of the crime of manslaughter. He does not appeal from the judgment of conviction, but the Commonwealth appeals in order to have this court rule upon the correctness of the third instruction in reference to manslaughter.

The court first, in proper form, instructed the jury as to the law of murder, and the proof clearly authorized that instruction. The court then gave instruction No. 3 in reference to manslaughter. In that instruction the crime of manslaughter is not defined. The jury is told that "if they have a reasonable doubt as to whether or not the killing was done with malice aforethought, they will find the defendant guilty of manslaughter."

The instruction leaves the jury to determine, as matter of law, what is necessary to constitute the crime of manslaughter, except they are told that malice is not an ingredient thereof.

The instruction is erroneous in not giving the jury the legal definition of the crime of manslaughter.

This opinion is ordered to be certified.

OSBORN V. COMMONWEALTH.

(*Filed Sept.* 17, 1892—*Not to be reported.*)

1. *Criminal law—Verdict sustained by evidence*—The evidence leaves little doubt of appellant's guilt of the offense of poisoning cattle and thereby causing their death, and his confession in this case is corroborated by other evidence.

2. *Instructions*—When the statute making it a crime to poison cattle provides that "if death be the result of the poison the person administering it or causing it to be done may be confined in the penitentiary *not less than one year*," it was not prejudicial to defendant to instruct that jury that they might fix the punishment of one guilty of such crime "*not exceeding one year's*" confinement in the penitentiary.

3. *Jury—Exclusion of colored persons therefrom*—As it does not appear from the record that colored persons are excluded from either the grand or petit juries in Fayette county, the court can not assume that it was done in this case.

4. *Criminal law—Examining courts*—Appellant has no right to complain because he was indicted by the grand jury without having been given an examining trial and thereby permitted to testify in his own behalf.

Digitized by Google

J. Alexander Chiles for appellant.

W. J. Hendrick for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

A. F. Berry, of the county of Fayette, having lost many valuable cattle, ascertained by having the contents of their stomachs examined by competent chemists that the stock had been poisoned with Paris green.

He failed to detect the wrong-doer until he employed a detective from Cincinnati, who, having made the acquaintance of the accused, soon ascertained that he knew all about the commission of the offense.

The accused was unfriendly to Berry and was suspected of having administered the poison. The detective, under the garb of a laborer, complained to the accused of the manner in which he had been treated by Berry and proposed to have revenge. It was then suggested by the accused that he could poison his damned cattle, and to this the detective readily consented, the accused telling him that he had before poisoned Berry's cattle with Paris green.

The money was given the accused to buy the poison at a certain drug store and the two, the detective and the accused, were to go out that night and administer the poison. The accused purchased the poison and, being told by the druggist that he must be careful, it was very poisonous, remarked, "he knew that and had used it before."

The detective and the accused, with salt and this poison, went to Berry's farm and there the accused emptied the poison and the salt in different places within reach of the cattle and while so engaged the other detective and Berry, who had secreted themselves in the woods, made an effort to capture the accused, but failed and he was not arrested until the next day.

The plan to entrap the accused was known to the two detectives, Berry and the druggist on the day and prior to the purchase of the poison, or at least the druggist was requested to let the accused have all the Paris green he wanted.

The accused denied having confessed to the poisoning of Berry's cattle prior to that time, and says he was compelled to go to Berry's by the detective, as the latter, with pistol in hand, threatened to shoot him if he declined to go.

There were four indictments against the accused for poisoning different cattle prior to the attempt to administer it on the night he was with the detective.

He was tried under each indictment, found guilty and his punishment fixed at confinement in the State prison for one year for each offense.

The statute provides that "if death shall be the result of the poison, the person administering it or causing it to be done may be confined in the penitentiary not less than one year.

There is but little doubt of defendant's guilt. His own conduct corroborates the confession made to the detective that he had poisoned Berry's stock. The latter had lost stock of the value of several thousand dollars, and the readiness with which the accused suggested the mode of revenge and the character of poison to be used conduced strongly to show that he had, prior to that time, been engaged in like business.

Digitized by Google

The instructions told the jury that if he administered the poison or caused it to be done, causing the death of the particular cow, they must find him guilty and fix his punishment not exceeding one year. This was favorable to the defendant instead of prejudicial, the statute fixing the punishment at not less than one year. Nothing was said, in argument, about the examining court and the failure to give the accused time to be heard in that court.

It required no examining court to enable the grand jury to indict the accused and, under the indictment, he could be tried, whether found guilty or acquitted by the examining court. The grand jury is not always in session and an examining court is provided that the party accused may be held to bail, and the testimony under which he was acquitted or held over taken down and subject to the inspection of the grand jury. Still this does not control the action of the grand jury when it comes to investigate the offense as they may indict while the offense is being investigated by an examining tribunal.

It is not pretended that under the law or practice in the Fayette Circuit Court that colored persons are excluded as members of either the grand or trial jury, and we see no reason why the judgment in each case should not be affirmed.

The testimony offered was competent and none rejected that affected the rights of the accused.

Judgment affirmed in each of the four cases, all having been heard together.

PROCTOR V. COMMONWEALTH.

(*Filed Sept.* 17, 1892—*Not to be reported.*)

1. *Criminal law—Evidence*—On the trial of one for an attempt to commit a rape the Commonwealth is not required to introduce as a witness the female upon whom the attempted rape was made before introducing its other witnesses.

2. *Same—Attempted rape—Indictment*—An indictment averring that appellant, "with *force* and arms, unlawfully, maliciously and feloniously did make an assault upon one L., a female under the age of 12 years, then and there unlawfully, maliciously and feloniously, against her will and consent, did attempt to ravish and carnally know," &c., "contrary to the statute," &c., is a good indictment under the statute for attempted rape, although the name "L.' or the pronoun "her" is omitted from the latter clause of the averment; the word "force" in the averment does not relate alone to the alleged assault but it must be construed as applying to the "attempt" to "ravish and carnally know" also.

P. B. Thompson, sr., and McAfee & Allen for appellant.

W. J. Hendrick for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was convicted of an attempt to commit the crime of rape on a child under twelve years of age, and his punishment fixed at confinement in the State prison for sixteen years.

There was a demurrer to the indictment that was overruled and this is made one of the grounds for a reversal. It is alleged that the

Digitized by Google

accused, with force and arms, unlawfully, maliciously and feloniously did make an assault upon Laura Bell McDaniel, a female under the age of twelve years, then and there unlawfully and feloniously against her will and consent did attempt to ravish and carnally know, &c., contrary to the form of the statute, &c.

It is urged that the word force can be applied alone to the assault on the child, and has no reference to the alleged attempt to ravish, either expressly or by implication, and, again, that from no reasonable construction of the indictment can it be said that the averment of the attempt to ravish and carnally *know* applies to Laura Bell McDaniel.

The whole of the averment, with reference to the assault and the attempt to ravish, is found in one sentence, and it would be an extremely technical view of the question to say that a part of the averment containing the assault applied to Laura, and that as to the attempt to ravish had reference to some one else, or at least could not, by any fair interpretation, be construed as one act, an assault by force with an attempt to commit a rape.

The averment is that the accused, before the finding of the indictment, "with force and arms, unlawfully, maliciously and feloniously did make an assault upon one Laura Bell McDaniel, a female under the age of twelve years, then and there unlawfully, maliciously and feloniously, against her will and consent, did attempt to ravish and carnally know, &c., contrary to the form of the statute."

The word *her*, or Laura Bell McDaniel, seems to have been omitted in the latter part of this averment, still it applies and is directly connected with the person upon whom the assault was made, and is a good indictment for an attempt to commit a rape upon a child under twelve years of age. "Whoever shall attempt to commit a rape upon the body of an infant under twelve years of age" is the language of the statute.

The language of an indictment must be construed according to its legal meaning, and as the statute punishes a party for attempting to commit a rape, the facts constituting the attempt must be stated so as to enable the court to say that the crime of rape would have been complete if the purpose of the ravisher had been accomplished. It was, therefore, necessary to allege that force was used, and this was done by the averment of an assault by force, then and there feloniously, against her will and consent, did attempt to ravish and carnally know.

It would have been a good indictment at common law for rape with the word *attempt* omitted.

It is claimed that under the rule of practice the party assaulted should have been first examined before any corroborative testimony was introduced. Such a rule may have been recognized under the ancient mode of criminal proceedure, but under our Code the manner or order of introducing testimony is not recognized or required in criminal proceedings, but if such a practice prevailed there was no testimony offered as to the attempt to commit the act or corroborative proof of that fact until the child had testified.

There was testimony as to where the child lived and facts showing the manner in which he obtained the custody of her person preceding the examination of the principal witness as to the main fact, and, if improper, it could in no wise have prejudiced the accused. There is no error in the admission of testimony either as to relevancy or competency, or any error in the order in which this testimony was permitted to go to the jury.

As to the instructions, those given by the court embraced the

Digitized by Google

entire law of the case, and if the court erred in the instructions it consisted in giving the accused the benefit of the statute punishing one for detaining a woman against her will and consent, &c., in which case the punishment could not exceed seven years; so, if prejudicial to either side it was to the State and not to the accused.

It is not necessary that this court should comment on the testimony. We know how easy it is to make such a charge and how difficult to disprove it, and particularly in a case like this, where the sympathies of all mankind must be with the injured child until all suspicion of guilt is removed.

It was the province of the jury, however, to determine the issue of fact, and while it may be difficult to believe that a man advanced in years, with a family around him, would deliberately plan and attempt to execute such a revolting crime as that of rape, there is proof conducing strongly to show that he had selected this child as the victim of his beastly desires.

Judgment affirmed.

COMMONWEALTH V. ECKERT.

(*Filed Sept.* 17, 1892—*Not to be reported.*)

1. *Criminal law—Return by officers of election under the Wallace Election Law*—Under the provisions of the Wallace Election Law, which regulates elections in the city of Louisville, it is the duty of the officers of the election to include in their "return" the number of ballots received by each candidate for office.

2. *Same—Indictment*—An indictment against a clerk at an election for councilmen in the city of Louisville, for making a false return, which avers that the clerk made a false return by reporting that one candidate received 41 votes and the other 46 votes, is defective, unless it also alleges the true number of votes received by each candidate, and how and in what respects said return is false. (Judge Bennett dissenting).

Frank Parsons, Bush & Wallace, C. B. Seymour and W. J. Hendrick for appellant.

Kohn, Baird & Speckert for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

This indictment charges the appellee, William D. Eckert, with making a false return as clerk of a municipal election in the city of Louisville.

It charges that he made a false return as to the number of votes in a certain precinct, of which he was clerk, received by each of two candidates for councilmen.

It is urged that the law does not require him to report the number of votes received by each candidate.

If so, and the return embraced matters not required to be returned by law, then, of course, the officer can not be held liable for falsity as to them.

By section 3, of what is known as the Wallace Election Law, the mayor of the city, among other duties, is required to have printed and sent to the election officers of each precinct, a form for the re-

Digitized by Google

turns, as "set out in section 15 of this act," and it is to be printed on the inside of one of the covers of the book of stubs and ballots.

Section 8 provides: "A false report by them in this particular (*i. e.* whether the package of ballots was in good condition and had not been tampered with when received by them) or of any other fact in their return shall be punishable as perjury."

Section 15 says: "The form of the election return above provided for shall be substantially as follows." It is then given, and as a part of it the number of ballots received by each candidate is to be stated.

The return to be made is incorporated into the statute. It is a part of the law, and although other sections provide that the officers are to report this and that matter, yet that, in our opinion, does not render it any the less their duty to report as to all the matters set out in the form. It is true the ballots are to be returned to the mayor and be preserved; but, doubtless, for greater certainty and security, and as evidencing the result, the officers are required to report the number received by each candidate. This, we think, was the legislative intention, and a statute is to be construed with a view to such intent.

This objection to the indictment is not well grounded. The law, however, in its consideration for personal security (for which the common law especially has such high regard) requires that a criminal charge shall be direct and certain. It must so far set forth the circumstances of the alleged offense as to apprise the accused with certainty of what he has to meet in order that he may prepare to, and be ready to, defend himself.

This indictment charges that two persons, naming them, were voted for as councilmen, but it does not state the number of votes each one in fact received. It merely avers that the accused made a false report by reporting that one received 41 votes and the other 46 votes.

It does not aver how many, in fact, each received, nor does it set out in what respect or how the report was false. As well might an indictment for forgery by the changing of a promissory note be held good, merely by alleging that a change was made, without setting it out.

In this instance the facts showing the report to be false are not stated. Upon the trial it would be necessary to prove in what the falsity consisted, and it is, therefore, necessary and equally so to aver it in the indictment. If not, then the accused is left to conjecture the precise character of the charge. Is it to be claimed that he falsely reported one man received a greater or less number of votes than were, in fact, cast for him, or is this or that to be claimed as to the other candidate?

The indictment should show how the report was false, and especially should such certainly be required when the act is so severely denounced, the perpetrator being subjected to punishment as in case of perjury.

The judgment sustaining the demurrer to the indictment is affirmed.

Judge Bennett dissenting.

Judge Bennett delivered the following dissenting opinion.

The opinion in this case holds that the indictment is defective in not stating the number of votes that each candidate received in order to show that the "report" made by the appellee, that one of the candidates received 41 votes and the other received 46 votes, was false. I do not agree to that part of the opinion. It is, as the opin-

Digitized by Google

ion holds, made the duty of the clerk, &c., to report the number of votes cast, &c.

The eighth section of the statute, quoted in the opinion, provides that "a *false report* by them" (one of whom is the clerk) "in their return shall be punishable as perjury."

The indictment charges that the appellee "did feloniously, fraudulently and falsely report in the return made by him" that one candidate received 41 votes and the other received 46 votes, &c. Now the gravamen of the offense consists in making a false report in the official return of an existing fact, not a number of facts. In other words, reporting a lie as to the number of votes, &c. It makes no difference whether or not the candidate received more or less votes than represented in the return, for the question is, is that return, consisting of the report of a fact, false? Does it tell a lie in that particular? If it does, then the person that returned the lie in his official capacity is guilty of official perjury, provided he knew it was a lie.

As said, the gravamen consists in knowingly and intentionally reporting a fact that does not exist. Here it is charged that the appellee feloniously, fraudulently and falsely reported a fact that did not exist. Now an indictment must charge a public offense in such plain language as to inform the accused, with reasonable certainty, of what offense he is charged. Does the indictment so inform the appellee? I think it does. It says he reported the fact that 41 and 46 votes were the correct number, which report was false and fraudulent. It is the return of that number of votes that is false. And how does the additional declaration, that the true number was so and so, tend to show with any greater certainty that the report of 41 and 46 was false? But, it is said, that the language employed to convey the idea of a false report is not such an allegation of fact that informs the appellee of what he is charged. Also the allegations in reference to an indictment for forgery are instanced as a parallel case in support of the position that the indictment is not sufficient. But I am at a loss to know why an indictment for perjury was not given as a parallel case, as the offense of making a false report is made official perjury, which is to be "punished" as common law "perjury."

Now in an indictment for perjury, where the offense consists of swearing to a particular fact, it has always been held that to set forth that fact and then traverse it by the allegation that it was false, &c., is sufficient to put the accused on his trial; such traverse constituting a traversible issue.

In the case of Still v. Commonwealth, 83 Ky., 275, the statement in Archibald's Criminal Practice, volume 2, page 995, in which it is held that the indictment must negative the matter sworn to by special averment, is explained on the next page. It is there said: "If the statement sworn to be of a particular fact, negativing that fact will, of course, be sufficient. But if the statement be general, and the assignment as general in the negative, as if a man swears that he has paid all his debts, and the assignment be that he has not paid all his debts, this would be bad for want of certainty, as it would afford the defendant no information of what was intended to be proved, because the assignment would fail to inform him what particular debt he had not paid."

In the case of State v. Huckly, 87 Mo., 414, it was held, under the Missouri statute, which is similar to our side in respect to perjury, that the allegation that the testimony was false, &c., was sufficient. Also the form given in the Criminal Code of Practice does not re-

Digitized by Google

quire the truth of the matter to be set forth in order to negative the false testimony charged.

The Massachusetts courts and others held the same rule. Now it seems to me that where the perjury is alleged to consist of a particular fact, it is sufficiently negatived by the averment that the fact is willfully and corruptly false. But if the falsehood may consist of one or a given number of facts out of a number of facts sworn to by the accused, then I can see why those facts should be pointed out as the false one, in order to inform the accused of what he is charged. To illustrate, if A's perjury is alleged to consist of swearing that he had paid B $50, it would not be necessary to allege that, in truth, he had only paid $45, because the offense consists of a particular fact, not of one or more of a number of facts, some of which are true and some are not true.

In the latter case all agree that the accused should be particularly informed of the untrue matter relied on. Here the indictment charges the particular fact of official perjury, the reporting of a certain number of votes. It seems to me the allegation that the appellee made the report that the two candidates had received, respectively, 41 and 46 votes, is an allegation of a particular fact, the truth of which was put in issue by the allegation that such report was false, &c.

The case of Richy v. Commonwealth, 81 Ky., 525, sustains the foregoing views.

CABLE, &C. V. COMMONWEALTH.

(*Filed September* 17, 1892—*Not to be reported.*)

1. *Practice on appeal*—Where there is any evidence conducing to sustain the verdict of the jury, this court will not reverse the case as for a failure of proof, although the evidence does not satisfactorily prove to this court that the accused committed the offense charged or that such offense was committed.

2. *Criminal law—Evidence—Confessions*—On the trial of a father and son for the offense of unlawfully poisoning the horse of another, from which he died, the court permitted the Commonwealth to prove that the son made this statement in a conversation at which many were present, viz: That he "took his poison and put it in a bag, climbed over a fence and put it in a trough, and that he reckoned the damned old mare got it." But the court refused to permit the witness to tell what those present said to the son at the time he used this language. *Held*—That it was proper to admit all that was said on the occasion mentioned in order to test the accuracy and truthfulness of the witness and for the purpose of ascertaining just what the son meant by the use of the language.

3. *Same—Evidence*—Such confession of the son, not made in the presence of the father, was not competent against him and it was the duty of the court to so instruct the jury.

Z. T. Hurst and A. F. Byrd for appellants.

W. J. Hendrick for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Lewis.

Appellants, Coon Cable, father, and John Cable, son, under twelve years of age, were indicted and convicted of the offense of unlawfully

Digitized by Google

poisoning a horse, the property of one Felix Pence, which died as the result, and the punishment imposed of confinement in the penitentiary for one year.

In the first place it is not to our satisfaction established that the horse did die of poison, though this court would not be authorized to reverse on that ground, the jury being, according to law, sole judges of the weight and sufficiency of the evidence. There is evidence that cattle, belonging to Pence and another person, two or three months before the horse in question died, wandered to the place where Coon Cable resided, and a dog was set on them, which resulted in a fuss between them, during which Cable said if they did not keep their cattle away from his place he would poison them. But there is no evidence whatever that Coon Cable was at any time on the premises of Pence, or near his stable when the horse was poisoned, if at all.

It was proved that John Cable and his sister were seen in the road that passes near the house of Pence after the horse became sick, and that they stopped a while, looking at the struggling horse, but no one testifies he was on the premises or near there prior to that time.

The presence of John and his sister in the road is explained by her, she stating they had been sent to a mill to procure meal, the way to which was along the road by the house.

It was stated by one witness that after death of the horse John Cable and his mother were at the house of a neighbor, there being others present, and during a conversation about the dead horse John said he "took his poison and put it in a bag, climbed over the fence and put it in a trough, and that he reckoned the damned old mare got it." But the court refused to permit the witness to tell all that was said by those who were there talking with the boy. It seems to us that to ascertain the exact meaning and purport of what was said by John on that occasion, as well as for the purpose of testing the accuracy and truthfulness of the witness, it was entirely proper to find out all that was said on the subject on that occasion. The propriety and necessity of such cross-interrogation is illustrated by the testimony of another witness introduced by the Commonwealth, whose evidence was not that John confessed he administered the poison, but that he stated "they said" he did.

In our opinion the court erred to prejudice of John's substantial rights in restricting the testimony in the manner mentioned, and committed a greater error in permitting any confession of John to be given in evidence against Coon Cable, without at least instructing the jury it could not be used against him.

There are other errors complained of, but for the reason already given the judgment must be reversed as to both appellants and a new trial granted.

KING V. COMMONWEALTH.

(*Filed September 22, 1892—Not to be reported.*)

1. *Rape—Force—Instructions*—An instruction on a trial for rape that the force used need not have been actual physical force applied to the person, if the prosecuting female "was intimidated into submission by threats *or by the force of the surrounding circumstances*" was erroneous, because the italicized words were too indefinite and general and liable to mislead the jury.

2. *Same—Evidence*—The prosecuting female witness claimed that defend-

Digitized by Google

ant, with certain companions aiding him, took herself and sister to an unoccupied school-house, where he detained her all night and committed the crime upon her person. On cross-examination she was asked if she had not stated to certain witnesses that she was not scared at the school-house and that the boys did not hurt her there, only talked a little bad. The court refused to permit testimony as to the alleged conversation to go to the jury. *Held*—That since the only question on the trial was, whether the defendant used force to compel the witness to have secured intercourse with him, or she did so willingly, the evidence was competent as conducing to show the truth or falsity of her testimony.

Nunn & Cruce, E. C. Flanary, O. M. James and C. S. Nunn for appellant.

W. J. Hendrick for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Lewis.

Under an indictment against himself as principal, and Phil. Martin, John Burton and James Burton, charged with aiding and encouraging him, appellant was found guilty of the crime of rape on Margaret Allen and sentenced to confinement in the penitentiary.

The circumstances, as detailed by her and her sister, who was, at the time, under sixteen years of age, are in substance as follows: The two females, accompanied by their father, N. W. Allen, July 4, 1891, went on an excursion railroad train to a barbecue, where were appellant, Phil. Martin and John Burton, and upon the return, which was after night-fall, their father, N. W. Allen, got off at the station nearest his residence, but the two daughters failed, for reasons explained by them, to do so, and were carried to another station where they were comparative strangers; that getting off the train at that station they were allured by appellant, King, Martin, John Burton and also James Burton, who there joined the party, to go to an unoccupied school-house, a considerable distance from the station, under the information given by the defendants it was a dwelling house at which they could safely stay the remaining portion of the night; that some time after they, against their will and by application of force, got into the school-house, appellant, King, dragged Margaret away from her sister over benches and out of doors, where the offense was committed; that King had, at the time, a pistol and said if the two girls did not submit to them he would kill them. Both the girls state that the other three persons implicated told them King would kill them if they did not submit; though, according to their testimony, none of the defendants, except King, used any violence or had sexual intercourse with either of them.

They both testify they were kept at the school-house against their will until about daylight, when they were carried to the station and thence by the first passing train returned home. And Margaret Allen testifies that after the offense was committed she attempted to get away, but by threats of King and actual force was prevented, he not only choking her but cut her hand with a knife he had open.

On the other hand, each of the defendants, except Martin, who was a fugitive and not present at the trial, testified that the two females need not have missed getting off the train at their proper station, and after getting off at the station near to where defendants lived, willingly, and of their own choice went to the school-house to spend the night with them instead of going to the dwelling-house of some person near the station, and that after they got there, without

Digitized by Google

force or threats, the youngest of them had sexual intercouse with John Burton, while the eldest, Margaret, had such intercourse willingly with Martin and afterwards with King.

It appears from the testimony in chief of Margaret Allen that about two weeks after July 4 two persons, Martin and Canada, went to the house of N. W. Allen in behalf of defendants for the purpose of compromising the matter and told Margaret defendants would give $400 and a nice farm if she and her father would drop the matter. And on cross-examination she was asked whether on that occasion she said she was not scared at the school-house; whether she said she could wade in blood up to her chin and not be afraid; and whether she did not say the boys did not hurt her on the night at the school-house; that they only talked a little bad. All of which questions she answered in the negative.

N. W. Allen being introduced as a witness, was asked on cross-examination whether he had, on the occasion first mentioned, said to Martin and Canada if the boys would quit talking about the matter he would drop it; whether he told them Margaret was not scared and could wade in blood up to her chin without being frightened, and whether he told them the Burton boys and Martin were welcome to come to his house.

The court, after permitting evidence of the proposed compromise to go to the jury, afterwards excluded it, with sufficient distinctness, according to the bill of evidence, and we think appellant was not prejudiced by action of the court in reference to that evidence. But he, by counsel, avowed he could prove by Canada and Martin, and offered to prove by them, that both Margaret and N. W. Allen did make the statements about which they were asked on cross-examination, and which they denied making. That action of the court was clearly erroneous, and it seems to us prejudicial to the substantial rights of appellant. For as the account of the occurrence at the school-house as testified by Margaret is contradicted by the defendants, and the inquiry for the jury was simply whether she had sexual intercourse with King willingly, or was caused by threats or intimidation, it was material to show she had afterwards stated she was not intimidated nor hurt, and especially to show by her own admission that all the boys did was to talk bad.

N. W. Allen also had testified that his daughters, immediately after their return home next morning, made known to him the alleged rape had been committed, which we do not regard as entirely consistent with what it was avowed Canada and Martin would prove he said to them on the occasion referred to; at least the jury ought to have been permitted to weigh the two statements together.

The instructions embody the law applicable to this case, except the second, as follows: "The force need not have been actual physical force, applied to the person by said King and others, if she was intimidated into submission by threats of King or the other defendants, *or by the force of surrounding circumstances*."

Undoubtedly the offense of rape may be committed without the actual use of physical force or violence, and if Margaret Allen was intimidated or put in fear by defendants, or any of them, and thereby against her will induced to submit to King, the offense was complete. But the words of the instruction, which we have italicised, are too general and indefinite, and, therefore, liable to mislead the jury.

For the reasons indicated, the judgment is reversed for a new trial.

Digitized by Google

KY. MUTUAL SECURITY FUND CO. V. TURNER, &c.

(*Filed May* 19, 1892—*Not to be reported.*)

Appeals—Partial transcript—The judgment appealed from required a debtor of the defendent to pay the debt into court. Defendant has filed only a partial transcript of the record, which does not certain the pleadings or the evidence; therefore, it is impossible to determine whether or not the judgment is erroneous.

Marc Munday for appellant.

W. O. Harris for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

According to statement made in the transcript of the record the judgment appealed from simply requires the German Bank, a garnishee not a party to this appeal, to pay into court two sums, amounting in the aggregate to $529.22, that was in its hands belonging to appellant, the Kentucky Mutual Security Fund Company.

It may be assumed, from the part of the record before us, that appellees, as plaintiffs, caused the fund in question to be attached to satisfy a debt against appellant. But as there are no pleadings or evidence copied into the transcript it is impossible for this court to determine whether the Judgment appealed from is erroneous or not. Besides, it does not definitely or finally determine the fund in question is liable for the debt of appellee nor direct application of it for that purpose.

Appeal dismissed.

JOHNSON V. COMMONWEALTH.

(*Filed Sept.* 8, 1892—*Not to be reported.*)

Indictments—Defacing brands on saw-logs—This indictment, charging appellant with the offense of defacing brands on saw-lows, &c., is sufficient under section 3, chapter 31, General Statutes. And the verdict of guilt is sustained by the evidence.

W. L. Hurst for appellant.

W. J Hendrick for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was convicted of defacing brands on saw-logs belonging to the Moore & Whipple Co. and sentenced to confinement in the State prison for one year. The conviction was had under section 3 of the General Statutes, chapter 31, by which it is made a felony to cut out or deface any brand upon the timber or logs of another upon the Kentucky and Cumberland rivers and their tributaries. The indictment is sufficiently certain in the statement of the facts constituting the offense.

It is alleged that the logs belonged to Moore, Whipple & Co.; that

Digitized by Google

they were branded and the character of the brand given, and, further, that the brand was defaced and, in some instances, cut from the timber by the appellant, with the felonious intent to appropriate the logs to his own use and that he did in fact dispose of them.

The brands were recorded, if such an averment was necessary, as is stated in the indictment in the county from which they were taken, and all essential averments made to make a good indictment. The testimony sustains the verdict and whether the owners were a foreign or home corporation is immaterial; they were the owners of the logs, as the testimony conduces to show, and the brand being defaced, as is alleged by the defendant, he was properly punished.

We think there was no error in refusing a continuance. The appellant had a number of witnesses present and his plea of not guilty was sustained by their statements, but the proof on the part of the State seems to have satisfied the jury as to the appellant's guilt. There was no error in the instructions. They were more favorable to the accused than to the State.

Judgment affirmed.

ADKINSON V. RAUSDALL.

(*Filed Sept.* 22, 1892.)

Judicial sales—Special commissioners—The sale of the land in this action having been made by the attorney for the plaintiff, who was appointed special commissioner to make such sale, it should be set aside on exceptions filed by the debtor-defendant where the testimony shows the land sold for less than its real value, although the attorney conducted the sale fairly and in good faith and had ceased to act as attorney for the plaintiff as soon as he ascertained that he had been appointed such special commissioner. But such special sale so made is not void and the purchaser could not complain because such attorney acted as special commissioner.

Bell & Bell for appellant.

J. F. Vanarsdall for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

While the defense interposed to prevent a judgment must be reregarded as purely technical, in our opinion the sale should have been set aside. The commissioner making the sale was the attorney for the plaintiff and as such obtained the judgment under which the sale was made.

By an act of the Legislature, approved January 12, 1878, it is made "unlawful for any master commissioner of any court of this Commonwealth to act as such commissioner in any case in which he is or shall become interested as attorney or otherwise." General Statutes, chapter 76, page 942.

While the attorney for the plaintiff in this case may not have been the master commissioner of the court, still he was made the commissioner in this particular case, and the spirit and meaning of the statute must necessarily be held to embrace both the regular and special commissioner.

The enactment was intended to prevent those who are the partisans of one of the litigants, by reason of being an attorney or other-

Digitized by Google

wise pecuniarily interested, from taking charge of the case after judgment or before, where he necessarily for the time being, is not under the control of the court but must act on his own judgment. He is presumed to be looking more to the interest of his client than that of his adversary and, therefore, this enactment prohibiting him from acting as commissioner.

We do not adjudge such a sale void, because if the purchaser alone was seeking to avoid the purchase we would compel him to abide by the sale, but where the vendor of the land, by proof on his exceptions, shows that the land was sold for less than its value and that the sale was made by the attorney prosecuting the case to a judgment, this court will set the sale aside.

There has been no improper conduct shown on the part of the attorney who acted as commissioner; but, on the contrary, he acted in good faith, still there is testimony showing the land sold for less than its real value, and having been sold by the attorney acting as commissioner, this court, however properly the attorney may have acted, will set the sale aside.

It is said that after the attorney discovered he was made commissioner by the judgment, surrendered his employment as attorney and proceeded to act from that time on as commissioner only. This does not cure the evil intended to be remedied by the statute, for if one can act as attorney until he is appointed commissioner and then take charge of the case as commissioner the very purpose of the statute would be defeated, and while there is not the semblance of unfair dealing with the defendant by the attorney for the plaintiff the statute must be regarded, and the only serious question in the case is, whether or not the mere fact of the sale by the attorney is not sufficient to invalidate it on the motion of the debtor, although no injury has resulted from it.

Judgment reversed, with directions to set the sale aside and order a resale of the land.

ROSS V. COMMONWEALTH.

(*Filed Sept.* 22, 1892—*Not to be reported.*)

Larceny—Evidence—In this case, in which a father is prosecuting his daughter for larceny, the father claims that he became the absolute owner of a cow under a certain contract with his daughter; the daughter claims that the father had a right to the cow only for a certain period. *Held*—That even if the father acquired absolute ownership of the cow, as he contends, yet it is clear that the daughter had no felonious intent when she repossessed herself of the animal and her offense could not have been more than a mere trespass and she should have been acquitted of the charge of larceny.

Z. T. Hurst and A. F. Byrd for appellant.

W. J. Hendrick for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Pryor.

This record presents a case where the father is prosecuting the daughter for the crime of larceny, alleged to have been committed in the taking of a cow from his possession, that was his property, and converting it to her own use.

Digitized by Google

The right of the father to the property is based upon a parol contract that he says was made by the daughter with him, by which she gave him the cow in consideration that he would provide for and raise her infant children; that her husband having died but a short time prior to this gift or contract, his daughter being without means, concluded to go to the State of Missouri, where her grandmother lived, and leave the children with him.

Whether she intended to reside permanently in Missouri does not distinctly appear. She, however, abandoned her intention of leaving the State and lived for years with her father and, as she says, provided for and supported her own children, and this seems to be uncontradicted.

Her version of the agreement is that the cow was to be taken with the children to her father's to furnish them milk, and there was no purpose to surrender the title.

It is evident that the contract or gift was never consummated, as the consideration failed and the mother undertook to raise her children. She conceived, as the testimony shows, that the contract was rescinded and there was no felonious taking but a mere trespass, conceding the cow to have belonged to the father.

While her conduct with reference to her loan was reprehensible, still there is no case, upon the facts, that would authorize the incarceration of this woman in the State prison for three years, or any period of time, at the instance of a cruel, unrelenting and inhuman father.

The judgment is reversed and cause remanded, with directions to award a new trial, and if, upon another trial, a similar state of facts is developed there should be a verdict of acquittal.

SMITH V. COMMONWEALTH.

(*Filed September* 24, 1892.)

Criminal law — Reckless use of fire-arms — Manslaughter — Prisoner and guard—While an accidental discharge of fire-arms, whereby one is killed, may be so heedless and incautious as to be deemed *per se* wanton and unlawful, so that the party guilty thereof may be convicted of manslaughter, although he had no express intent to do mischief, still there are exceptions to this rule and every accidental killing, by reason of the negligent use of fire-arms, can not be considered manslaughter. The circumstances of each case must determine the degree of the offense.

One accused of murder, and the guard in whose custody he was, began firing pistols "at the clouds" at a secluded place on a public highway. The two exchanged pistols, and during the exchange, or immediately after, the prisoner was shot and killed. It does not clearly appear whether he shot himself or was shot by the guard accidentally. *Held*—That the question of the guard's guilt of manslaughter should be determined without reference to the relation of prisoner and guard that existed between them, and it was error to instruct the jury that if the guard "either carelessly or negligently, in discharging fire-arms, shot and killed" his prisoner, "they will find him guilty of manslaughter, * * * even though they may believe that defendant did not intend to shoot deceased." Whether the guard was guilty of manslaughter depended upon the actual circumstance at the time of the alleged accidental killing.

J. Smith Hays for appellant.

Digitized by Google

W. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Lewis.

The deceased, James Bailey, had, on the same day of his own death, killed a man named Brinks and was arrested and taken to Barboursville. But the examining trial being put off, he was given the right to employ a guard and by the accommodating constable permitted to select the person to act as such, who was appellant, Smith.

The prisoner and his guard, each being armed, the former with a large and the latter small pistol and shot-gun, started from town without presence of the constable, to go to the residence of the prisoner's father, about twelve miles distant, to return on day of the trial, or, for all the officers apparently cared, never.

On the way they met one Green Hammons, who permitted the prisoner to ride with him on his mule, the one he started from town on having been taken from him by the owner. When they, the prisoner, guard and Hammons, got within a short distance of the draw-bars opening into his father's farm, the first mentioned proposed to fire his pistol at a tree but was dissuaded because the mules might become frightened, though it was agreed he might shoot when they got to the draw-bars. Accordingly, upon arrival there, all dismounted, and the prisoner, now deceased, commenced shooting with the large pistol, not at a mark, as was suggested to him, but as he said was preferable, "at the clouds," and his guard, now appellant, followed his example. After two shots were fired by each of them, the deceased called for the small pistol, at the same time handing appellant the large one, muzzle foremost, back over his shoulder, whether the right or left is not stated, which he took, handing the small one back foremost to the deceased. The latter pistol was immediately fired three or four times, but by whom Hammons was not able to state, because he says his attention was at that time given to his mule.

When he turned his face toward the other two he saw the deceased sinking back as though going to sit down, and throwing his hands behind him said: "Bill, I believe I am shot," and the small pistol fell directly behind him. The pistol ball, which caused death in about five minutes, entered his back below the shoulder blade and to right of the spine, ranging downward and towards the left side. The position of appellant at the time of the shooting was to the left of where the deceased stood, and upon higher ground about two feet.

If Hammons, the only other eye witness besides appellant, testified truthfully it does not seem to us at all probable the latter shot the deceased, for it was hardly possible for him, occupying the position he, as well as Hammons testifies he did, to have shot the deceased in the place he was struck and given to the bullet the direction it took; nor is it natural or reasonable, if he had done so, that the deceased would have with his last breath used words indicating he had himself done it, and that appellant was not to blame. Besides, the deceased having handed the large pistol to appellant, asking at the same time for the small one, which Hammons states he saw the latter in the act of giving to him, it is scarcely credible that as many as three shots were afterwards fired with it by appellant instead of the deceased.

But there is testimony of statements subsequently made by appel-

Digitized by Google

lant tending to show he and not deceased fired the shot that caused the death, though there is none from which it can be reasonably inferred he intentionally shot or killed deceased.

The court gave an instruction applicable to a case of murder, for which appellant was indicted, the usual instruction as to manslaughter and also the following: "If the jury shall believe from the evidence, to the exclusion of a reasonable doubt, that the deceased was under arrest and in charge of the defendant as a guard, then it was his duty not only to prevent an escape by deceased, but also as far as he reasonably could to protect deceased from violence, and if while such relation of prisoner and guard existed, they shall believe from the evidence, to the exclusion of a reasonable doubt, that the defendant either carelessly or negligently, in discharging fire arms, shot and killed said Bailey, they will find him guilty of manslaughter and fix his punishment at confinement in the penitentiary not less than one nor more than twenty-one years, even though they may believe that defendant did not intend to shoot deceased."

The verdict of the jury reads thus: "We, of the jury, agree and find the defendant, Smith, guilty of killing by the reckless handling of fire-arms, and fix his punishment at two years in the State prison."

The jury seems not to have returned a verdict in terms of manslaughter, but undertook to describe in their own lauguage the offense of which they concluded appellant was guilty of, but to affix punishment provided by stutute for the technical offense of manslaughter.

Undoubtedly an act may be so heedless and incautious as to necessarily be deemed wanton and unlawful, though there may not be any express intent to do mischief, and the party who thereby causes death will be guilty of manslaughter. Sparks v. Commonwealth, 3 Bush, 111. And in such case it does not, as a general rule, make any difference whether the party whose negligent act causes death was or not at the time engaged in discharge of legal business. Chrystal v. Commonwealth, 9 Bush, 669.

But as said in that case there are exceptions to that rule, and it is to be applied in full force or modified, or not at all, according to circumstances of each case. For death may result from the act of a party under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator, as where stones and heavy timbers are thrown from top of a house down on a street where persons are constantly passing. On the other hand it does not necessarily follow where one of two persons, remote from other people, accidentally kills the other during the process of voluntarily exchanging loaded weapons, or by accidental discharge of his own weapon, while they are both engaged in shooting at a mark or in the clouds, that such act is of such reckless and wanton nature as to be felonious or criminal. Nor does it seems to us probable the verdict of the jury would have been returned but for the instruction quoted. Whether appellant was guilty or not of manslaughter must depend upon the time, place and actual circumstances under which it occurred, without regard to the relations of guard and prisoner, to which the court, we think, erroneously called attention of the jury. If appellant was derelict in his duty as guard he has to answer directly therefor otherwise than under an indictment for murder, and his failure to do his duty as such should not be considered in determining whether, while he and deceased were willingly and not, as we think, unlawfully engaged

Digitized by Google

in firing their pistols, he killed him in such negligent and careless manner as to be wanton and criminal.

It seems to us the question of apppellant's criminality should be determined without regard or reference to the relation of guard and prisoner, and the instruction mentioned is erroneous and was well calculated to mislead the jury to appellant's prejudice. We think there ought to have been given an instruction on the subject of involuntary manslaughter, punishment for which is fine and imprisonment.

Judgment reversed for new trial.

CAVANAUGH V. RILEY, &C.

(*Filed June* 4, 1892—*Not to be reported.*)

1. *Fraudulent conveyances*—Appellant was surety and creditor of a firm that had a subcontract to construct certain portions of the railroad. The firm becoming embarrassed during the progress of the work transferred to appellant all its property of every character, including all its right under the contract and she agreed to complete said contract for the firm and, after re-imbursing herself for her expenses, to hold the proceeds of all the firm property for the equal benefit of its creditors. *Held*—That the transaction was not a fraudulent or unlawful hinderance of creditors or preference of appellant.

2. *Partnership—Evidence*—There is no evidence sufficient to prove that appellant was a member of the firm which assigned its property to her.

3. *Trusts*—In this action, in which other creditors of the firm were seeking to attach the property in appellant's hands and to hold her liable as a member of the firm, the court should have referred the case to a commissioner to ascertain the exact amount of the firm debts and the amount of firm estate in appellant's hands, and then, after allowing appellant her reasonable expenses for completing the firm contract, should have distributed the firm assets *pro rata* among all the firm creditors, including appellant.

Lane & Burnett for appellant.

A. E. Willson for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

In October, 1886, Andrew Cavanaugh, a son, and John Crowe, nephew of appellant, Catharine Cavanaugh, as partners, under the firm name of Cavanaugh & Crowe, made a contract with Mason, Gooch, Hoge & Co. to grade twelve sections of the Louisville Southern railroad, afterward reduced to four sections, the latter firm being the principal or original contractor, and Cavanaugh and Crowe subcontractor.

Being without means or credit sufficient to procure the necessary outfit of animals and implements with which to do the work, Cavanaugh & Crowe got Catharine Cavanaugh to become surety of the firm for that purpose, and she also advanced or loaned money to it, she, though a married woman, having previously obtained a judgment empowering her to transact business as a *feme sole*.

A few weeks after the work was commenced she insisted, as a condition of further loan of money, that her husband, John Cavanaugh, should be admitted into the firm as an equal partner, which was done, and the business was thereafter carried on under the firm

Digitized by Google

name of Cavanaugh, Crowe & Co. The latter firm being thus indebted to her in February, 1887, executed a mortgage on the firm property, which is not, however, in controversy in these cases.

April 20, 1887, Cavanaugh, Crowe & Co. made a deed, assigning and transferring to Catherine Cavanaugh the benefit of the contract with Mason, Gooch, Hoge & Co., including all estimates and sums retained on estimates to be thereafter made of work done and materials furnished in construction and completion of the road, together with all property of every description owned by the firm.

In the deed it was recited that the firm of Cavanaugh, Crowe & Co. had, in the prosecution of said contract, contracted debts, then due, which it was unable to pay; and, in consideration of the conveyance Catherine Cavanaugh agreed to complete construction of such portions of said sections, according to contract with Mason, Gooch, Hoge & Co., as were then unfinished, and, after re-imbursing herself for the expense thus incurred, to apply the balance of the property and assets conveyed to payment of debts of said firm, partnership property to be applied to payment of partnership debts in the order of their priorities and according to liens, and in the same manner individual property to individual debts.

Immediately after execution and recording of that deed numerous creditors, having debts of various amounts against the firm of Cavanaugh, Crowe & Co., instituted suits in different courts to recover judgments therefor, and in each case an attachment was issued, upon the ground the firm had conveyed its property, with fraudulent intent to cheat, hinder and delay its creditors.

May 14, 1887, Andrew J. Cavanaugh and John Crowe, members of the firm of Cavanaugh, Crowe & Co., brought an action against John Cavanaugh and Catherine Cavanaugh, the firm of Mason, Gooch, Hoge & Co. being made a party, for a judgment setting aside said deed, retransferring the property to plaintiff, settling the partnership of Cavanaugh, Crowe & Co., reference to the commissioner for that purpose being asked, and further, that the money due the firm from Mason, Gooch, Hoge & Co. be paid into court for benefit of creditors of Cavanaugh, Crowe & Co., according to their respective rights, and that a receiver of all the property be appointed, if deemed necessary by the court.

It is alleged in the petition of that action the deed was made for the purpose of preventing creditors of the firm of Cavanaugh, Crowe & Co. levying on and selling property of the firm of Cavanaugh, Crowe & Co. until it could complete its contract with Mason, Gooch, Hoge & Co., and receive the money due on that account, which was intended to be then applied to pay firm indebtedness. It was further alleged the deed was rendered necessary by reason of the failure of Catherine Cavanaugh to advance and loan money to Cavanugh, Crowe & Co. as she had agreed to do, and that such failure caused damage in a large sum to the plaintiffs, for which they asked judgment against her. All the actions against the creditors of Cavanaugh, Crowe & Co. were afterward transferred to the Louisville Chancery Court and consolidated, and, by amendments to their pleadings, filed in June, 1887, none earlier, Catherine Cavanaugh was sought to be made personally liable for each debt of Cavanaugh, Crowe & Co. upon the alleged ground she was a partner and member of that firm.

By the judgment appealed from the deed of assignment was set aside and each creditor of the firm of Cavanaugh, Crowe & Co. recovered a personal judgment for the unpaid balance of his debt

Digitized by Google

against Catherine Cavanaugh, the amount of which she was ordered to pay into court. But the court reserved control of all matters concerning settlement of affairs of the partnership.

The deed of assignment, if made for the purpose of hindering creditors of Cavanaugh, Crowe & Co., even temporarily, as Andrew J. Cavanaugh and John Crowe allege in their petition, was fraudulent in meaning of the statute. But Catherine Cavanaugh denies it was made for such purpose, and no such purpose is shown by any thing stated in the deed. On the contrary, no advantage or preference to Catherine Cavanaugh was stipulated for in the deed, or could have resulted. For she not only obligated herself to account for all the property and money that went into her hands in virtue of the deed and for proper and equitable distribution among the creditors of Cavanaugh, Crowe & Co., but also agreed to complete the work and thereby earn the ten per cent. reserved by Mason, Gooch, Hoge & Co. and turn that over to the creditors, as well as profits on additional work to be done by her, after being re-imbursed for only her expenses incurred. Inasmuch as but for her agreement the work would have been left unfinished, the firm of Cavanaugh, Crowe & Co. being wholly unable to go on with it, and the ten per cent. and additional profits of subsequent work, probably lost, we do not see wherein the creditors were prejudiced by that deed, or Catherine Cavanaugh specially benefited. We think the evidence entirely insufficient to show that Catherine Cavanaugh was a member of the firm of Cavanaugh, Crowe & Co., and that the allegation to that effect was the result of an afterthought by the other creditors. Her agreement to become a member is not proved, nor are any facts shown from which it can be fairly inferred she was a member—her conduct and speeches being entirely consistent with her real attitude, which was that of creditor. Both Andrew Cavanaugh and John Crowe, who instituted their action in a bad spirit towards her, swear she was not a partner, and the deed was attacked and attachments applied for by the creditors upon the hypothesis she was not, and none of the creditors alleged she was until their amended pleadings were filed in June, 1887.

The judgment was rendered against her without any report of a commissioner, showing the amount and value of money and property of the firm that she got possession of under the deed, without allowing or even correctly ascertaining the indebtedness of the firm to her, and without taking any account of expenses she incurred in completing the work the firm had contracted to do.

In our opinion it was error to adjudge Catherine Cavanaugh a member of the firm of Cavanaugh, Crowe & Co., for she was, instead, a creditor; and before rendition of the judgment there ought to have been a reference to the commissioner, with directions to ascertain the value and amount of money and property received by her under the deed, the expenses and compensation she was entitled to for completing the work and then judgment for distribution of the assets of the firm of Cavanaugh, Crowe & Co. amongst its creditors, including Catherine Cavanaugh, according to priority.

Wherefore, the judgment is reversed and cause remanded, for proceedings consistent with this opinion.

Digitized by Google

KENTUCKY SUPERIOR COURT.

ROYSTER V. HECK.

(*Filed June* 1, 1892.)

1. *Release of surety*—The release by a creditor of a lien upon the property of the debtor releases a surety for the debt. And the value of the property released is not material, as the release of the surety is absolute and not merely a release to the extent of the value of the property released.

Where creditors, who had acquired a lien upon all the property of their debtor by virtue of an assignment made by him for the benefit of his creditors, released to the debtor a part of the property, a surety for one of his debts was thereby released.

2. *Where the surety pays the debt after he has been released* from legal obligation he has no right of action against the principal to recover the amount paid.

R. H. Cunningham for appellant.

M. Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Presiding Judge Yost.

The appellee, Heck, became the surety of Royster on three notes, payable to the Farmers Bank of Kentucky. Suit was instituted on these notes in the Henderson Circuit Court and, at the January term, 1891, a judgment was rendered against Heck, by default, who was compelled to and did pay to the bank $500 in satisfaction of the judgment and then brought this suit to recover the amount from Royster.

After the execution of the notes, but prior to the filing of the suit, Royster made a general assignment for the benefit of his creditors, conveying to his assignee all of his property subject to execution, consisting of several tracts of land in Henderson and Union counties and a lot of personal property.

After this, on the 6th of February, 1890, the creditors, including the bank, in order to get the property into their own hands and wind up the estate with less expense to themselves and their debtor, entered into a contract with him by the terms of which they, in consideration of his conveying to them his Henderson county lands and his personal property, set apart and released to him as free and exempt from the payment of their debts a tract of land in Union county and paid for him a vendor's lien of $1,750 thereon.

On the calling of this case judgment was rendered against Royster, but, on a later day in the term, he tendered and offered to file an answer, which the court refused to permit him to do, on the ground that it did not present a good defense to the action, and this is the question before us on this appeal.

After setting up the facts of the assignment Royster, in this pleading, alleged that the bank, payee of the notes, and his other creditors, had, in the contract referred to, released to him property "more than enough in value to pay off and discharge in full all of his liabilities," upon which property so released to him the creditors, by reason of the assignment, had a lien to secure them in the payment of their debts.

Digitized by Google

He further alleged that the bank, by this surrender to him of property upon which it had a lien, released Heck from all liability as his surety, and that Heck, when he suffered the judgment to go against him by default and afterwards satisfied it, was under no legal obligation to pay it and did so voluntarily and without any request, actual or implied, from him.

Did the contract release Heck as surety on the notes? Of this there can be no question. The bank had a lien upon the land released to Royster and a creditor is not entitled to relinquish any hold which he has actually acquired on the property of the principal, which might have been made effectual for the payment of the debt, nor must he deal with the debtor or the security which he holds upon the debtor's property to the prejudice of the surety, unless he intends to release him from further liability.

There is no better settled principle of law than that when two persons are respectively liable to the creditor for the same debt, one as principal and the other as surety, an absolute release of the principal releases the surety.

In many of the States the surety is released *pro tanto* or entirely, according to the value of the security released, but in this State any agreement or active interference by an obligee, whereby the surety may injured, releases him absolutely and it is not material whether the property so exempted was sufficient to discharge the whole debt or not. This was held in Sneed's ex'ors v. White, 3 J. J. M., 525, and has been followed by the Court of Appeals and this court since that time.

Assuming then that Heck was released by the agreement it follows, by necessity, that he acted voluntarily and without legal obligation in suffering the judgment to be rendered against him by default and in paying it off. This true, he ought not and could not, after his release and exoneration, pay the debt and look to Royster for remuneration, for when a surety pays the debt of his principal the law implies that the latter requested such payment to be made and also implies a promise to repay him, but, as was held in Kimble v. Cummins, 3 Met., 327, the surety must be under some legal obligation to pay, otherwise the implication of a request will not arise.

In the case cited Cummins signed a replevin bond as Kimble's surety. No execution was issued on the bond for more than a year and Cummins was thereby released. After the expiration of a year an execution was issued against Cummins, who paid it off and sought in that action to recover the amount from Kimble.

The court held that he paid the debt without being under any legal obligation to do so and was not entitled to a judgment against Kimble.

Royster's answer presented a good defense and the court erred in refusing to permit it to be filed.

The judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

Judge Barbour delivered the following response to petition for rehearing:

The court, in its former opinion, did not quote the answer correctly in saying that it was there alleged that the property surrendered by the bank to Royster was sufficient to pay the debt. That, however, is not material.

The answer does allege that, by the terms of the agreement, Royster himself and his property was released and discharged from liability on the bank debt.

Digitized by Google

It matters not what amount or property was released, as was held by the Court of Appeals in the case cited in the opinion. Either the discharge of Royster or any part of his property from liability released the surety.

Petition overruled.

BAUGHMAN, &C. V. L. E. & ST. L. R. R. CO. (CONSOLIDATED).

(*Filed May* 25, 1892.)

1. *Contract limiting liability of common carrier*—A common carrier is liable for the value of goods lost through his negligence, notwithstanding the bill of lading provides that he shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so fixed is less than the value of the goods; and this is true, although less is charged and paid for the transportation than when the exempting clause is omitted.

2. *Contract by agent for different principals—Separate right of action*—Where an agent ships, in his own name under one bill of lading, goods belonging to different persons, acting as the agent of each separately and not as agent of the owners jointly, each owner can maintain his separate action for the damages sustained by him.

Muir, Hayman & Muir and E. F. Trabue for appellants.

Humphrey & Davie for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Presiding Judge Yost.

These four cases are heard together.

The bill of lading under which the horses were shipped from Louisville to St. Louis, over appellant's road, contained a printed stipulation to the effect that if damages should occur, for which the company would be liable, "the amount claimed should not exceed $200 for a stallion and $100 for a horse."

For damages to the horses sustained, through the negligence of appellant's servants, these several actions were brought and judgments rendered against the company for the amount fixed in the bill of lading. From that judgment the plaintiffs prosecute this appeal, complaining that the court erred in refusing to permit them to prove the real value of the horses injured and in instructing the jury that they could not find for a greater sum than that fixed in the bill. The avowals show that the value of the horses were $1,500, $1,000, $1,975 and $1,900 respectively.

That the court erred in these rulings seems clear to us. If the amounts fixed in the bill had represented something near the real value of the stock, if the shippers had fixed those amounts as their value, if there had been any agreement between shippers and carrier that those sums were their real value, then they would have been bound by the terms of the bill. There was, however, no element of an agreement in the contract. No one attempted to fix a value upon the horses. No representations as to their value were made by the owners and no questions were asked them on this point by the carrier. The amounts were printed in the bill and applied indiscriminately to all stock alike shipped by owners and carried by the company, from Shetland ponies to Norman stallions, and from the common "scrub" to the finest bred of American racers.

Digitized by Google

This court has held that these contracts were unreasonable and against public policy, and we are of the same opinion still. It is the rule in Kentucky that carriers can not, by special contract, release themselves from their common law liability for damages arising from the negligence, either ordinary or gross, of their servants and employes. It seems to us then that wherever the rule is, that the carrier can not, by contract, protect himself against loss by negligence, it necessarily follows that the courts, in order to be consistent, must hold that he can not limit his liability to a certain amount, unless such amount be agreed on between the parties or represent the fair value of the property shipped. Many of the leading cases cited and relied upon by appellee's counsel hold to this view of the law. In Graves v. L. S. & M. S. R. R. Co., 137 Mass., 33, the high wine was shipped at an agreed valuation of $20 per barrel, and the court held that, if a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate, such person ought to be barred by his representation and agreement.

In Rosenfield v. P. D. &. E. R. R., 103 Ind., 124, the court, in passing upon this question, say if, without any representation of value by the shipper, or a request of him for a statement of the value, the carrier should place a value upon the articles received for carriage that would not bind the shipper, who would clearly have the right to recover the full value of the articles lost. If, however, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, he could not recover beyond the value so fixed by him.

That the court construed that there was an agreement of value in Hart v. The Pennsylvania Co., 112 U. S., 336, is shown by this language: "If the shipper is guilty of fraud or imposition by misrepresenting the nature or value of the articles, he destroys his claim to indemnity. * * There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after loss. It is just to hold the shipper to his agreement fairly made as to value. * * The distinct grounds of our decision * * is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, * * even in case of loss or damage by the negligence of the carrier, the contract will be upheld." * * *

It will be seen that all of these cases were decided upon the ground that the shippers having, in order to procure reduced rates, agreed upon a value of their property, were estopped to claim a greater amount. In none of them was it held that shippers were bound by a valuation arbitrarily fixed by the carrier, and so grossly incommensurate and disproportionate to the real value of the thing shipped, as in this case. That many of the courts have so held we do not, however, deny, but the better rule, in our opinion is, that a common carrier is liable for the value of the goods lost through his negligence, notwithstanding the bill of lading provides that he shall not be liable beyond an amount named therein, when the true value is not given, or when it is understood by the parties that the sum so fixed is less than the value of the goods, and this is true, although less is charged and paid for the transportation than when the exempting clause is omitted. 4 Lawson's Rights and Remedies, 1844; Lawson's Contracts of Common Carriers, 133, and cases there cited.

Digitized by Google

Knowing that this question was to some extent involved in L. & N. R. R. Co v. Owens, lately pending in the Court of Appeals, we have held this case up, waiting the opinion of that court, which was handed down a few days since, the court holding that Owens was not bound by this stipulation in the bill of lading, as such contracts are against public policy.

As this case will go back to the court below, we deem it necessary to pass upon another question raised on the former trial. The horses injured were each owned by different parties, but one Weatherford, acting as their agent, shipped them in his own name under one bill of lading. The appellee moved that the cases be consolidated, which motion the court properly overruled. Could the principals maintain in their own name their actions upon the contract made in the agent's name? Clearly they could do so. Contracts other than those, under seal made by agents in the execution of their agency, in their own name may be enforced by the principal by appropriate actions brought in his own name. Whenever the acts of an agent bind his principal and impose upon other persons corresponding obligations the principal may enforce his rights by action against such third persons.

This being true, can the owners' right to bring their several actions be questioned? There was but one contract, it is true, but it was made by a party who was agent, not of the owners jointly, but of each of them separately and individually for the purpose of securing rates for the shipment of each horse, and each one of the owners, therefore, could maintain his separate action for the damages sustained by him.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

Brewer, &c. v. Commonwealth.

Filed October 5, 1892. Appeal from Webster Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Repeal of statutes by implication*—While repeals of statutes by implication are not favored, yet the question of repeal is largely one of intent, and if two statutes relate to the same subject-matter, and the subsequent one is plainly intended to prescribe the only rule that shall govern, it will repeal the former.

An act prohibiting the sale of liquor in a county repeals the local option law in force in a particular precinct in the county, the punishment prescribed by the two laws being different.

2. *Local option law—Distillers*—Under the local option law a distiller is deprived of the privilege granted him by section 3, article 2, chapter 106, General Statutes, of selling liquor of his own manufacture at his residence; but an act of the Legislature which prohibits the sale of liquor in a particular county, without making any exceptions, does not deprive distillers of the privilege granted them by the general law.

3. *The local option law does not, upon its adoption in a locality, repeal any law.* It merely suspends in that locality inconsistent laws, and when, for any

Digitized by Google

reason, the option law is repealed, becomes inoperative or is rejected by the voters in the locality, the suspended laws at once come into operation again.

Yeaman & Lockett and F. M. Baker for appellants; W. J. Hendrick, W. E. Bourland, S. V. Dixon and R. Reid Rogers for appellee.

PURDY v. SQUIRES, &c.

Filed October 5, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Arrest for debt—Liability of bail*—To fix the liability of the bail in a civil action in which the plaintiff has sued out an order of arrest, the plaintiff must have a return of "not found" upon an execution issued against the body of the defendant within twenty days after it might have been issued.

2. *Execution against the body of the defendant may issue* upon the judgment in such an action without an order of court. It is only in the actions for tort, mentioned in section 1 of article 3, chapter 38, General Statutes, that the court must note at the foot of the judgment that the writ may issue. Therefore, in this action upon a bail-bond, the fact that it was more than two years after judgment was rendered before the court ordered a capias to issue does not excuse the delay in issuing the writ.

3. *Power of court to amend judgment*—Even if it had been necessary that the court should note at the foot of the judgment that the writ might issue, the plaintiff's position would be no better, as the court had no right at a subsequent term to so amend the judgment as to authorize an additional remedy.

4. *Same—Liability of bail*—If it be conceded that the court had the right to thus amend the judgment at a subsequent term, still the plaintiff's pleading shows no case, as it is not alleged that the court originally directed the writ to issue, and, consequently, it does not appear that there was any thing to amend. The allegation that the court directed the omission to be corrected "as a clerical misprision" is not sufficient. Besides, the plaintiff owes the duty to the bail to see that the writ is issued within the prescribed time, and he can not rely upon the omission of the clerk or the court as an excuse for his failure to perform this duty. The bail's liability is conditional only, and he has the right to stand on the letter of his bond.

Judge Brent concurs except as to that part of the opinion which holds that the court had no power at a subsequent term to order a *capias* to issue.

O'Neal, Phelps & Pryor for appellant; C. B. Seymour for appellees.

SANDERS v. CARTER.

Filed October 5, 1892. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Sales of personal property—Measure of damages*—In this action to recover the price of corn which the plaintiff alleged he had sold and delivered to defendant, in which the defendant pleaded as a counter-claim the damages which he alleged he had suffered by the failure of plaintiff to deliver the full quantity of corn which the contract called for, the measure of damages was the difference between the contract price of the corn to be delivered and its market value at the time of the delivery and not at the time when defendant sold the corn received.

2. *Failure to instruct jury*—The defendant can not now complain that the court failed to properly instruct the jury as to the measure of damages upon his counter-claim, as he asked no instruction other than one which did not state the true criterion of damages.

S. H. Bush for appellant; W. H. Marriott for appellee.

SPEED v. CARPENTER.

Filed October 5, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Liability of owner of building for negligence of janitor*—In this action against the owner of a building, rented for offices, in which the plaintiff seeks

Digitized by Google

to recover damages for injuries received by falling over a roll of wire matting in the hall, if the janitor employed by the defendant left the matting in the direct passage-way from the elevator to the door and thus caused the injuries, it was negligence on his part, for which the defendant is responsible, unless the plaintiff could, by the exercise of ordinary care, have avoided the accident.

2. *Contributory negligence*—It was error to instruct the jury that if they believed the plaintiff was injured by the negligence of the defendant's servant in leaving the matting in the passage-way, they should find for plaintiff, unless they should further believe from the evidence that his injury "was caused" by his failure to exercise ordinary care for his own safety. If plaintiff's negligence so far "contributed" to the injury as to be its "proximate" cause the plaintiff was not entitled to recover, and the court should have so instructed the jury.

Grubbs & Morancy for appellant; O'Neal, Phelps & Pryor and G. W. Smith for appellee.

Curtis v. Louisville City Railway Company.

Filed October 5, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. *New trial*—The appellate court should be more inclined to sustain a judgment granting than a judgment overruling a motion for a new trial; and it will refuse to reverse a judgment granting a new trial when the party at whose instance it was granted has been successful, when it would not, upon the same ground, have reversed for the refusal of the court to grant a new trial.

2. *A peremptory instruction is not authorized where* the plaintiff has made out a *prima facie* case by his own evidence, no matter how strong and convincing the court may deem the defendant's evidence to be.

3. *Street railways—Failure of driver to give correct change*—When a passenger on a street car has given to the driver a piece of money to be changed and the latter retains the amount of the fare, whether he does it innocently or intentionally, the passenger is, in effect, prevented from putting the money into the box by the driver's own act, and does not violate either the statute or a rule of the company which requires passengers to put the fare into the fare box. The failure of the driver to give the correct change is the wrong of the company, and whether as between the company and the driver the change is the driver's or the company's, is immaterial.

4. *A carrier of passengers may make and enforce rules, but they must be reasonable.* And if the rules of the defendant be construed to require the passenger to put the fare in the box after the amount has been retained by the driver they are unreasonable and will not be enforced.

5. *Carriers*—The rule that the conductors of standard railroad cars and the captains of steamships must have the complete supervision and control of the train or the ship, and that it is the duty of the passengers to submit to their reasonable demands, is not recognized in this State. And even if it were it would not apply to the conductors or drivers of street cars.

W. O. Harris and Thomas Lawson for appellant; Humphrey & Davie for appellee.

Trice v. Commonwealth.

Filed October 12, 1892. Appeal from Trigg Circuit Court. Opinion of the court by Judge Barbour, affirming.

Failure of special judge to take oath—In the trial of an indictment for a misdemeanor the agreement of the defendant that a certain attorney should preside as special judge carried with it the waiver of the requirement that the judge should be sworn, and, therefore, the defendant will not be heard to object that the special judge did not take the required oath. And this is true, although the defendant was a minor, he being represented by counsel.

R. A. Burnett and E. W. Hines for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

Digitized by Google

TUCKY LAW REPORTER.

EDITOR:
. . . . . Frankfort, Ky.

OVEMBER 1, 1892. No. 9

KENTUCKY COURT OF APPEALS.

COWAN v. PROWSE.

(*Filed May* 5, 1892.)

1. *Contested election—Evidence on appeal from contesting board*—Where an appeal is taken to the circuit court from the decision of the board, appointed by law for determining contested elections of officers elected by the voters of a county, only the depositions on file and read before such board can be heard as evidence by the circuit court.

2. *Same—Grounds of contest*—On the trial before such board and before the circuit court, the contestant can rely on those grounds only that are stated in his original notice of contest; and if the incumbent files a response, relying upon grounds other than his *prima facie* right to office, he must specifically state such grounds and will be restricted to them.

3. *Same—When appeal stands for trial*—The appeal from the decision of such board stands for trial at the first term of the circuit court after the appeal is taken. Section 726, Civil Code, does not relate to or govern such appeals.

4. *Registration laws constitutional*—The constitutional authority of the Legislature, under the Constitution of 1849, to enact a registration law, either local or general in its operation, is now well settled in this State. Commonwealth v. McClelland, 85 Ky., 689.

5. *Elections—Legal voters fraudulently registered*—Where a person clearly qualified and entitled to vote obtains a certificate of registration, and has his vote duly recorded, such vote can not be stricken from the records in an election contest, although it appears that the certificate of registration was obtained fraudulently. The penalty imposed on the voter for such act is punishment by imprisonment and not by disfranchisement.

6. *Registration in wrong voting place of true precinct*—In this case the fact that certain voters, who resided in a certain precinct, registered at the wrong voting place of the precinct, does not disfranchise them, it appearing that they voted at the proper voting place.

7. *Registering and recording votes after hour for polls to close*—Courts will not throw out votes duly recorded on the poll books, on the ground that such

Digitized by Google

voters were registered or recorded on the poll books a few minutes after the hour fixed by law for the polls to close, unless it appear there has been a palpable and flagrant disregard of the law in that respect by the officers of election.

8. *Illegal voter—Naturalization*—In 1870 a citizen of foreign birth, in open court, made his declaration of intention to become a citizen of the United States, at the same time making oath that he had served in the marine service of the United States from 1861 to 1864 and was honorably discharged therefrom in 1864; he also made oath of fealty to the United States and abjured allegiance to all foreign states, and two witnesses, at the time, made oath that he was of good moral character. He has ever since resided in this State and exercised the right of suffrage without question. No formal order admitting him as a citizen was ever made. *Held*—That he was a citizen of the United States, and entitled to vote as such.

9. *Same—Bribed voters*—Votes of two persons, who confess that they received bribes for their votes, must be thrown out and it is not necessary that they should be convicted for such crime before the contesting board can throw out their votes.

10. *Same—Disfranchisement by reason of conviction of crime*—Persons who have been convicted of housebreaking, or of horse stealing, or of burglary, or of malicious shooting, or of malicious cutting, under the Constitution of 1849, and the statute enacted in pursuance thereof, are disfranchised and not entitled to a vote.

11. *Same—Conviction in Federal courts—Pardon by the President*—Under the provisions of said statute and Constitution there is no doubt that one convicted in a Federal court of violating the statutes of the United States, by robbing the mail of the United States, is disfranchised in this State; but where the offender has been pardoned by the President before the sentence of imprisonment inflicted for such crime has fully expired, he is thereby restored to his rights and entitled to a vote.

12. *Mistake of clerk in recording votes*—The courts will not undertake to add to the record and count votes it does not show were cast, and will not count votes recorded for one candidate as really cast for another, except upon the fullest and clearest proof of mistake upon the part of the clerk in recording the vote; and if the matter is at all doubtful, the votes, as recorded, will not be changed.

13. *Authority of county court to change boundary of voting precinct and to transfer voters from one precinct to another*—The county court has jurisdiction to divide the county into voting precincts and may, by proper order, change the division line or boundary between precincts or voting places; but such court can not arbitrarily by order change the voting place of a citizen from one to another precinct, without making or attempting to make any change in the boundary of such precincts.

An order that changes the voting place of one by changing the boundary of the precinct, so as to include his farm, is valid.

An order changing the boundary of a certain precinct, so as to include a named person, is valid, because it is presumed that it was intended thereby to so change the boundary of such precinct as to include such person's farm or home.

14. *Contested election—Weight of judgment of chancellor*—On mere questions of fact, involved in a contested election case, this court is not inclined to reverse the finding of the chancellor thereon, especially where his conclusion is the same as that reached by the board created by law in the county to determine such contest.

Joe McCarroll for appellant.

J. I. Landes, James Breathitt and Harry Ferguson for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Lewis.

Digitized by Google

The question in this case is, whether appellant, Cowan, or appellee, Prowse, was legally elected clerk of the Christian county court at the August election, 1890.

According to face of the poll-books the latter received a majority of votes cast, obtained a certificate of election and took possession of the office. But the contesting board decided that 92 of 3,215 votes recorded for him were illegal, while 73 of 3,210 votes recorded for Cowan were illegal, and, as a result, the latter had received a majority of legal votes cast and was duly elected to the office.

Upon appeal to the circuit court, however, that decision was reversed, the judgment being that Prowse had received of the legal votes cast a majority of one and was entitled to the office.

It appears that in the notice of contest and also in the response and counter-notice the legality of numerous votes recorded was put in question upon grounds stated by the parties respectively and a large number of depositions taken and read before the contesting board, the decision of which was not made until January 21, 1891. And a preliminary question thus arises, whether depositions, taken after that decision was rendered but before the ensuing term of the circuit court, to which each party excepted, were properly excluded on trial of the appeal.

Under section 4, article 6, chapter 33, General Statutes, the judge of the county court and two justices of the peace nearest the court-house constitute a board for determining contested election of an officer elected by voters of a county or district therein. Section 6 gives to any person in interest right of appeal from a decision of the board to the circuit court, and from there to the Court of Appeals as in other cases. Section 7 is as follows: "A copy of the decision and the original papers and *depositions* used in the contest shall be filed by the board in the circuit court. *The proof shall be taken in depositions and no oral evidence shall be heard on the trial of the appeal.*" And section 9 provides that "the appeal shall be placed on the equity docket and tried in equity as other actions."

In the same article a board is provided for to determine contested election of any officer, other than governor or lieutenant-governor, elective by voters of the whole State or a judicial district thereof. But substantially the same mode of proceeding is provided for both boards; by subsection 4, section 5, depositions properly taken are required to be read in evidence by each, and a fair implication from the language then used is that neither can call for or hear other proof.

There is, however, an important difference in the provisions applicable to the two boards, in that an appeal is allowed from a decision of the county board only. And hence the special provision in section 7, that "the proof must be taken in depositions and no oral evidence shall be heard on trial of the appeal." But it does not seem to us it was thereby intended to authorize depositions to be taken at the will of the parties after final decision of the contesting board, for clearly the Legislature did not contemplate those used by the board and, in express terms of that section, required to be filed in the circuit court would be arbitrarily discarded and the parties thus needlessly forced to prepare anew for trial of the appeal.

Subsection 1, section 5, in terms restricts a contestant to the grounds of contest stated in his original notice; yet ample time is allowed in which to sustain them by proof in depositions before trial by the contesting board. And, although the statute does not expressly require it, still it is not only plainly just but was manifestly intended that if the incumbent files a response, relying upon other

Digitized by Google

grounds to defeat the contestant than his *prima facie* right to the office, which was done in this case, he must specifically state them and be likewise restricted; for subsection 3 authorizes him as well as the contestant to proceed to take proof in depositions immediately after notice of contest.

As these issues of fact, not subject to change, are made up and all proof either party has chosen to make is before the contesting board when its decision is rendered, there is no reason why an appeal from it should not, without further preparation, stand for trial at the first term of the circuit court. To keep the case open would enable one party to put the other to unreasonable trouble and cost, and also protract indefinitely a contest it is the public interest and distinctly indicated policy of the statute to terminate as early as practicable.

Section 726, Civil Code, relates exclusively to appeals from judgments of certain courts of inferior jurisdiction and as evidence heard on trial of an action in such court is oral an appeal therefrom is properly required to be docketed and stand for trial in the circuit court as an ordinary action, and has necessarily to be "tried anew as if no judgment had been rendered."

But that section has no application, even by analogy, to an appeal from the decision of a contesting board on a trial before which, as well as on trial of an appeal therefrom, evidence taken in depositions only can be heard. The circuit court might grant leave to either party to supply material and necessary proof that the contesting board had erroneously denied a reasonable opportunity to procure; but the depositions in question not being so taken, were properly excluded.

1. The lower court adjudged recorded votes illegal as follows: First, 40 for Prowse and 32 for Cowan, cast out of districts in which the voters severally resided; second, 4 for Prowse and 3 for Cowan of persons non-resident of the State or not resident long enough; third, 1 for Prowse and 3 for Cowan of minors; fourth, 4 for Cowan of non-residents of the State; fifth, 1 for Prowse, failure to register; sixth, 5 for Prowse and 1 for Cowan of persons convicted of crimes; seventh, 4 for Cowan of persons of foreign birth, not naturalized, making an aggregate of 51 illegal voters of those classes cast for Prowse and 47 for Cowan.

Exceptions were taken by the parties respectively as to many of the votes so adjudged illegal and also on account of refusal of the court to exclude many others challenged upon similar grounds. But as no question of law is involved in any of the very large number of such cases, except as hereafter indicated, and there is evidence conducing to support the finding of fact by the court as to each of them, we think it should not be disturbed by this court, especially as it agrees with the finding of the contesting board, except as to two votes, whereby the parties were alike affected.

2. The contesting board found two votes recorded for Prowse illegal, because the voters had not registered as required by "An act to provide for the registration of voters in county of Christian," approved April 16th, 1890, and three others for him, illegal because fraudulently registered.

The constitutionality of such statute is not an open question in this State; it having been expressly held in Commonwealth v. McClelland, 85 Ky., 686, that legislative power exists to enact a registration law, either local or general in its operation, and counsel do not indicate any provision in that act by which conditions unreasonable or illegal in any respect were imposed upon those having the

Digitized by Google

right to vote at the election held in Christian county August, 1890. But the court properly adjudged but one of the voters referred to illegal, upon the ground the voter had failed to register. And even if the other three had, contrary to the court's finding, fraudulently procured certificates of registration, their votes would not have been necessarily invalid if they were in all other respects legal voters, about which there seems to be no question. For, under the statute, if a person who is entitled to vote obtains a certificate of registration and has his vote duly recorded it is legal, provision being made for punishing him by imprisonment, not by disfranchisement, if he fraudulently procures such certificate.

Exception was taken to the decision as to one vote recorded for Cowan, upon the ground he had not registered at all, and to three others who registered at one voting place and voted at another in the same precinct or district. Whether the first mentioned person registered or not is a question of fact decided by the court affirmatively, and, for the reasons heretofore indicated, we will not undertake to revise that decision.

It appears that by a special act of the Legislature an additional voting place had, previous to the registration act, been established in each of two existing precincts, the boundaries of which had not, however, been changed. But it does not seem to us the latter act, fairly construed, makes the legality of a vote cast in the precinct of the voters' residence depend upon it having been recorded at the identical voting place in that precinct where he registered.

Another ground of exception is, that some of the voters registered after the time of day prescribed by law, and in that connection we will consider an objection made to other votes upon the ground they were cast and recorded later on the day of election than allowed. As testimony about a question of time is generally uncertain and conflicting, especially when reckoned by minutes, a court should not take cognizance of such matter except when there has been a palpable or flagrant disregard of the law by officers, which is not made to appear in this case.

3. Another one beside the four votes adjudged illegal was challenged, upon the ground the person casting it was of foreign birth and not naturalized. It is shown by the record that, in 1876, he appeared in open court and filed his declaration of intention to become a citizen of the United States, at the same time making oath that he, in 1861, enlisted in the marine service of the United States and was honorably discharged therefrom in 1864. He also then made oath to support the Constitution of the United States and renounced and abjured allegiance to any foreign prince, potentate, State and sovereignty whatever, and particularly that of King William, of Holland, where he was born. At the same time appeared two witnesses who testified he was a man of good moral character. And he has ever since resided and exercised, without question, the right of suffrage in this State.

The statute authorizes an alien, who has enlisted in the army or by construction navy, and been honorably discharged therefrom, to become a citizen of the United States without any previous declaration of his intention to become such, upon taking the oath of allegiance and of abjuration of allegiance to any other sovereignty, provided the court admitting him be satisfied by competent proof of such person having been honorably discharged from the service of the United States, of his good, moral character and previous residence of one year.

There does not appear to have been a formal order of court

Digitized by Google

admitting the person in question to become a citizen, nor does the statute, in terms, make such order indispensable. Although the record shows the declaration to have been one of intention merely, he in fact, as fully stated in the certificate, made oath, not of his intention to apply to become a citizen of the United States, but of present allegiance and abjuration required as condition of being admitted to be a citizen. The record does not show that he filed a certificate or made other proof of his honorable discharge from the service; but, after such long and undisputed exercise of the right of a citizen, and in view of his compliance with every other requirement of the statute, a reasonable presumption arises that competent and satisfactory proof of that fact was made in court. In our opinion his vote was correctly decided to be legal.

4. But we think the votes cast for Cowan by the two persons alleged to have been bribed ought not to be counted. The contesting board refused to strike from the list the name of either of them upon the ground there had not been a judgment of conviction for the offense, while the circuit court held, in substance, that although it would be proper to discard votes of such persons, upon proof of the offense, their own testimony should never be credited. Neither position is tenable. Of course a verdict and judgment must precede the punishment of fine and exclusion from office and suffrage, which section 11, article 22, General Statutes, provides a person shall suffer who is guilty of receiving a bribe for his vote at an election. But it has never been doubted that a vote obtained by direct pecuniary or other valuable consideration is a bad vote and ought to be rejected upon proper proof by a court or tribunal trying a case of contest. McCreary on Elections, sections 180–1.

It may be true, as said by the lower court, that a person who testifies he, for a bribe, corruptly cast his vote, thereby affords indubitable evidence of his own infamy; but it does not necessarily follow his testimony should be in every case discredited. One of the offenders only testified, but he stated that, intending to vote for Prowse, he and the other, for the consideration of $5 paid to each of them, voted for Cowan, and gave the name of the person who made the bargain with and directed them where to go in order to get the money, also the name of the person who, in pursuance of the bargain, paid it to them. It is idle to say the two persons thus implicated would not have contradicted and shown the falsity of that statement if they could have truthfully done so, as it would be unreasonable to discredit testimony, the truth of which is thus demonstrated.

5. Five votes recorded for Prowse were adjudged illegal because the persons who cast them had been convicted of felonies prior to the election. Whether those votes were properly held illegal depends upon article 8, section 4, of the Constitution, and the statute enacted in pursuance of it. That section is as follows: "Laws shall be made to exclude from office and from suffrage those who shall be thereafter convicted of bribery, perjury, forgery or other crimes or high misdemeanors." The statute provides that "any person convicted of *robbery*, forgery, *counterfeiting*, bribery *or* perjury or *other like crime* shall forfeit his right of suffrage and his right to hold office." Section 15, article 12, chapter 3, General Statutes.

As to the offenses of which three of the persons were convicted there can be no question, one of them being house-breaking, one horse-stealing and the other burglary. Though none of them are specially mentioned in either the Constitution or statute, yet, according to the rule applied in Anderson v. Winfree, 85 Ky.,

Digitized by Google

596, they must each be regarded as comprehended by both, it having been there held that a person convicted of grand larceny was thereby disfranchised and his vote properly excluded. And such being the case, it would seem a person convicted of either of the three offenses in question should be treated as also disfranchised.

The offenses of which the other two were convicted are malicious shooting and malicious cutting, both made by statute felonies, and, therefore, properly classed as crimes or high misdemeanors in meaning of the Constitution. It will, however, be seen that the language of it is somewhat different from that of the statute in two respects. First, only bribery, perjury and forgery are in terms designated in the Constitution, while in the statute the additioned crimes of *robbery* and *counterfeiting*, are named. Second, the alternative words of the Constitution are "other crimes or high misdemeanors," while those of the statute are "other like crimes." And construing the latter by itself, a fair inference would be the Legislature intended to exempt from its operation such crimes as malicious cutting or shooting, and even murder, rape and arson. But although the section of the Constitution quoted is not self-executing, it is plain and imperative. Consequently, a reasonable presumption arises that the Legislature intended such meaning and effect should be given to the language of the statute as necessary to faithfully and strictly obey and carry out that mandate.

It is very clear that the language of the Constitution, which is general and not at all restrictive, comprehends every crime of whatever character, as well as high misdemeanors. If it was not so the statute in question would, in respect to *robbery* and *counterfeiting*, not mentioned in the Constitution, be invalid, for the Legislature has no power to exclude any person from office or suffrage, except to the extent it is derived from the section in question. Therefore, the lower court, in our opinion, properly adjudged the votes of the two persons convicted of malicious cutting and malicious shooting, as well as the three others, illegal. But erred in deciding the vote cast for Cowan by the person convicted of mail-robbery, also illegal, for by the only evidence that he had been so convicted, which was his own confession, it is shown he was pardoned by the president of the United States before expiration of his term of punishment. Therefore, though, according to a reasonable construction of the Constitution and statute, his conviction of the crime of mail-robbery in the Federal Court would have had the effect to exclude him from office and suffrage as if convicted in a court of this State of a crime against its statute, still the pardon operated, in the language of Blackstone, "to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtained his pardon."

In Jones v. Board of Registrars, 56 Miss., 766, where the precise question before us arose, it was held that the effect of a pardon by the President of the United States was to restore a person convicted in a Federal Court to the right of suffrage from which he would have been otherwise excluded, in virtue of the Constitution and statute of that State. And such seems to be the settled doctrine. 4 Wall., 333; 9 Wall., 531; 16 Wall., 147; 95 U. S., 149. It has been also substantially recognized by this court. Maust v. Commonwealth, 2 Duvall, 94.

6. Another exception by appellee, Prowse, relates to 3 votes alleged to have been cast for him that were not recorded; 2 recorded for Cowan not cast for either of them, and 2 others who, it is contended, voted for Prowse but were recorded and counted for Cowan. It seems to us it would be a dangerous precedent for a court to un-

Digitized by Google

dertake to add to the record and count votes it does not show were cast, and not less so to take from the record votes it shows were actually cast.

In Anderson v. Winfree, 85 Ky., 597, it was held that when, in case of voting *viva voce*, it can be made to appear by oral testimony the vote of a person cast for one candidate was, by mistake of the clerk, recorded for his opponent, such mistake ought to be corrected, but if the proof is doubtful the record made by the clerk ought to stand.

Though the evidence in such case may be entirely satisfactory that a mistake was made, it does not necessarily follow it was committed by the clerk, for the voter may himself have inadvertently called or presented to the officer of election the name of the candidate he did not really intend to vote for, and if so the record ought not to be changed. But whether the alleged mistake as to the 2 votes under consideration was made by the clerk is a question of fact like that made by the parties respectively and argued at length by counsel in regard to a very large number of other disputed votes, and as the contesting board and circuit court concurred in finding the evidence insufficient to overcome the presumption of verity of the record, we do not think that finding should be reversed by this court.

7. It appears the contesting board decided 36 votes recorded for Prowse and 25 recorded for Cowan illegal, because cast out of precincts in which the voters severally resided, notwithstanding the right was assumed by it to have been exercised in each case under color of orders of the county court. But that decision was wholly reversed by the circuit court, for the reason stated in the judgment, and now urged by counsel that the county court had general jurisdiction conferred by statute to change voting precincts of the county, and, consequently, orders made from time to time for that purpose can not be questioned collaterally.

Section 5, article 2 of the former Constitution provided that the General Assembly should divide each county of the Commonwealth into convenient election precincts, or might delegate power to do so to such county authorities as designated by law. And in pursuance thereof, power has been given by statute to county courts to change election precincts and voting places. Consequently, they may be treated as having general jurisdiction of the subject. But a distinction must be observed between an order of court changing the boundary line of a precinct, or place of voting therein, which is presumed to have been made in every case for public convenience, and in strict compliance with the statute, and arbitrarily transferring the voting place of a person from one precinct to another without an actual and definite change of the division line being made, or if made at all, done without regard to location or continuity of such line. The latter being a mere grant of personal privilege, the Legislature had no power to do itself, nor could delegate such power to any tribunal. Therefore, every order of a county court for transfer of the voting place of a person, without so changing the division line of the two precincts as to include his place of residence within the boundary of the one to which the transfer is attempted to be made, is absolutely void. For if such personal privilege may be legally granted to one, it can as well be given to every other person applying therefor, thus practically effacing precinct boundaries, required by the Constitution to be established and kept distinguishable, and rendering it in many cases uncertain in which of the two precincts persons reside and have the legal right to vote.

While it is not indispensable for precinct lines to be fixed by instrumental survey and measurement, they should be so fully and clearly

Digitized by Google

described by roads, water courses, adjacent farms or tracts of land or other known objects as that their true location will be certain, or capable of being made certain. For not only is it a matter of public concern that votes be legally cast, but the Constitution makes no distinction between the full and certain enjoyment of the right of free suffrage by every one entitled to vote, and the absolute and unquestioned security of any other right. And to render transfer of the voting place of a person valid it is necessary not merely that the division line between precincts be so changed as to include his place of residence, but that the new line be made as definite and certain as was the original line. But an order that transfers the voting place of a person by changing the division line so as to include his farm in the precinct to which he appears to be transferred is valid, for in that case the boundary lines are preserved and described so as to be known or ascertained. And such seems to have been the character of most of the county court orders under consideration. So is an order providing for change of the line of a designated precinct so as to include a person mentioned sufficient; for, according to a reasonable construction, the farm or place of residence of such person is to be treated as the object by which the new line was intended to be described. But, as already intimated, an order of court simply transferring the voting place of a person from one precinct to another, without any change of the line between them, is a violation of the Constitution, and all votes cast in pursuance of such order are illegal. It appears that 5 of the 36 votes for Prowse were cast in virtue of such an order of court. There was one other person who disregarded a valid county court order and voted in a precinct different from the one in which the farm where he resided is situated and different from where others living on the same farm voted. It is clear that holding votes of the others to be legal, as was done by the circuit court, necessarily requires his vote to be treated as illegal. There were two others, who, though not in the list of 36 votes, did, under an order of court in operation as to them, vote outside the district in which they resided, the evidence showing they did not reside on the farm adjacent to the division line of the two precincts. They should, therefore, be added, making eight illegal votes cast for Prowse, under color of county court orders, that were void, yet adjudged by the circuit court to be legal votes.

Of the 25 votes for Cowan, under consideration, it appears that six of them were cast under color of orders simply changing the voting places without any change of precinct lines, and are illegal. Counsel for appellee refer to 8 others, naming them, who, it is contended, for the same cause are illegal. But one of that number is not on the list of 25 mentioned, and 4 of the 8 are in the list of 6 first referred to. As to the remaining 3 it seems to us the evidence is sufficient to show they, at the time of the election, resided on farms which, by fair construction, had been included by change of lines of the respective precincts where they voted. There are 2 others, T. T. and J. L. Arion, on the list of 25, who, it is contended by counsel for appellee, and not disputed by opposing counsel, voted out of their district without any order of court, valid or otherwise, changing their voting place.

We have not been able to find any order of court authorizing those two persons to so vote outside of the districts in which they resided, and, consequently, they must be held to have cast their votes for Cowan illegally. There are four others in the same situation, but as the contesting board and circuit court found they voted out of their districts in virtue of the county court orders, and the fact is not con-

Digitized by Google

troverted, we assume such orders were made, although not able to find them among the original papers of the case, which, instead of a transcript, have by consent of the parties, been filed in this court. Adding 8 votes to the 51 adjudged by the lower court illegal, makes 59 illegal votes to be deducted from the whole number of 3,215 recorded for Prowse, leaving 3,156. There was found by the court 47 illegal votes cast and recorded for Cowan, including, as we have indicated, improperly the vote of a person convicted of crime, but pardoned, and not including votes of two persons who were bribed, as should been done, making 48 to be added to the 8 of the 25 that are illegal, and a total of 56 to be deducted from the whole number of 3,210 cast and recorded for him, leaving the number of legal votes received by him 3,154, and a majority of 2 for Prowse.

Judgment affirmed.

ABERNATHY, BY, GUARDIAN, &C. V. ROSS, &C.

(Filed Sept. 22, 1892—Not to be reported.)

Sale of infant's real estate—Liens—An infant's interest in land was sold by her guardian, the other joint owners uniting in the sale. The vendee has sold parts of the land to sub-vendees. In this action to determine the extent of the lien for the purchase money held by the infant on the land, *Held*—

First—The guardian of the infant will not be allowed a lien on the whole tract sold, when enough land remains in the hands of the vendee to satisfy the claim of the infant.

Second—Although the infant was a non-resident and not before the court in the action in which her lien on the land was ascertained, still her guardian was a party to the suit and had a right to have her land divided, and the judgment is binding on her.

R. A. Burnett for appellants.

J. Ed. Kelly for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Pryor.

We see no error in the judgment below. The appellant, who was an infant, and entitled to certain interest in lands in conjunction with her mother, brothers and sisters, sold this land by her guardian before she was of age.

The other parties in interest sold their interests also and this land passing to subvendees a question arose as to the nature of the liens existing by reason of the sales of this land and the mode of enforcing those liens against those in possession.

The guardian of the infant claimed that he had a lien on the whole land for the note he held, payable to the infant.

The court below held that there was enough land in the possession of the original vendee unsold to pay the infant's debt, or whether so or not that he would have the land divided and the interest of the infant allotted to her and subjected to her lien.

The other parties are not complaining, but, after a judgment to that effect, giving the infant her interest, a petition is then filed alleging that the infant was a non-resident and not before the court by summons or otherwise in the original action. Her guardian was

Digitized by Google

before the court and had the right to have her land divided, it was divided and, we think, binding on her.

There is no fraud alleged and, in our opinion, the judgment was equitable and just.

BAILEY, &c. v. BOYSE.

(*Filed Sept.* 22, 1892—*Not to be reported.*)

Adverse possession—The claim of one who enters upon land under a title of record will prevail against one claiming only by adverse possession, who has no definite enclosure, and the boundary of whose claim is indefinite and in doubt.

J. D. Jones and Jno. L. Scott for appellants.

E. B. Wilhoit and Wm. Lindsay for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Pryor.

It is evident that the appellee is the owner of the land embraced within the patent to Nethercutt, nor does the appellant claim that his intrusion, viz: Where he cut the timber, was in the boundary of the J. F. Bailey patent. Nor was there any inclosure by the appellant of any part of the land of the appellee, but he claims against the appellee by reason of adverse possession.

So with no defined boundary, or even if defined, the entry by the appellee, under a paper title of record, must prevail against an adverse possession without any other title and in a case where the location of the real boundary is in doubt.

There was no objection made to the petition for uncertainty in the description of the land, but the case was prepared and went to trial; where the survey made makes that certain which was before uncertain, and while there is a difference in the character of timber forming the corners and lines as found in the judgment or survey from that in the petition, it is evidently the same land.

The plaintiff has not recovered beyond the Nethercutt patent, nor has he interfered with the Bailey patent.

Judgment affirmed.

COMBS v. COMMONWEALTH.

(*Filed Sept.* 22, 1892.)

Criminal law — Unlawful, &c., burning of a dwelling-house - Where one sets fire to a school-house, intending thereby to burn a dwelling-house, occupied at the time as a residence, which is so situated as that the fire from the school-house is likely to communicate to the dwelling-house, and does thereby burn the latter, he may be indicted and convicted of the crime of unlawfully, willfully, &c., burning a dwelling-house, which was at the time occupied as a residence.

Jno. L. Dixon and W. T. Bentley for appellant.

Digitized by Google

W. J. Hendrick for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and Ep Hicks were indicted in the Knott Circuit Court, charged with the crime of unlawfully, willfully, feloniously and maliciously burning the dwelling-house of D. O. Gibson, which dwelling was then occupied by said Gibson as a residence; that the said burning was effected by firing the public school-house in school district No. 1, the appellant and Hicks knowing, at the time of the firing the school-house, it was so near the said dwelling-house that it would be burned by the firing of the school-house.

Bishop, in second volume of his Criminal Law, section 16, says that "a man is presumed to intend the natural and probable consequences of his own voluntary act. If, therefore, one kindles a fire in a stack, situated so that it is likely to communicate and communicates in fact to an adjoining building he is chargeable with burning the building; and, for a still stronger reason, if he applies the torch to his own house, intending to burn his neighbor's also, and the neighbor's is burned, he commits this offense."

The indictment charges that the appellant and Hicks set fire to the school-house with the intention of burning the dwelling-house, and the latter was burned. The proof clearly sustains the allegations of the indictment, and the instructions conform to the rule *supra*.

The judgment is affirmed.

WILLIAMS V. COOPER, &C.

(*Filed Sept.* 24, 1892—*Not to be reported.*)

1. *The offer to file a reply was not made until eighteen months* after the answer had been filed and not until after a motion to submit the case was entered, and this court will not hold that the trial court abused its discretion, relative thereto, in refusing to permit the reply to be filed.

2. *Motion to dissolve injunction Notice*—No notice is required of a motion to dissolve an injunction, which is made during the regular term of the court.

W. W. McGuire for appellant.

Jno. E. Cooper for appellees.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

At the April term of the court for the year 1888 the defendants filed their answer and some eighteen months after, at a subsequent term of the court, a demurrer was filed to the answer and overruled. There was then a motion to submit and an offer for the first time to file a reply that was, at the time, objected to. There was no reason or valid excuse given for not having filed the reply sooner and we can not say the court abused its discretion in refusing the filing.

The motion to dissolve the injunction was made during term time and no notice was necessary, and the injunction having been dissolved the greater the necessity for a reply to the answer that the title to the land might be settled.

Digitized by Google

But whether so or not, this court ought not to reverse upon the record as presented.

Affirmed.

McCARTY V. COMMONWEALTH.

(*Filed Sept.* 24, 1892—*Not to be reported.*)

1. *Criminal law—Insanity*—The fact that one, who was a peaceable and orderly citizen when sober, was rendered very quarrelsome by drink, so that he would construe trivial language and conduct into intentional insults, which he would resent by engaging in personal difficulties with the supposed offenders, does not evidence such insanity in such person, when drunk, as will excuse him for the commission of the crime of murder of his wife.

2. *Same—Expert evidence*—On the trial of a defendant for murder, whose plea is insanity at the time of the commission of the homicide, physicians, who testify as experts concerning the defendant's mental condition, should base their opinion upon a hypothetical case and not upon the evidence heard by them at the trial.

Gardner & Moxley and E. J. McDermott for appellant.

W. J. Hendrick for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried, convicted, sentenced to suffer the death penalty by the Jefferson Circuit Court for murdering his wife.

The evidence is that the appellant was seen going to his and his wife's room, up stairs, in the city of Louisville, having his hand upon his hip pocket; that he entered said room and shot her to death, no one, however, seeing the act, but the appellant's son entered the room immediately after the firing ceased and while his father was standing over the dead body of his mother snapping his pistol at her.

The appellant then left the room and went upon the street and then ran across the street, and, in running across the street, he ran into a wagon and fell, and in falling he dropped his pistol; a little boy picked up the pistol and offered it to the appellant, but he declined to take it, telling him to throw it away, he then ran on until he was captured, after which he stated he had killed his wife and he was glad of it; also, that his wife had acted wrong, &c., and when being taken to jail he said that he was crazy. Also, he had, previous to the killing, quarreled with his wife, telling her that if he should kill her the only thing that could be done with him would be to send him to the asylum.

The only excuse made for him by counsel is that he was, at the time of the killing, insane.

The jury, under correct and full instructions upon that subject, found that the appellant, at the time he killed his wife, was not insane.

The evidence is clear and convincing that the appellant, when sober, was peaceable and orderly and extremely rational, but, when drunk, he was quarrelsome and would torture language and conduct into intentional insults, which he would resent by having personal difficulties with the parties. But that he was not insane in the

Digitized by Google

sense that the law holds to excuse crime, there is, to our mind, no shadow of doubt.

But the counsel insist that the court erred in allowing Dr. Pusey, as an expert, to give his opinion as to the appellant's mental condition from the evidence, and not compelling him to give his opinion upon a hypothetical state of case. It is undoubtedly true the doctor should have spoken from a hypothetical state of case. Brown v. Commonwealth, 14 Bush, 410.

It is also true that the doctor did testify all the way through from a hypothetical state of case except in the single instance mentioned by counsel, which occurred upon cross-examination and which was evidently an inadvertance by the Commonwealth's attorney.

But, be that as it may, the answer to the question did not prejudice the substantial rights of the appellant.

The question that was put to Dr. Dougan, and objected to by the appellant on the ground that it was not hypothetical, was clearly hypothetical.

The judgment is affirmed.

There has been no brief filed for the Commonwealth.

HOLMES, &C. v. HERRINGER, &C.

(*Filed Sept.* 24, 1892—*Not to be reported.*)

Division line—Evidence—The true location of the division line between the parties hereto was the only question in this case, and the verdict of the jury in regard thereto is supported by the evidence. The trial court properly refused to permit the jury to consider the plaintiff's title papers for any other purpose than as evidence of the location of the division line, that being the only issue in the case.

Jno. D. Ellis and Reiley & Reiley for appellants.

T. M. Hill for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Lewis.

According to opinion of this court upon the former appeal of this case (12 KY. LAW REP., 22) the simple and only question is one of fact as to the true location of the Carrington and Beall division line, which is the present division line between the lands of appellant and appellee. The lower court fairly and properly submitted that issue of fact to the jury, and as the verdict in favor of the defendant is not, by any means, palpably against, but is fully supported by, the evidence we are not authorized to disturb it.

The refusal of the court to permit the title papers offered by the plaintiff to go to the jury for any other purpose than as evidence of boundary did not prejudice him, because there is no question of title involved, both parties claiming under the same patent and the subsequent deed of partition between Beall and Carrington.

Judgment affirmed.

Digitized by Google

EASTERLING V. CHILES, THOMPSON & CO.

(*Filed Sept.* 24, 1892.)

1. *Jurisdiction—Attachments*—The circuit court has no jurisdiction of an action for $46 for goods sold and delivered, although the plaintiff seeks to subject the debtor's land for the debt, by obtaining an attachment. The jurisdiction of the quarterly courts and of the courts of justices of the peace of such action is exclusive.

2. *Same—Void judgments—Appeals*—A judgment rendered by the circuit court in such action is void for want of jurisdiction, but an appeal therefrom to this court must be dismissed, unless a motion is first made in the court below to set the judgment aside.

Jno. T. Hazelrigg for appellant.

Jno. P. Salyers for appellees.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

The action below was on an account for goods sold and delivered, amounting to $46, and was instituted in the circuit court with a view of obtaining an attachment that was levied on the debtor's land, he owning no other estate.

We are aware of no statute conferring upon the circuit courts such a jurisdiction, but, on the contrary, the jurisdiction is confined by statute to the courts of justices of the peace and to quarterly courts.

By the provisions of an act, passed in the year 1880, the real estate of debtors who are non-residents, and who have no personal estate sufficient to pay the debt, may be subjected by a proceeding in the circuit court in the same manner as in cases where such jurisdiction is expressly conferred on circuit courts.

It is there suggested that the creditor has no remedy by which he may make his debt out of the realty or avail himself of a provisional remedy for that purpose where his claim is for less than the jurisdiction given to the circuit court.

The mode of acquiring a lien on the land by attachment or subjecting it in such a case is found in section 723, Civil Code, where it is provided that upon a return of *no* property on an execution from a justice's or quarterly court the plaintiff may have a copy of the judgment, execution and return, and when filed in the clerk's office of the circuit court he becomes entitled to the same remedies as if the judgment had been rendered in the circuit court.

It is argued that a lien created by resorting to a provisional remedy should confer the jurisdiction upon the circuit court to enforce the lien upon land for the same reason that liens are permitted to be enforced when created by deed or by contract.

As between the vendor and the vendee, where the purchase price is less than fifty dollars, neither the court of a justice of the peace nor the quarterly court has the power to enforce the contract or subject the land to the lien created by the contract.

The jurisdiction in such cases is expressly excluded from the inferior tribunals, and the circuit court has original jurisdiction of all matters in law and equity of which jurisdiction is not by law exclusively delegated to some other tribunal.

The circuit court is given the jurisdiction and the inferior courts excluded from exercising it. The cause of action is for goods sold and delivered and is for less then $50, and the provisional

Digitized by Google

remedy obtained, being merely in aid of the judgment when rendered, the circuit court had no jurisdiction to render a judgment for the debt.

In a case of lien created on land by contract the right to enforce it is a part of the contract. It is as much a part of the cause of action as the sum to be paid, and the inferior court having no jurisdiction it is necessarily conferred on the circuit court by the very terms of the act regulating the jurisdiction of circuit courts.

Although the judgment is void for want of jurisdiction, the appeal must be dismissed because there was no motion made in the court below to set the judgment aside as required by the Code, section 763.

The appeal is dismissed.

THOMAS V. COMMONWEALTH.

(*Filed Sept.* 24, 1892—*Not to be reported.*)

1. *Criminal law—The verdict convicting appellant of murder*, is sustained by the evidence, which, though circumstantial in its nature, leaves no room for doubt of his guilt.

2. *Same—Evidence*—On the trial of appellant it was not error to permit witnesses to narrate the testimony at the examining trial of the coroner, who had died before the indictment and trial in the circuit court.

3. *Same—Evidence*—Evidence that appellant and deceased had quarrelled a week before the murder was competent to show malice on the part of appellant, and that he had a motive for the murder.

4. *Indictment—Evidence—Variance*—While the indictment alleges that the deceased was strangled and choked to death by the hands of accused, and the testimony conduces to show the choking was effected by placing a scarf around deceased's neck, still this constituted no material variance, the offense being made out substantially as alleged.

Chas. G. Richie and A. Lincoln Dembitz for appellant.

W. J. Hendrick for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The appellant has been convicted of the murder of Birdie Coleman upon circumstantial testimony alone, and his punishment fixed at death.

The woman killed and her husband lived on Ormsby avenue, between Ninth and Tenth streets, in the city of Louisville. Mollie Durrett, a witness, and her husband, lived on the same street directly opposite the house of the deceased.

On the 9th of February, the morning of the day on which the murder took place, this witness saw the deceased, about half past seven o'clock, enter the woman's dwelling. The husband of the deceased had, as the proof shows, left his home at five o'clock and gone to his work in another part of the city. They had no children, and from all the testimony there was no one in Birdie's home from the time her husband left until she was found dead but the accused. The evidence conduces to show that the deceased and the accused had some trouble about a week previous, in which angry words passed, but nothing more. The witness states that the accused en-

Digitized by Google

tered the door without knocking; that he returned to the door and looked up and down the railroad, then went around the house, returned and pushed the door open. He came again to the door and closed it, and again looked out. His conduct attracted the attention of the witness, but she left her home shortly after, and when she returned ascertained that Birdie was dead. Philip Durrett, the husband of this witness, saw the deceased and the accused standing in the door. The accused took hold of the deceased and pushed her back and slammed the door. This was about half past seven. Neither of these witnesses saw the accused leave the house, and no one seems to have seen him about the premises until after ten o'clock and after the woman was found murdered. She was bruised on the head, evidently such a blow as would make her insensible, and then strangled either with a scarf that was found about her neck or with the hands of the murderer.

The condition of the bed clothing gave evidence of an assault and resistance by the one party or the other when this crime was being perpetrated. The appellant proves an *alibi* by his mother, brother, father and others, and if their testimony is to be believed he is innocent of the charge made against him. After hearing of the death of the woman he assisted in the preparation for the burial, and went to inform the husband of his wife's death. These circumstances conduce to show innocence, and at the same time might well be regarded as a means resorted to by the accused to prevent being suspected of having committed the atrocious crime. There can be but little doubt as to the accused being in the room of the deceased that morning. The testimony of Debbins, an intelligent witness, corroborates the statement of Durrett and wife. He says that he saw the accused enter the house of Coleman that morning and it was his recognition of the accused that caused his arrest. The accused denies being with the deceased that morning or in her house, but we think the testimony conclusively shows that he was in the room of the deceased, and his conduct conduces strongly to fasten the crime upon him. It was the province of the jury to pass on the facts, and after a careful reading of the testimony we are not prepared to say that the verdict is not sustained by the testimony. The legal questions raised by counsel in an argument well presented and impressive do not authorize a reversal. The coroner who testified at the examining court was dead when this trial was had. His statements, or the substance of them, were proven by others who recollected his testimony. The accused was present at the examining trial and represented by council. They only conduced to show that the deceased came to her death by violence, and in no manner prejudiced the accused.

The court gave the whole law of the case. No instruction for involuntary manslaughter should have been given, as there was not a single fact upon which such a conclusion could have been reached. We perceive no variance between the indictment and the proof. The charge of strangling and choking with hands, and puts into testimony that it was effected by placing a scarf around the neck, constitutes no material variance—in either case the offense is made out as is substantially alleged. The quarrels between the accused and the deceased a week before the murder was competent to show malice and that the accused had a motive for taking the life of the deceased. The accused had had a fair trial, has certainly been well and ably defended, and we are satisfied, both in the law and the facts, the ac-

Digitized by Google

cused should not escape punishment for his cruel act in taking the life of the deceased.

Judgment affirmed.

ALEXANDER V. COMMONWEALTH.

(*Filed Sept.* 27, 1892—*Not to be reported.*)

1. *Criminal law—Larceny*—Defendant, at the time he was engaged in a fight with G., knew that the latter had over $60 in his coat pocket. As G. turned to run appellant grabbed the back of his coat collar and in the struggle by G. to get away his coat was stripped from his back. Defendant carried it away with him, and when G. recovered it subsequently, the money was not in the pocket. *Held*—That the evidence was sufficient to authorize the verdict convicting defendant of larceny.

2. *Same—Robbery—Instructions*—The instruction in this case was proper, which defined larceny to be a "wrongful and fraudulent taking and carrying away by trespass by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his own use, and make them his own property without the owner's consent."

The instruction given in this case concerning larceny embodied the law of the case, and was the only instruction concerning that offense that was necessary for a fair trial.

Wm. Marble for appellant.

W. J. Hendrick for appellee.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Lewis.

Appellant was indicted for robbery, but convicted of larceny, charged and proved to have been committed as follows: He had purchased of one Glazier, peddler, a suit of clothes for himself at the price of $12, of which $4 was paid and the balance agreed to be paid the following Saturday. But having failed to make that payment, an agreement was entered into for Glazier to take back the suit of clothes, let appellant have a suit for his child at $2 and pay back $2. Glazier, when the parties arrived at his boarding-house, refused to take back the clothes, because, as he states, appellant had worn them, and, therefore, they got into an angry altercation, during which appellant grabbed at Glazier's watch, but missed getting it, and blows were also passed.

While thus engaged Glazier called on appellant to hold on, and took out of his coat pocket a pocket-book, in which he states there was the amount of $62.50, of which $60 was in paper and the residue silver. He states he opened the pocket-book, exposing the money to appellant, and, doubtless, intending to return the money, but after looking at it a moment returned the pocket-book to his coat pocket, saying he would die before giving up the money. And then again a scuffle began, but Glazier soon started to flee from his antagonist, and, as he turned for that purpose, appellant caught hold of the back of his coat collar and, in his effort to get away, it was stripped from him and left in the possession of appellant, who carried it off to his own residence. Glazier afterward got back his coat, but never recovered any part of the money in it.

Upon trial the court instructed the jury as to robbery, and also lar-

Digitized by Google

ceny, which was correctly defined to be "wrongful and fraudulent taking and carrying away by trespass by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his own use, and make them his own property, or to deprive the owner permanently of his property without the owner's consent." And another instruction was given, intended to be applicable to this case, as follows: "If the jury believe from the evidence, to the exclusion of a reasonable doubt, that the accused did * * * * wrongfully and fraudulently take and carry away by trespass from any place the personal goods or money of said Glazier of the value of $10 or more, with the felonious intent to convert them to his, the defendant's, own use, and make them his own property, or to deprive said Glazier permanently of the property taken without his, said Glazier's, consent, they should find the defendant not guilty, as charged, but guilty of grand larceny, and fix his punishment in the penitentiary for not less than one nor more than five years," &c.

It is stated by text-writers as a general rule that larceny, composed of the act of trespass and the superadded intent to steal, is not committed when this trespass and this intent do not exist at the precise moment together. And certainly there can be no complaint of the instruction, because it did not comport with that rule. Nor was the jury without evidence to support the verdict, according to the law thus defined. For the proof is convincing appellant saw the pocket-book containing the money when Glazier took it from his pocket, and must have known when he forcibly and unlawfully took away the coat he was also carrying away the money, which was never returned.

There may be a case where property innocently and without force taken, or innocently received by a person, would not amount to larceny, because not composing all the elements of that crime, although the property may be afterwards wrongfully appropriated. But the money which appellant is charged to have stolen was not innocently but forcibly and unlawfully taken, and not having been returned must be regarded as feloniously taken and converted.

There were instructions asked by appellant, but as those given cover every condition in which the offense of larceny may exist, and any other or further instruction would have served only to confuse the jury, the court did not err in refusing to give those asked by appellant.

Judgment affirmed.

HAMMILL v. L. & N. R. R. CO.

(*Filed Oct.* 1, 1892.)

1. *Death by willful neglect*—It is well settled that where the evidence conduces in any degree to establish a right of recovery in plaintiff, it is improper to instruct the jury to find for the defendant.

2. *Same—Trespasser on track*—Decedent lived on the south side of the Licking river, just opposite the round-house of the appellee on the north side of the river, at which he had been for some time employed. It was his custom to go from his home to the round-house every morning by way of the trestle and bridge of appellee across the river. He was killed by an engine of the appellee on the trestle while so going to his work. *Held*—That the evidence in this case did not authorize the conclusion that the deceased was a trespasser on the trestle, but conduced to show that appellee had tacitly, if not expressly, licensed him to use the trestle and bridge in going to

Digitized by Google

his work, and, therefore, those in charge of appellee's train were under obligation to vigilantly look out for deceased's presence there and guard against injuring him.

3. *Same—Peremptory instruction*—In this action the evidence conduced to show that those on the train could have discovered deceased's perilous position on this trestle in time to have avoided the collision with him, had they been on the lookout, and that the engine was out of repair so that steam escaped from it so as to obstruct the view of the track, and that the engine was not moved across the bridge and trestle with proper care. Hence the peremptory instruction to find for the defendant was improper and error.

Hallam & Myers for appellant.

O'Hara & Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, Ann Hammill, widow of James Hammill, brought this action to recover damages for destruction of his life by alleged willful neglect of servants and agents of appellee. And the question for our decision is, whether the lower court properly instructed the jury, at conclusion of plaintiff's evidence, to find for the defendant. As said in L. & N. R. R. Co. v. Howard's administrator, 82 Ky., 212, "this court has often held that where the evidence conduced in any degree to establish the right of recovery it is improper to instruct to find for the defendant."

That doctrine is in accordance with the well settled rule making the jury the sole and exclusive triers of fact in both criminal and civil proceedings, and investing them, not the court, with power to judge of and determine the weight of evidence and credibility of witnesses. Applying to this the test indicated in the case cited, it was, we think, error to give the peremptory instruction to the jury of which appellant complains.

It appears from the evidence that James Hammill was, at time of his death, and had, for many years, been in employment of appellee, and for about one year next preceding that event was daily engaged about the round-house, situated in Campbell county, on the north side of Licking river, while his residence was on the south side thereof in Kenton county.

At the south end of the railroad bridge is a trestle connecting it with ground higher than bank of the river, the precise length of which trestle does not clearly appear. As was his custom the deceased had, between five and six o'clock a. m., started from his residence to the round-house, and when near the north end of the trestle, upon which he was traveling, was struck and knocked off by a switch engine going from the north to south side, to which was attached two or three freight cars. There were upon the engine, besides the engineer and fireman, two or three brakemen, the fireman, not the engineer, having, at the time, charge of it.

The witness, and only one, who testified on the trial to the circumstances under which the collision occurred, resulting in death of appellant's intestate, was, at the time, a brakeman in employment of appellee, who, instead of going with the engine and cars across the river, as he testifies, remained on the north side, and was, at the time, near the switch leading from the main track to the company's yard, and was near enough to see the engine and cars when the collision took place. He testifies that he heard, just before the de-

Digitized by Google

ceased was struck, a person who was evidently him, cry out "stop, for God's sake, stop." That the weather was somewhat rainy and misty but not enough so to obstruct the engineer's view of the track, and the inference is reasonable he might have seen the deceased in time to avoid the collision. The witness states the important fact the steam-chest, on the right side of the engine, leaked very badly, causing so much steam to arise therefrom as to obstruct the view of the engineer or person in charge of the engine. It further appears the employes while on the engine were scuffling, and the jury might reasonably conclude the engine was not moved across the bridge with proper care.

It further appears that there was no other convenient way for the deceased to cross the river from his residence to the round-house except upon the trestle, which was too narrow for a person to get out of the way of an approaching engine, and he had been accustomed to go that way. The evidence does not authorize the conclusion the deceased was a trespasser. On the contrary, it may be fairly assumed the appellee knew he was in the habit of going that way and, therefore, was tacitly, if not expressly, licensed to do so, and those in charge of the engine that killed him were, therefore, under obligation to vigilantly look out for his presence and guard against colliding with him.

In any event it was their duty to use reasonable care to avoid killing him, after discovering his presence, and there is evidence conducing to show this might have been done, for the track on the trestle where he was struck is on up-grade, the engine could have been more readily stopped than on a down or even level grade.

It seems to us clear that the testimony in this case is such as that the jury might have reasonably inferred the collision could have been avoided if those in charge of the train had observed proper diligence, or not been hindered seeing the deceased by the steam from the defective steam-chest, and, consequently, if permitted, might have, in their judgment, found sufficient evidence to warrant, and, consequently, returned a verdict of willful neglect.

There was an effort on cross-examination to contradict and depreciate the credibility of the main witness for appellant. But whether the testimony of that witness was credible or not, or to what extent he was entitled to be believed, was exclusive province of the jury, not of the court to determine.

Wherefore, the judgment is reversed for a new trial and further proceedings consistent with this opinion.

HOBSON V. CARTWRIGHT, &C.

(*Filed Oct.* 11, 1892.)

1. *Construction of deeds*—It should never be assumed, in the absence of plain and unambiguous words to such effect, that parties contract in relation to the sale or exchange of real property, with sole reference to its present condition, and without at all contemplating or providing for future changes and improvements that may take place in or about it. Such construction is not suited to the condition of a country growing and changing so rapidly in all its relations of property, as well as its value and modes of enjoyment.

2. *Same—Easements*—A vendor conveyed a lot to N. in May, 1842, with the condition annexed that N. and his heirs and assigns were never to erect any

Digitized by Google

building thereon, between 40 and 90 feet from the front line thereof, such space to remain open to light and air for such buildings as the vendor might then have or thereafter erect on adjacent lots owned by him. And the vendor stipulated that he would not erect any building more than one story high on part of an adjacent lot owned by him, back of an existing counting-room thereon, the object, as recited, being to prevent N. being incommoded in regard to light and air in the back part of his lot by any high building on the adjacent lot back of the counting-room. Afterward the vendor sold the adjacent lot, and in the deed recited his agreement with N. above mentioned. At the time of the conveyance to N. the lot back of the counting-room was occupied by a one-story building. In this action between remote vendees, claiming the adjoining lots under the two deeds mentioned, *Held*—

First—Whatever easement N. enjoyed in the adjoining lot of his vendor by the terms of the conveyance to him was annexed to his lot and passed to his vendees.

Second—The provision concerning the erection of a building not more than one-story high back of the counting-room was intended to prevent the erection of a two-story building thereon, or the addition of a second story to the existing one-story building, but it was not intended to forever and unalterably confine the latter building to the precise height it was then. And the owner thereof may increase the height of the existing one story, provided he does not make the one story so unusually and unreasonably high as to destroy all benefit of the easement annexed to the adjacent lot, or does not impair it to an extent not contemplated by the parties to the original conveyances.

Rodes, Settle & Rodes for appellant.

Galloway & Gains and Sims & Covington for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Lewis.

In May, 1842, Graham, Howarth & Graham conveyed to Isaac Newton a parcel of land, fronting 12 feet on Main street and extending back 200 feet to an alley, in the town of Bowling Green. In the deed was a reservation or condition that Newton nor his heirs or assigns was ever to erect any building on the lot between 40 and 90 feet from the front line thereof; such intermediate space to remain open to light and air for any building the grantors then had or might erect upon the residue of lots 62 and 58, not then sold to him. It was further stipulated that the grantors were not to erect any building more than one story high on the part of said two lots reserved from sale to him, back of their then existing counting-room; the object of that agreement, as recited in the deed, being that said Newton was not to be incommoded in regard to light in the back part of his premises by any high buildings on their premises, back of their counting-room.

In October, 1842, the same grantors conveyed to Atchison a parcel of land, fronting 20 feet on the same street and extending back 200 feet and adjacent to Newton's lot, being the same upon which said counting-room was situated. In that deed it was recited that the grantors transferred to the grantee all right and privilege of light and air reserved by them in the deed to Newton. And it was also stipulated that said Atchison, his heirs and assigns, were to be bound by the covenant contained in that deed, which, and the object thereof, were specially set forth, and that neither he nor they should ever erect any building more than one story high on the lot back of said counting-room.

Digitized by Google

It appears from the evidence that on the Newton lot is a two-story house, extending back 40 feet, now owned and used by appellant as a business house. On the Atchison lot is a two-story building, extending back 60 feet to a one-story one, extending 40 feet further, the whole structure 100 feet deep, being owned and used by appellees as a store or merchant's house.

This action was brought in 1889 by appellant, claiming as remote vendee under Newton to enjoin appellees increasing the height of the one-story structure, which it was alleged he was about doing, and that the evidence shows he has done to the extent of about two feet by building up the wall, it being a brick house.

There can be no serious dispute of the easement claimed being annexed to the lot conveyed by Graham, &c., to Newton, and, consequently, following it into the hands of appellant. For it was not only in express terms thereby granted but, in the subsequent deed to Atchison, specially reserved, in place or consideration of which the Newton lot was charged with a reciprocal easement, ever since enjoyed.

The only question then is to what extent, according to a fair construction of the two Graham deeds, which do not essentially differ on that subject, such easement was intended to be granted and enjoyed by Newton and those claiming under him. And in determining that question regard must be had to the rights of the owner of the servient estate as well as of the owner of the dominent estate.

For both deeds plainly show it was not intended to wholly deprive Atchison and those claiming under him of the use and enjoyment of the lot conveyed; while the actual existence of the one-story building on his lot, extending, as it did then and does now, 60 feet beyond the Newton building, necessarily restricted Newton and those claiming under him to a partial and imperfect use of light and air coming from that direction, his main reliance therefor being the open space in rear of his own building.

But it is somewhat questionable whether it was intended there should be any restriction at all as to the height of the present one-story building. For Atchison was inhibited in the language of the deeds from "*erecting* any building more than one-story high on the part of said lot *back* of the counting-house;" which restriction does not seem to be properly applicable to the one-story building in question, that some of the witnesses testify, was, at date of the deeds, already erected and being used in connection with the two-story building in front as one business house. We will, however, consider and determine the case as if the restriction did apply to the structure which appellee has added to.

We think it evident the parties had in view, and that the purpose of the restriction was to prevent the erection of any two-story building back of the counting-room, or it may be to prevent the raising of the existing one-story structure to the height of a two-story building, and that it was not intended to unalterably and forever confine the latter to the precise height it then was. For the object of granting the easement as recited in both deeds was that "Newton should not be incommoded in regard to light and air in the back part of his premises by any *high* building," by which was clearly meant a two-story building.

Moreover, it will be observed that while the space in rear of Newtown's store-house, upon which he was prohibited erecting any building, was particularly measured and described by feet, as was done in respect to the lots conveyed, the height of such building as might be erected back of the counting-room was simply limited to

Digitized by Google

one story, which is the distance from one floor of a house to another, that may be increased or decreased at will without at all destroying identity of the building.

It seems to us, therefore, if the parties had intended to prescribe a definite and fixed height, above which the one-story building was never to be increased, if any restriction at all is applicable to it, it would have been so plainly stated in the deeds. And as it was not done we do not see how appellant can complain until appellee has added or is about to add another story to the present one-story structure, or at least until he has made or is about to make the present story so unusually and unreasonably high as to destroy all benefit of the easement or impair it to an extent not contemplated by the parties.

The purpose of appellees in increasing height of the one-story building to the extent of two feet, as alleged and shown, was to have the ceiling thereof even with that of the front building, thereby making a store-room of the depth of 100 feet, having a ceiling of uniform height from front to rear.

If they had a right to increase the height of the one story at all it certainly has not been exercised unreasonably, nor, so far as the record shows, for an improper purpose. On the contrary, the improvement was necessary for successful operation of their business as merchants. And, giving the deeds a just and fair interpretation, we do not think appellant has been unreasonably or illegally incommoded; certainly he has not been incommoded by erection of "any high building" in meaning of the deeds.

The only possible ground upon which he can found a cause of action is, that the actual height of the one-story structure, at date of the deeds, was intended by the parties to remain fixed and unchanged, whatever might be the future increase of population and business of Bowling Green and consequent necessity for changing and improving appellee's store-house to correspond with changed and improved methods of doing business.

There is nothing in the language or context of the two deeds requiring such interpretation, and for the same reasen that has induced this and courts generally of this country to reject the English rule as to prescription right to light and air, it should not be given. That reason is, that, as stated in Washburn on Easements, 498, "such construction is not suited to the condition of a country growing and changing so rapidly in all its relations of property as well as its value and modes of enjoyment."

It, therefore, should never be assumed, in absence of plain and unambiguous words to such effect, that parties contract in relation to sale or exchange of real property with sole regard to its present condition and without at all contemplating or providing for future changes and improvement that may take place in or around it.

In our opinion it was not error to dismiss the action.

Judgment affirmed.

Digitized by Google

KENTUCKY SUPERIOR COURT.

KENTUCKY FLOUR CO. V. SMITH, &c.

(*Filed Sept.* 21, 1892.)

A contract based upon an illegal consideration will not be enforced, and, while an illegal agreement will not be raised by implication, it is not necessary, in order to invalidate the contract, that any particular form of words should be used or that the illegality should appear in a contract as written. It can be proved just as any other contract.

Where a company procured the arrest of an employe who had embezzled its funds and afterwards, with the understanding that "the matter was to be kept quiet," took from him and his brothers a note secured by mortgage, and when the case was called refused to prosecute, saying that the matter had been settled so far as the company was concerned, these facts appearing upon the trial of an action upon the note and mortgage, were sufficient to establish the defense that the note and mortgage were executed for an illegal consideration.

Fairleigh & Straus for appellant.

Strather & Gordon for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

The only question in this case is, whether the evidence is sufficient to establish the defense that the note and mortgage sued on were executed for an illegal consideration.

The appellant, the Kentucky Flour Company, is a corporation. One Ballard Smith, while in the employ of the company, embezzled $1,500 of its funds. The company employed a detective and, at its instance, Smith was arrested and placed in jail though, at the time, no special charge seems to have been publicly made against him. Whether a warrant was sued out by the officers of the company is not made plain; the evidence rather indicates that the warrant charging Smith with the embezzlement of appellant's funds was obtained after Smith had been placed in jail, with purposely no specific charge lodged against him, by one Lammers, a creditor of Smith, who resorted to that mode for co-ercing the payment of his debt.

It is shown that after Smith was jailed, Lammers, hearing of his trouble with the company, saw its officers and said to them that he understood that they were going to take a mortgage on his (Smith's) home place, and that he expected to come in *pro rata*. They replied by asking him what they had to do with his debt, when he retorted that he would let them know what they had to do with it.

Lammers says he swore out the warrant. It is, however, immaterial who swore out the warrant, though these facts tend to support the appellees' contention that it was the agreement that the matter was to be kept as quiet as possible.

John Smith, the son of Ballard Smith, upon hearing of his father's arrest, before he was placed in jail, went to Bashaw, the president, and Gardner, the secretary of the company, his father having been taken to them, and, to use his own language, in response

Digitized by Google

to the question as to what arrangement was made about the prosecution of his father after the execution of the mortgage, said: "No arrangement at all; it was mutually understood between the officers and my father that the thing was to be kept quiet; that was my suggestion. The flour company told me repeatedly that all they wanted was their money; that if we would secure them they would keep the matter quiet; that they would do all in their power to keep the thing down."

Gardner says that the object in putting Smith in jail "was that he should be punished in case the matter was not settled." "Our object in the whole matter was to try to secure the amount due the company. If our debt was secured or paid there was no reason why we should prosecute him. I may have said something to that effect to them but I did not agree not to prosecute them even if the case was settled." Bashaw's testimony is more guarded, but is substantially the same as that of Gardner.

The undisputed facts are that John Smith paid $200 in money to the company and his father paid to it $235. For the balance, $1,072, a note and mortgage were drawn up to be executed by Ballard Smith and his brothers and sisters, the property to be mortgaged being a tract of land jointly owned by them.

The mortgage was drawn up on the 19th of November but was not fully executed until the 28th. In the meantime Smith was confined in jail and his case was called and continued until the day the mortgage was finally perfected, when the case was again called in the city court and Bashaw, the president of the company, stating to the court that the whole matter had been settled as far as the company was concerned, the court dismissed the case and discharged the prisoner.

We agree with counsel that an illegal agreement will not be raised by implication; that an express agreement is necessary. But by this is not meant that any particular form of words shall be used or that the illegality shall appear in the contract as written—it can be proved just as any other agreement can be proven. "An agreement in which no illegality appears and of which neither the consideration nor the promise in itself imports any illegality may, nevertheless, be made for an illegal purpose, and the agreement, though unobjectionable in its terms, may then be rendered void by the illegality of the purpose for what it is made," 5 Lawson's R. and R., section 2,429.

It seems to us that the evidence clearly sustains the chancellor in his judgment, holding that the note and mortgage were made for an illegal consideration. Any agreement which prevents or impedes the due course of public justice is invalid. Chitty's Contracts, 991.

The promise of the appellant's officers to keep the matter quiet can have no other meaning than that they would not prosecute Smith. True, if called upon to do so they would be compelled to testify to the facts within their knowledge—facts which were peculiarly within their keeping and without which there could be no foundation for the beginning of a prosecution—no sort of contract could have exempted them from this liability. The suppression of such facts tended to defeat any prosecution and it was just such cases that the rule was intended to meet.

The company knew that John Smith was to procure the note and mortgage, it was made an agreement with the company that he undertook to have them executed. After they were executed the company accepted them and is now suing upon them. It was, there-

Digitized by Google

fore, competent for the appellants to prove the representations made by John Smith to them to induce them to execute them.

But, aside from this evidence, the other evidence sustains the judgment, and it is affirmed.

TRUAX V. COMMONWEALTH.

(*Filed Sept.* 21, 1892.)

A razor is a deadly weapon within the meaning of the statute against carrying concealed a deadly weapon upon the person. And one who carries such a weapon upon his person is guilty under the statute without regard to the intent with which the weapon is carried.

H. Kennedy and Ross & Owens for appellant.

W. J. Hendrick and R. Reid Rogers for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Presiding Judge Yost.

Is a razor a deadly weapon within the meaning of the statute against carrying concealed a deadly weapon upon the person? In many of the States all weapons meant to be placed on the prohibited list are named. The statutes of others include pistols, dirks, razors, &c., and all weapons of a similar character, but our law (General Statutes, chapter 29, section 29) prescribes a penalty against so carrying upon or about one's person any deadly weapon, other than an ordinary pocket knife.

That the Legislature by this broad declaration intended to make it unlawful for the citizen to carry concealed any weapon which is or could be habitually so carried, and with which personal injury could be inflicted, save the one excepted, seems clear. That it was not intended to restrict this list to such weapons or instruments as are made and designated for offensive or defensive purposes, or for the destruction of life, seems equally clear.

Counsel's contention that a razor could not come within the scope and purview of this law, though confessedly a most deadly weapon, because it was designed for a lawful purpose, is not well taken. When and while used, or intended for use as an article of the toilet, it is not nor need not be concealed, but the man who carries it upon his person hidden from the public view, arms himself with a weapon deadly in its nature and merciless in its power to do harm, and is, in our opinion, as guilty of a violation of the law as he who so carries the pistol, dirk or the sling-shot.

The chisel was designed by man for a ligitimate, innocent and useful purpose, and yet it could hardly be claimed that one who carried this instrument concealed upon his person was not a violator of the law, for that it could be perverted from its original design into a dangerous and deadly weapon can not be denied.

Of course the purpose with which the razor in this case was, or might have been carried, can have no bearing upon the result. To hold otherwise would emasculate the statute. If carried on or about the person innocently and lawfully it must be carried openly. Carried concealed the law is disregarded and the penalty should be inflicted, it matters not with what intention it was so carried. Were

Digitized by Google

it not so the appellant could hardly claim protection by reason of his intention, in the face of the charge that he not only carried a razor concealed on his person on the day named in the indictment, but on divers other days within twelve months next preceding that date.

The demurrer to the indictment was properly overruled, and the judgment is affirmed with damages.

SUPERIOR COURT ABSTRACTS.

MATTINGLY v. MATHEWS, &c.

Filed October 12, 1892. Appeal from Daveiss Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Sales of personal property—Acceptance after opportunity to inspect*—In sales of personal property, to be delivered at a future day, a representation of the quality of the thing sold, where the quality can be as easily ascertained at the time of delivery as at any subsequent time, can not be treated as a warranty. And if the vendee accepts the goods he can not afterwards claim a deduction from the contract price on the ground that they were not of the required grade or quality.

2. *Same*—Defendant, a distiller, proposed to buy a lot of corn which plaintiffs had at their farm, agreeing that if, after inspecting it it proved to be of the quality represented, to take it at a certain price per bushel, and to send a barge to plaintiff's farm to receive it. Defendant had the barge towed to plaintiff's farm, and it was loaded with a part of the corn. Defendant had no one there to inspect the corn. After the barge was loaded it was towed down to defendant's distillery, and defendant then refused to take the corn, notifying plaintiffs that it was not of the quality represented. Plaintiffs then had the corn towed to another distillery, and there sold at less price than the defendant had agreed to pay, which was the best price they could obtain. In this action to recover the difference between the contract price and that they obtained in the resale and their expenses incurred in consequence of defendant's breach of the contract, *Held*—That the court properly instructed the jury that if the defendant received the corn on the barge they should find for plaintiffs; but if the defendant, by his contract, was to have an opportunity to inspect the corn at the time, or before being placed on the barge, and plaintiffs placed it on the barge without defendant's knowledge, or without allowing him an opportunity to inspect it, and defendant did not waive his right to inspect it, the placing the corn on the barge was not a receiving of it in the meaning of the first part of the instruction.

3. *Right of vendor to resell and recover difference in price*—The resale of the corn by plaintiffs after defendant refused to receive it did not amount to an election to rescind the contract. If the buyer unreasonably refuses to accept the article sold the seller is not obliged to let it perish on his hands and run the risk of the solvency of the buyer.

4. *Same—Expenses of resale*—The expenses of towing the barge and the other expenses incurred in making the resale were recoverable if the plaintiffs were entitled to recover at all.

C. S. Walker and John G. Wier for appellant; Sweeney, Ellis & Sweeney for appellee.

Digitized by Google

COMMONWEALTH v. BROWN, &c.

Filed October 12, 1892. Appeal from Livingston Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Bail—Authority to take bond*—Where the accused is admitted to bail by an examining court, the magistrate holding the examining court is the only officer authorized to take bail before the commitment of the accused to jail. After commitment and before the next term of the circuit court, the committing magistrate and county judge are the only officers authorized to take the bail. And neither of the officers named can delegate his authority to any other person or officer.

2. *Same*—An admission by one of the sureties made to the committing magistrate after the discharge of the prisoner can not give vitality to a bond that was void when executed.

W. J. Hendrick, R. Reid Rogers and J. C. Hodge for appellant; Bush & Wooten for appellees.

COMMONWEALTH v. CARTER, &c.

Filed October 12, 1892. Appeal from Casey Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *An indictment for gaming*, which charges that the defendants unlawfully played at games of cards and dice with each other, in which games money and property of value was bet, won and lost, is good under an amendment to article 1, chapter 47, General Statutes.

2. *Election by Commonwealth's attorney to prosecute under particular statute*—Where an indictment is good under one statute the fact that the Commonwealth's attorney elects to prosecute under another statute under which the indictment is not good will not authorize the court to sustain a demurrer to the indictment. Therefore, although the judgment sustaining demurrer and dismissing the indictment in this case recites that the Commonwealth's attorney "elected to stand upon the statute denouncing oontz, craps and games played with dice and other similar contrivance," under which statute the indictment is not good, it was error to sustain the demurrer, the indictment being good under another statute.

W. J. Hendrick and Wm. Herndon for appellant; R. C. Warren for appellees.

SWARTZ v. MCMAHON.

Filed October 12, 1892. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *A new trial will not be granted upon the ground of newly discovered evidence* unless the new evidence would, in the opinion of the court, have a preponderating influence upon another trial.

2. *Where the newly discovered evidence is merely cumulative* it does not present a good ground for a new trial.

Kennedy & Son for appellant; B. H. Robinson and John P. Norvell for appellee.

DAVIS, &c. v. WILSON'S EX'TX.

Filed October 12, 1892. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Implied contract—Where acts of kindness are voluntarily rendered without request, or where the circumstances account for the transaction on some theory more probable and just than that of a promise of payment no such promise will be implied.

In this action against an executor to recover for attention to the testator during his last illness, the plaintiff and the testator being neighbors, the circumstances, instead of being such as to imply a promise to pay for the services, wholly negative that presumption.

Sam T. Spalding and John T. Fogle for appellants; Samuel Avritt for appellee.

Digitized by Google

PAYNE v. COMMONWEALTH.

Filed October 12, 1892. Appeal from Graves Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Liability on appeal bond*—Where the defendant in a prosecution for a misdemeanor has prosecuted an appeal from an inferior court to the circuit court, and judgment has been rendered against him on the appeal, the steps necessary to fix the liability of the sureties in the appeal bond having been taken, all that is necessary in order to initiate a proceeding on the bond is a summons issued at the request of the Commonwealth's attorney. A petition is not necessary.

2. *That there is another suit pending will not avail the defendants*, this court having, upon appeal, ordered that suit to be "dismissed without prejudice." It was not necessary for the Commonwealth to wait until that mandate was entered in the court below before instituting another proceeding.

3. *In a proceeding upon an appeal bond* the court will not inquire into alleged errors upon the trial of the appeal.

4. *Appeal from city court*—A provision in a city charter giving the city court the right to hear, try and determine "finally" all prosecutions for violations of city ordinances does not prohibit an appeal to the circuit court, but simply means that the city court shall proceed to judgment on the matter, and not stop at a preliminary investigation.

R. O. Hester, D. Smith and Stephen Elmore for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

CITY OF COVINGTON v. ULRICH.

Filed October 12, 1892. Appeal from Kenton Circuit Court. Opinion of the court by Judge Brent, affirming.

In an action against a city to recover damages for injury to plaintiff's property from the making of a fill by the city which caused an overflow of water upon his premises, the amount which the plaintiff's property has been appreciated in value by reason of the improvement can not be deducted from the damages the plaintiff has suffered, and it is, therefore, not competent for the defendant to prove such appreciation in value.

W. A. Byrne for appellant; J. T. and C. H. Fisk for appellee.

BALDWIN & CO. v. KENDALL.

Filed October 12. 1892. Appeal from Morgan Court of Common Pleas. Opinion of the court by Judge Brent, reversing.

Judicial sales—Intermeddling of purchaser—In this action, in which personal property was sold to satisfy various liens, appellants being given priority, appellee, who was one of the lien-holders, became the purchaser of the property at about one-third of its value, which was less than the amount of appellants' debt. Upon the trial of exceptions by appellants to the report of sale, it appeared that appellee, the purchaser, while the sale was being made, appealed to M., who was bidding against him, not to do so, whereupon M. not only ceased to bid but withdrew the bid he had made. *Held*—That as it is clear that appellee's interference prevented the property bringing as much as it otherwise would, that fact, in connection with the insolvency of the debtor and the gross inadequacy of price, leads to the conclusion that the court erred in overruling the exceptions to the report.

John P. Salyer for appellants; John T. Hazelrigg for appellee.

CHILES, THOMPSON & CO. v. RINGO, &c.

Filed October 19, 1892. Appeal from Menifee Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Injunction lies to prevent trespasses upon land* where they have been persisted in for a long time and a purpose to continue them appears.

Digitized by Google

2. *The fact that no temporary injunction was issued by the clerk*, who confounded the order granting the injunction with the order of injunction, did not preclude the court from giving an injunction as a final judgment.

J. J. Cornelison for appellants; Wood & Day for appellees.

Griffith v. Commonwealth.

Filed October 19, 1892. Appeal from Lyon Circuit Court. Opinion of the court by Judge Barbour, reversing.

The county court has no power to refuse license to sell liquor in towns and cities which are authorized by their charters to grant such licenses. And while the statutes provides that a license granted by a city or town shall be no protection for any purpose "unless the State license be obtained and the State tax be paid before the grant thereof," the purpose of the law is fully met by the payment of the State tax to the officer authorized by the State law to receive it, although he may refuse to issue the license. And in this case, even though the clerk of the county court refused to receive the money as the State tax but accepted it "simply as a deposit," agreeing if the court should order him to grant the license he would then apply it to the payment of the tax, the payment of the money to him operated as a license to the appellant.

F. W. Darby for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

Fletcher v. Radford's assignee.

Filed October 19, 1892. Appeal from Christian Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Transfer to equity*—In this action, begun at law against a married woman upon a note executed by her in which the defendant, by her answer, denies any personal liability, as the court, in its judgment, refused to hold her personally liable and the other issues are purely equitable, she has no ground to complain of the action of the court in transferring the case to the equity side of the docket.

2. *Married women*—A married woman being authorized by statute to subject her estate to the payment of a debt contracted for necessaries furnished to her to enable her and her family to live, may, by her subsequent promises to pay, prolong the period of limitation as to a debt thus contracted by her. And where she executes her note for such a debt an action to subject her estate to the payment of the note is an action upon a written contract, and the limitation of fifteen years applies.

3. *Life estate*—Where real estate is devised to a married woman "for the purpose of raising and educating her children to her own separate use and benefit, and at her death to be divided between the heirs of her body," her life estate may be subjected to her debts. What the extent of her life estate is, or what would pass to the purchaser, is not determined in this case.

4. *The real estate of a married woman may be subjected to the payment of debts created by her for necessaries*, as provided by the statute, although the property may have been acquired since the debt was created.

J. I. Landis for appellant; Wood & Bell for appellee.

Haynes, &c. v. Harris.

Filed October 19, 1892. Appeal from Union Circuit Court. Opinion of the court by Judge Barbour, reversing.

Where a life tenant rents out the land and dies before the rent becomes due, the rent should be apportioned between the personal representative of the life tenant and the remainderman unless in the case of a devise the will otherwise directs (General Statutes, chapter 39, article 2, section 30). And the amount to which the personal representative is entitled is in proportion to the time the life tenant lived after the term began.

Digitized by Google

A will, by which the testator devised to his wife all his estate during her life, she to have all rents accruing as long as she lived, and at her death the real estate and all personal property not used by her during her life, to be divided among certain other persons, does not alter the rule made by the statute as to the apportionment of rents where the life tenant rents out land and dies before the rent becomes due.

W. O. Haynes and Adair & Morton for appellants; Knott & Edelin for appellee.

DELPH & SON v. WAINSCOTT.

Filed October 19. 1892. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

Compensation of broker for effecting exchange of property—As a rule a broker acting for both the vendor and purchaser in effecting an exchange of property can receive compensation from neither, their interests being incompatible. But where the agent representing both parties does nothing more than to bring them together and does not aid or assist either in the trade he can receive compensation from both.

In this action by a firm of brokers to recover compensation for their services in effecting an exchange of defendant's property for the property of another, from whom they have already received compensation, the evidence fails wholly to establish the fact that plaintiffs acted as defendant's agent in any way and a peremptory instruction to find for defendant was authorized.

George Denny, jr., for appellants; Beauchamp & Allen for appellee.

TOWN OF BELLEVUE v. GENOWAY AND WIFE.

Filed October 19, 1892. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *It is the duty of a municipality to keep the sidewalks in repair and clear of unnecessary obstructions*, and it is liable for injuries resulting from any defects therein. But, while this is true, cities and towns have the right to place shade trees, lamp posts, hydrants, &c., in the sidewalks just within the curbing, as they are needed for the convenience and good of the public, and the municipality is not liable to pedestrians for injuries received therefrom, provided they are property placed and constructed.

In this action against a city to recover damages for injuries received by plaintiff from falling over a hydrant placed by the defendant in a sidewalk, it was error to strike from defendant's answer allegations showing that the hydrant was placed in the usual and proper part of the sidewalk, and was properly constructed; and also error to refuse to instruct the jury that if they believed from the evidence that the hydrant was properly constructed and placed in the usual and proper part of the sidewalk and was, at the time of the injury, in such a condition as to afford ample, safe and convenient passage along the sidewalk for pedestrians they should find for defendant.

2. *Contributory negligence*—While the fact that the plaintiff knew of the existence and exact location of the hydrant would not have impressed upon her more than ordinary care, still such knowledge was a strong circumstance going to prove contributory neglect and ought to have gone to the jury. It was, therefore, error to strike from defendant's answer allegations touching plaintiff's actual knowledge of the obstruction.

Matthew Herold for appellant; T. M. Hild and E. H. Kilpatrick for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. NOVEMBER 15, 1892. No. 10

KENTUCKY COURT OF APPEALS.

SMITH v. BOGENSCHULTZ.

(*Filed May* 26, 1892—*Not to be reported.*)

1. *Pleadings—Negligence—Departure*—Plaintiff was injured by the spilling of molten iron upon him by a fellow-employe, and in his original petition against his employer to recover damages therefor, alleged that the employer negligently constructed a passway that the employes had to use so narrowly and suffered it to become so obstructed as to cause the injury. Subsequently plaintiff offered to file an amended petition, in which he alleged that the injury was caused by defective ladles for carrying the molten iron that were furnished by defendant to his employes. The trial court rejected the amendment on the ground that it presented a cause of action different from that of the original petition. *Held*—That this was error, the injury complained of in each petition being that which resulted from the overflow of the metal—the same cause of action—and the two petitions only stating different causes therefor.

2. *Same—Res adjudicata*—Plaintiff, before the first trial of this case, offered to file an amended petition, which was rejected, and a trial was had and judgment rendered for him, which, on appeal by defendant to this court, was reversed. On the second trial plaintiff again offered the amended petition and it was again rejected. On this appeal by him from a judgment for defendant, *Held*—that the failure of plaintiff on the first appeal to take a cross-appeal and complain of the rejection of his amended petition does not estop or conclude him now from complaining therefor.

J. F. & C. H. Fisk for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

Digitized by Google

This case has been heretofore in this court and was reversed because of a defective petition and on account of the erroneous instructions, one of the instructions authorizing a recovery upon a ground not relied on by the plaintiff in any pleading.

The plaintiff was a laborer in defendant's foundry and was injured, as is alleged, by molten iron poured upon him from the ladle of a co-laborer, the two being in the same employment and employed in carrying this molten iron in ladles from one part of the building to another.

It is alleged in the petition that the gangway over which the workmen passed was narrow and obstructed, so much so as to render it quite dangerous to the employes when passing upon it with their ladles filled with this molten iron, and the result was the pouring of this lead on the plaintiff, caused by the neglect to have the passway widened and the obstruction removed.

When the case went back another trial was had, resulting in a peremptory instruction to find for the defendant, and if the injury resulted from the alleged defect in the passway this court would not hesitate to approve the action of the court below.

The appellant had worked in the foundry for four years and knew all about this gangway and the alleged obstruction that had been there for years, and if the accident occurred from the jostling of the ladle in the hands of a co-laborer the appellee is not responsible, as the injury occurred from the risks that are necessarily undertaken when agreeing to perform such service, and the fact that the gangway was, after the accident, changed was properly excluded from the jury. The appellee doubtless removed all obstruction as a greater precaution against danger, and for this he is to be commended instead of punished, as the appellant, besides his knowledge of the passway and its use by him for a long time, assumed the risk of the neglect of his fellow workman and, if injured in that manner, must abide the consequences.

The question presented now is: How did the molten iron escape from the ladle? An amended petition was filed, in which, among other things, it is alleged "that the ladles provided for and furnished the workmen by the defendant (the plaintiff being one of them) were, by the defendant or the superintendent of the work, delivered to the workmen and the plaintiff to be used in the manner stated in the original petition, &c., and that many of the ladles—the one that was given his co-laborer and which boiled over, resulting in the injury, being one of them—were not properly prepared or baked or dried for use by the workmen and were not safe for use by them but were unfit and dangerous for use, all of which were known to the defendant and his superintendent at the time they were delivered to the plaintiff and his co-laborers, and was wholly unknown to the plaintiff, who could not ascertain or discover said facts, and this caused the molten iron to boil and overflow on the plaintiff, causing the injury," &c.

On motion of the defendant all that part of the amended petition, alleging that the injury was caused by the defective ladle, was stricken out and the plaintiff confined to the issue as made on the first trial. This ruling was based on the idea that the amended petition, to the extent the same was stricken out, presented a different cause of action, and, if so, the motion to strike out was properly sustained.

The injury to the plaintiff was caused by the spilling or the boiling over of this molten iron in the ladle in which it was being carried, and the allegation that the overflow of the liquid was

Digitized by Google

caused by the narrowness of the passway, bringing the workmen too close together in carrying it, if untrue or was not the real cause of the injury, did not estop the plaintiff from alleging that this overflow was produced from a different cause, nor did it change the character of the action. It is at least the same cause of action, viz., the injury to the plaintiff by the overflow of this liquid.

If the plaintiff had been injured by a defect in a particular part of the machinery connected with this foundry, a fact known to the defendant, the averment as to the cause of the defect or the character of the negligence would not preclude the plaintiff from alleging that the defect in the machinery was to be attributed to another cause than that alleged, or that the negligence of the defendant with reference to that particular machinery was different from that alleged. It is but one cause of action.

The objection to the amendment seems to have proceeded on the idea that the one year statute of limitation as to personal injuries barred the recovery on the amended petition. This would be so if it presented a different cause of action.

Here the liquid boiled or overflowed the ladle; this is the injury. What caused this boiling over is the inquiry to be made. If it was spilled by the neglect of the co-laborer or the one jostling the other then, under the proof, the non-suit was proper. If caused by a defective ladle, the defect being unknown to the plaintiff and known to the defendant or his superintendent, or should have been known by the exercise of ordinary care, then the right of recovery exists.

It is said that two amendments were offered on the first trial similar to the one now being considered, and that the plaintiff should have raised the question as to the propriety of this ruling on the first appeal. There was but one issue of fact as to neglect raised in this court and only one made in the court below by the pleadings.

The plaintiff had recovered a verdict. This court held that the verdict was erroneous and reversed the judgment, and on its return we see no reason why the amendment should not have been allowed so as to meet the avowal of the plaintiff as to what he could prove by the witness. His amendments, offered on the first trial, were not a part of the record and could not have been considered.

In our opinion the judgment below should be reversed and remanded, with directions to overrule the motion to strike out and allow the amendment as presented to be filed.

Judge Pryor delivered the following response to petition for rehearing:

The amended petition being a part of the original record, as counsel for the appellee contends in his petition, and in this he is sustained, still it was not made a question on the first appeal, nor was the appellee (now appellant) required to make that point. He prayed no cross-appeal and was willing to abide by the judgment he had obtained. He recovered a judgment that was satisfactory to him, but the appellee, who was the appellant on the first appeal, obtained a reversal on the grounds that did not affect the question now made.

Conceding, therefore, that it was error in refusing to permit the filing by the appellant of his amended petition on the first hearing, yet he obtained his judgment and the appellant, now appellee, had it reversed and sent back for another trial and it is now contended that the error, if any, should have been corrected on the first appeal. We think not. The appellant (now appellee) was satisfied with his judgment and wanted no reversal. If he had prayed a cross-appeal

Digitized by Google

then all the the questions affecting him or that could have been made by him on the first hearing in this court would have been *res adjudicata*. This he did not do and it was needless for him to allege an error where he was willing to abide by the judgment that his adversary was seeking to reverse.

Petition overruled.

HITE V. COMMONWEALTH.

(*Filed Sept.* 27, 1892—*Not to be reported.*)

1. *Practice in criminal cases*—During the progress of his trial for murder, appellant was compelled several times to leave the court-room by reason of sudden sickness, and he now complains because proceedings were had in the case during his absence. But it appears that he did not ask that the proceedings be suspended during his absence, and that his substantial rights were in no manner prejudiced by reason of such absence, therefore, he can not now complain of the action of the trial court in that regard.

2. *Criminal law—Insanity—Evidence*—Where one, not an expert, is introduced to testify concerning the mental condition of a defendant, "the court must be satisfied that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is speaking; but as to the extent and character of the evidence no better rule can be established than to leave it within the discretion of the court" (following Brown v. Commonwealth, 14 Bush, 405).

Sam. Avritt and W. R. Kinney for appellant.

W. J. Hendrick for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried, convicted and sentenced to suffer the death penalty for the murder of Alfred Baurman.

The evidence conclusively establishes the following facts: In September, 1891, the appellant and the deceased, Baurman, and Wm. Sebordein, were, late in the night, walking up Market street and the appellant asked Baurman and Sebordien to stop, which they did. The appellant then exhibited a knife, the blade of which was sharp; he then exhibited another knife and showed them, by motions, how to use it. The three proceeded from the place they had stopped to a saloon; some beer was drank, then the appellant and Baurman threw dice for the drinks; then their attention was called to a picture on the wall of a man and a mule, and it seems that the appellant understood Baurman to ask him if he was the man or mule, at which the appellant took offense and, notwithstanding the disclaimer of Baurman, the appellant struck at him with a walking-stick; thereupon the proprietor put the appellant out of the saloon; not long after that Baurman and Sebordein quit the saloon and went on the street; they stopped on the street near the saloon and commenced talking, and while they were talking the appellant, who had not gone away, approached them and asked Baurman what he had said about him. Baurman replied that he had said nothing; notwithstanding the disclaimer the appellant advanced upon him, striking at him with the stick, and Baurman backed and caught the stick, when the appellant drew his knife and stabbed

Digitized by Google

Bourman to death. He thereupon went to his father's house and, when the officers went there to arrest him, he tried to make his escape, and, when he was arrested by an officer, he had the same two knives on his person that he had theretofore exhibited on the streets, and with one of which he had killed Baurman.

It seems that during the progress of the trial the appellant's stomach became so much disordered as to cause occasional vomiting and the officer having him in charge was compelled to take him from the court-room to let him vomit when the vomiting spells came on.

The appellant contends here that the court should have suspended the trial of the case until the appellant could have gotten relieved of his sickness.

Now, it is a fact that the appellant did not, by himself nor able counsel, ask the court to suspend the trial until he recovered from his sickness. It is true that the counsel for the appellant privately called the attention of the court to the fact that the appellant was suffering in the manner indicated, which the court seems to have observed, and stated that he had sent for the jail physician to examine him, &c.

The physician soon appeared and made an examination and gave the appellant some medicine and reported that if the medicine acted favorably the appellant could proceed with the trial. The medicine did soon give relief and the court did proceed with the trail.

Now the fact is that the appellant did not, by himself or counsel, move the court to suspend the trial on account of the sickness of the appellant and his inability to give his case proper personal attention on that account. Nor does it appear that the substantial rights of the appellant were in any wise prejudiced by progressing with the trial while he was sick. He got over that sickness during the progress of the trial in time to look over what had occurred during his sick spell (it does not appear that the sickness made him oblivious to what had occurred during its continuance), and to remedy any omission that might have been made during the sickness and in consequence of it; in fact none had occurred so far as the record shows.

The case does not show any error prejudicial to the substantial rights of the appellant upon that subject.

The next objection urged is that the opinions of the non-expert witnesses, as to the sanity of the appellant, were not based upon sufficient observation of the appellant to entitle them to give their opinions as to his sanity.

Upon that subject the opinion in the case of Brown v. Commonwealth, 14 Bush, 405, lays down the rule that "the court must be satisfied that the witness has had an opportunity, by association and observation, to form an opinion as to sanity of the person in reference to whom he is to speak; but as to the extent and character of the evidence no better rule can be established than to leave it within the discretion of the court."

In that case one witness was permitted to testify as to the sanity of the accused, who said he "had known the accused for twenty years, not intimate with him; never heard his sanity called in question." Another witness said he "had known the accused ten years; never made it my business to observe his habits; conversed with him a few moments before the killing and thought him sane."

This court held that the admissibility of the foregoing and similar

Digitized by Google

evidence was addressed to the discretion of the trial judge, and that judge having admitted it as competent evidence to be considered by the jury for what it was worth, this court would let the decision of the trial judge stand.

The non-expert witnesses in this case had at least as good opportunity, by association and observation, to form an opinion as to the sanity of the appellant as did the witnesses in the case *supra*. We see no error in the record.

The judgment is affirmed.

DANIEL V. BRANDENBURGH, &C.

(*Filed Sept.* 29, 1892—*Not to be reported.*)

1. *Fraudulent conveyances*—The evidence shows that the insolvent debtor, without consideration, conveyed his property to a trustee for the benefit of his infant son; therefore, the chancellor properly held the conveyance fraudulent and void.

2. *Same—Husband and wife*—Where a wife owns personal estate in her own right and dies, the husband's creditor's can subject it for his debts, the husband having reduced the property to his possession before the wife's death.

Theo. B. Blakey, E. W. Hines and J. M. Beatty for appellant.

Jas. Andrew Scott for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, having obtained judgment against John M. Daniel, father of the appellant, for several hundred dollars, and the execution thereon having been returned "no property found," instituted their action in equity against said John M. Daniel, Chris. McGuire, W. W. Baker and the appellant to set aside a conveyance of a house and lot, and subject it to the payment of said judgment debt. It is alleged, in substance, that John M. Daniel, being insolvent, purchased said house and lot from Chris. McGuire with his own money, and caused Chris. McGuire to make the conveyance to W. W. Baker, in trust for R. Lee Daniel, infant son of John M. Daniel, for the purpose of defeating and defrauding the appellees in the collection of their judgment.

The lower court, upon final hearing, sustained the appellees' contention, and subjected the house and lot to the payment of said judgment. The appellant, upon attaining his majority, has appealed from that judgment.

John M. Daniel answered the appellees' petition, but he did not deny that he was insolvent, and that he purchased the house and lot from Chris. McGuire with his own money, and caused the conveyance to be made to W. W. Baker, in trust for his son, an infant of tender years, for the purpose of defrauding the appellees. W. W. Baker admits that he did not pay for the house and lot with his money. He says that he "charges and believes that the money paid for said house and lot belonged to R. Lee Daniel's mother (wife of John M. Daniel) in her life-time, and after her death rightfully belonged to R. Lee Daniel."

Digitized by Google

It does not appear that the wife of John M. Daniel owned or was entitled to the money as her separate estate, or that it come to her as her estate and was invested in the house and lot as her estate before John M. Daniel had acquired a right to it as husband. To entitle the wife to the money as her estate, to the exclusion of the husband's creditors, one or the other of the things indicated should affirmatively appear. And as neither appears in this case the money, as far as the rights of creditors are concerned, belonged to the husband, John M. Daniel. It also appears that John M. Daniel moved into the house not long after the purchase, and has been living in it ever since, controlling it as his own, and rebuilt the house when it was burned down at his own expense.

The excuse that W. W. Baker gives for allowing John M. Daniel to live in the house and control it as his own is, under the circumstances of this case, unreasonable.

The judgment is affirmed.

SEBASTIAN V. STEEL.

(*Filed Sept.* 29, 1892.—*Not to be reported.*)

Judgment of chancellor affirmed—The judgment of the chancellor on the issue of fact in this case was not erroneous, and the appellant's claim for legal services will not avail to defeat appellee's right to a homestead in the land involved herein.

John W. Rodman for appellant.

E. E. Hogg for appellee.

Appeal from Jackson Court of Common Pleas.

Opinion of the court by Judge Pryor.

We are not disposed to adjudge that the chancellor erred on the issue of fact. The testimony for the appellee shows that the land sought to be subjected was purchased with the remnant of purchase money for land sold, but occupied by the appellee as a homestead prior to the creation of appellant's debt. There is no lien asserted by the appellant for his fees by any pleading filed, and no claim by plea that a lien exists. In fact, if the testimony for the defense is to control, there was no lien, and however meritorious the claim of the appellant may be for professional services rendered the appellee, we must concur with the chancellor in the conclusion that the claim will not avail as against the homestead right.

Judgment affirmed.

ADAMS V. FRAZIER.

(*Filed Sept.* 29, 1892—*Not to be reported.*)

Patents—Time of filing survey with register—A party claiming under a patent, issued upon a survey which was not deposited with the register of the land office for nearly ten years after it was made, has no valid title to the land in controversy, even though the defendant's title be equally as defective.

Digitized by Google

J. B. Fitzpatrick for appellant.

J. P. Marrs for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Pryor.

It is evident from the testimony in this case that the father of the appellant and himself settled the boundary lines between their respective tracts, and designed the land in controversy for the use of his widow. We doubt much whether the land patented was vacant land, but if so it was nearly ten years after the survey before it was deposited with the register when the statute requires it to be done within six months from the time of survey. While the appellee has the junior patent, and has complied with the statute in obtaining it, we are still inclined to think that each claim is fictitious, and in any event the appellant has no merit in his claim.

Judgment affirmed.

FRIDDLE, &C. V. KOHN.

(*Filed Sept.* 29, 1892—*Not to be reported.*)

1. *Sale of infants' real estate—Evidence*—In an action for the sale of land, in which infants have an undivided interest, on the ground that it can not be divided without materially impairing its value, the purchaser can not complain that no evidence was offered to show that the land was indivisible, when that fact is apparent from the face of the petition and the character of the land.

2. *Same—Evidence*—Other joint owners of such indivisible land, in such a suit, can not be considered parties to the suit with such an adverse interest to the infants as would prevent their evidence being considered by the court.

3. *Same—Judicial sale*—Even if the evidence of the indivisibility of such property was not sufficient, yet the purchaser can not object, since the title thereto passes to him by the sale.

H. R. Phillips for appellants.

Kohn, Baird & Speckert for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

This is an appeal from the law and equity court of the county of Jefferson by the appellant from a judgment of the court below, releasing the purchaser from his bid for real estate, in which infant non-residents were interested and made defendants. The appellee resisted compliance with his purchase on the ground that the infants were not properly before the court, and for the want of testimony to support the judgment.

The judgment is based on the ground that the property sold is indivisible, and can not be divided without materially imparing its value. The two infants have an interest of one fifty-sixth each in the two lots, and it is apparent from the face of the petition and the character of the property, that it is indivisible. The infants were represented by an attorney, who evidently looked to their interests, and are not complaining of the judgment. It is argued that there is

Digitized by Google

a want of evidence to support the judgment, as the witness testifying is interested and a party to the judgment, and, therefore, under the provisions of the Code could not testify against these infants, who are constructively summoned. We are not satisfied that this is the character of case, where the court could well adjudge that the witness was testifying against the infants. Their interest is conceded, and there is no contest, except as to the indivisibility of the lots, and this is apparent without the testimony. Conceding that the proof is wanting or not sufficient, the title, nevertheless, passes to the purchaser.

The parties were all before the court, and that tribunal had full power over the subject-matter and the parties litigant. Many of the heirs or parties in interest have made deeds, and there is no room to speculate as to the interest of the infants. It is true they might have a greater interest than is alleged, but this might be the fact in many cases, still without proof the judgment would be valid.

Reversed and remanded, with directions to enfore compliance with the judgment.

CRABTREE V. ATCHISON, &C.

(*Filed Oct.* 1, 1892.)

1. *Bills and notes—Fraud—Estoppel*—The maker of a note, simultaneously with its delivery, executed and delivered to the payee a writing, addressed "To all whom it may concern," stating that there was no offset, discount, or defense against the note and that it would be paid at maturity to the payee or his assignee. In this action by an assignee of the note against the maker, *Held*—That the maker is estopped by this writing to plead fraud or want of consideration for the note against an assignee of it, who purchased it upon the faith of the writing and without any notice or knowledge of any infirmity in it, and the fact that the makers of the note may have executed the writing in good faith and without intent to defraud, does not change the rule.

2. *Same—Burden of proof*—The answer to an action on such notes contained a plea of fraud and want of consideration. The reply traversed the allegation of the answer and contain a plea of estoppel against defendant. *Held*—That the burden of proof was on the defendant and it was reversible error to give plaintiff the burden.

Sweeney, Ellis & Sweeney for appellant.

Weir, Weir & Walker for appellees.

Appeal from Daveiss Circuit Court.

Opinion of the court by Judge Bennett.

The appellant executed to J. McDavrick & Co. a promissory note for $102.60.

McDavrick & Co. assigned the note, before its maturity, to the appellees. They brought suit on it. The appellant answered that the note was obtained from him by the fraud of the payees, and that it was without consideration, having been executed for a lightning rod that was utterly worthless.

The appellees, replying, traversed these allegations. They further alleged that when the appellant executed and delivered the note to McDavrick & Co. he executed and delivered to them two writings. The

Digitized by Google

one deemed material to the question at issue is as follows: "To all whom it may concern: This is to certify that a note executed by me to J. McDavrick & Co., for $102.60, is a *bona fide* debt against me. There is no offset, discount or defense against the same, and the same is good against me for the full amount thereof, and will be paid to the said J. McDavrick & Co., or to such persons as they may assign said note to." Signed, &c.

The appellees further alleged that they purchased said note for value, and without notice of the alleged fraud or want of consideration, and that, at the time of the negotiation for the note, the writing, *supra*, was exhibited to them, and they purchased the note upon the faith of the assurances therein contained. The appellant rejoined, denying that appellees knew of the contents of said writing, or that they purchased the note upon the faith of the assurances therein contained.

On the trial of the case the lower court ruled that the burden was on the appellees. Consequently, they were entitled to conclude the argument.

The appellees obtained judgment on the note, and the appellant has appealed. Under the instructions of the court, to which there is no serious objection, the jury was authorized from the evidence to find that the said writing was exhibited to appellees at the time they purchased the note, and that they purchased it upon the faith of the assurances therein contained. But it does not appear that the appellant issued and delivered the writing with the purpose of defrauding or deceiving the appellees or any one else. So the question is, there being no actual fraudulent or deceitful purpose on the part of the appellant in issuing and delivering said paper, does the doctrine of estoppel apply in favor of the appellees, they having purchased said note for value and without notice of the alleged infirmaties and upon the faith of the assurances contained in said writing? In a case like this, where a person has made certain assurances, upon which he intends third persons to rely as true in contracting in reference to the subject-matter of the assurances, and upon which they do rely as true in making such contracts, and but for which they would not have thus contracted, and the denial of the truth of the assurances would be injurious to the contractual rights of such person, the person giving the assurances is estopped from denying their truth as to such persons. The fact, in a case like this, that the person made the assurances in good faith, and without design to defraud, can not relieve or avoid the doctrine of estoppel, because he intended the other party to rely upon the truth of the assurances, and he did rely upon them in contracting, and would not have thus contracted but for such reliance, and it would be a fraud upon him to allow the person to deny the truth of them to the detriment of the other party. Rudd v. Mathews, 89 Ky., 479.

The writing delivered to the payees of the note, and exhibited to the appellees by the payees to induce them to purchase it, and upon the assurances of which they relied in making the purchase, was equivalent to personal assurances made to the appellees by the appellant, face to face, to induce them to make the purchase, and upon which they relied in making the purchase

But, as said, the court held the burden to be upon the appellees. Consequently, it allowed them to open and conclude the argument. The appellant complains of that ruling. We have decided that an error in that particular is a reversible error.

The Civil Code, section 526, provides as follows: "The burden of proof in the whole action lies on the party who would be defeated if no evidence was given on either side."

Digitized by Google

The note sued on being *prima facie* evidence (the signature being admitted) that the payor was indebted according to its terms, the burden was upon him to establish the allegations of fraud and want of consideration. Those allegations being traversed, and if no proof was offered establishing them, appellees would be entitled to judgment on the note. Hence, the burden thus far was on the appellant to establish the allegations of fraud and want of consideration, and failing to establish that issue, the appellees would be entitled to judgment for the full amount of the note.

The plea of estoppel, in event of such failure, would cut no figure, for the proof having failed on the issue of fraud and no consideration, the appellees would be entitled to judgment on the note. So, notwithstanding the appellees, in case the plea of fraud and no consideration was etablished, would, in order to avoid the effect of it, be compelled to establish by proof their plea of estoppel, yet, in case there was no proof offered, they would be entitled to judgment for their demand. Hence, as judgment would have been rendered against the appellant, in case no proof had been offered, the burden was upon him, and he was entitled to conclude the argument. For that reason, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

FIELD V. COLSON.

(*Filed Oct.* 1, 1892.)

Slander — Damages — A charge against a candidate for the Legislature that he had, when previously a candidate for the same office, accepted a bribe of $300 from his opponent to quit the race, did not charge him with an indictable offense, nor can it be regarded as spoken concerning his office, profession or trade, and, therefore, such words are not actionable *per se*: and even if actionable by avering special damages, an allegation that by reason of such false charge the party was defeated in his candidacy and thereby lost the emolnments of the office and was brought into bad repute and was much injured in his character, is a statement of damages too remote, uncertain and speculative to be recovered.

J. L. Scott for appellant.

Appeal from Leslie Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellant was making a race for the Legislature against one Howard, and, during the canvas, abandoned the contest. After this he became a candidate again for the same office and his opponent was one Colson.

The brother of Colson (Gillis Colson), the appellee in the present case, being an active partisan of his brother, spoke and published, as the petition claims, slanderous and defamatory words of the appellant, viz: That he, the plaintiff (naming Field), in the former contest with Howard, took a bribe of $300 from Howard to quit the track, and, in consequence thereof, he, the plaintiff, was defeated in the race for the Legislature by Colson and lost the emoluments of the office and was brought into bad repute with his neighbors and his character much impaired.

On the trial, an issue being joined, there was a verdict for the de-

Digitized by Google

fendant. The jury was told in an instruction that if the words were maliciously spoken of the plaintiff, and published by the defendant and by reason thereof the plaintiff was defeated for the Legislature, they may find for the plaintiff the damages he sustained by the loss of said office not exceeding the amount claimed.

The defendant says that instruction was erroneous because he was seeking to recover for the stain upon his moral character and not for the loss of the office for which he was a candidate.

The plaintiff had no cause of action. The words charged did not, if true, constitute an indictable offense, nor were they spoken of him in the way of his office, profession or trade, unless his candidacy can be so regarded; and, even if actionable by averring special damage, the damage alleged is too remote, uncertain and speculative. The plaintiff had neither an office of trust nor confidence, and while the words said to have been spoken might affect to some extent his moral standing, to say that one candidate gave another $300 to abandon the race, are not actionable, coupled with the averment of special damages.

It is true that words spoken of another that would necessarily result in the loss of some future benefit or advantage to the party injured may, with the averment of the special damage, present a cause of action, but we do not think such a state of case is presented here, and if the petition is good it clearly appears from the testimony that no such special damage resulted from the language used. So, on the issue of fact, there being no demurrer to the petition, the judgment was properly rendered for the defendant.

Judgment affirmed.

FARMERS' & TRADERS' NAT. BANK OF COVINGTON V. CONNER, &C.

(*Filed Oct.* 1, 1892—*Not to be reported.*)

Fraudulent conveyances—The conveyance by the insolvent debtor of his farm to his brother must be regarded as a fraud upon his creditors, and, therefore, void, although the grantee was a surety of the insolvent debtor to a large amount, and the grantor may have often agreed to convey the land to him if he would satisfy such debts, and although the grantee did not know of the execution of the deed until after it was recorded, when he accepted it and made arrangements to satisfy the debts for which he was bound as surety.

O'Hara & Bryan for appellant.

Joel C. Clore and J. M. Lassing for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Pryor.

Conner, Sleet & Co. were partners, doing business in the purchase and sale of stock in the city of Cincinnati. The firm kept an account with the appellant, the Farmers' and Traders' National Bank, of Covington, Ky.

In the early part of August, 1889, they had overdrawn their account with this bank for a considerable sum, and about the 7th or 8th of August, 1889, this sum amounted to $2,700.

One of the appellees, Wm. M. Conner, being a member of the

Digitized by Google

firm of Conner, Sleet & Co., and the member in whose business integrity the bank seems to have confided, was notified of these overdrafts and the purpose of the bank to no longer hold up the credit of the firm unless the bank was in some way secured.

Conner asked indulgence until he could collect outstanding accounts, which he said would enable him to pay the overdrafts, and this occurring between the 1st and 8th of August, 1889, the cashier continued to honor the drafts or checks until the 8th of August, when the amount overdrawn had reached $2,700, and he then refused to pay any more checks and they went to protest.

In a subsequent interview with Conner and the cashier of the bank with reference to the overdraft, Conner represented that the accounts, out of which he expected to pay the overdraft, had been collected and applied to the payment of debts owing other banks, and he was, therefore, unable to comply with his promise to pay the bank debt out of those accounts.

It seems that on the 8th day of August, 1889, about the time the bank refused to honor any more of the checks of the firm, the appellee, W. M. Conner, owning a tract of land in Boone county, Ky., conveyed the same, by deed, to his brother, Owen P. Conner, for the alleged consideration of $6,000.

The appellant, the bank, on the 17th of August, instituted this action aud obtained an attachment that was levied on this land, it being alleged in the petition as the basis of the writ that the conveyance was made to defraud the bank and to prevent the collection of its debt. The other members of the firm are and were insolvent. The court below, on the hearing, discharged the attachment and this is the error complained of.

It is evident from the testimony that Conner, being aware of his embarrassed condition and struggling to relieve the firm from its indebtedness to the bank, made promises to its cashier with which he could not comply and that induced the bank to increase instead of diminish the indebtedness to it, and equally manifest that Conner, seeing the financial wreck of the firm, thought proper to attempt to secure his brother and perhaps save for himself a remnant of his estate.

When their checks were going to protests he caused an attorney in Cincinnati to prepare a conveyance of this farm in Boone to his brother, O. P. Conner, a co-appellee, and had the deed sent to the office of the clerk of the county court of Boone for record. This was without the knowledge of O. P. Conner, the deed reciting the payment of $6,000 dollars, when not one cent had been paid and no obligation existing on the part of the brother to pay them. There had been no contract entered into by which O. P. Conner had purchased the land or by which Wm. Conner had divested himself of either the legal or equitable title.

Utz held a mortgage on this land for half its value; the bank at Burlington, in Boone county, held the note of Wm. Conner, with O. P. Conner as surety, for $1,500, and O. P. Conner held Wm. Conner's individual note for $1,000. And it is now claimed that O. P. Conner had assumed to pay the Utz debt, the Burlington bank debt and release his own debt, and this was the real consideration for the land. The evidence shows that he had not assumed the payment of either debt and made no arrangement with the Burlington bank until after this action was instituted.

Wm. Conner says he sold this land to his brother in November, 1886, and O. P. Conner says that, in January, 1889, he agreed to give his brother about $5,500 for the place and pay it in the $1,000 note

Digitized by Google

and the $1,500 note to the bank at Burlington if he would make him a deed, but that if he could arrange to pay him it did not matter whether he deeded the place at that time or not, and to sell the place if he could—all he wanted was to be made safe.

The Utz mortgage was perfectly secure and no agreement was ever made by O. P. Conner to pay it that could be enforced; in fact there was no agreement binding on either party with reference to this land. No consideration was paid and none agreed to be paid until after the attachment was obtained and when O. P. Conner was informed at Burlington that the attachment had been issued.

Here was the voluntary execution of a conveyance by one brother to another without the knowledge of the latter, based upon a consideration not then executed or agreed to be executed by the vendee, but assumed after the deed is made and after the attachment is issued, for there was no discharge of liability to the Burlington bank until the attachment was obtained, and still it is maintained that the acceptance of the deed by the brother, when informed of its execution and that it had been recorded, is to operate as a *bona fide* transaction and defeat the claims of creditors under the statute against fraudulent conveyances.

We can not concur in such a construction, and while we have no doubt that a sale was talked of by the brothers it was never binding as an executed or an executory agreement, and in considering the transactions with the bank in reference to the checks and the sudden execution of the deed and its recording, without the knowledge of the grantee, we can not do otherwise than to adjudge the transaction to be a fraud on creditors.

The relation of the parties to each other, the grantee a brother of the grantor, with a conveyance executed and lodged for record to the grantee, ignorant of its execution and with no legal or equitable obligation on the part of the grantee to comply with its terms or pay the consideration, it must necessarily follow that the act is void as to existing creditors, and to permit the parties to carry out a previously expressed intention to execute such a deed would be to disregard the letter and spirit of the statute to prevent the fraudulent transfers of property.

The judgment is reversed and remanded with directions to sell the land, first to satisfy the mortgage of Utz and then the claim of the bank. The cause is remanded for further proceedings.

DUNCAN V. MASON, &C.

(*Filed Oct.* 4, 1892—*Not to be reported.*)

Conveyances—Mental capacity—Evidence—The transaction by which Thomas Duncan, who had purchased land at a judicial sale, assigned his right thereunder to his brother, who was his surety on the sale bonds and had satisfied the same, was entirely natural and reasonable in itself, and many intelligent and disinterested witnesses, who had occasion to observe his condition, testify that Thomas was at the time mentally competent to understand the transaction and to make the assignment, therefore, the chancellor erred in holding such assignment void because of mental incapacity of Thomas at the time; the witnesses who testify that he was mentally infirm being either parties in interest or those that did not have sufficient opportunity to judge of the grantor's mental condition and who could give no sound reason for their opinions in the matter.

Digitized by Google

Leslie T. Applegate and Hallam & Myers for appellant.

L. P. Frayer for appellees.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Bennett.

Thomas Duncan, brother of the appellant, and bachelor, died intestate.

The appellant brought this action against the heirs at law of Thos. Duncan, his brother, to obtain the legal title to a tract of land which he claimed to own by equitable conveyance by his said brother. The said heirs resisted the relief sought by the appellant, upon the ground that, at the time of the alleged equitable conveyance, Thomas Duncan was, by reason of mental infirmity, incapable of making said conveyance, &c.

The lower court refused the relief demanded, but allowed a lien on the land in favor of the appellant for any sum that might be due the appellant on account of the payment of the purchase money due by Thomas Duncan for said land.

The undisputed facts are, that in the case of Thomas Duncan v. Fishback, pending in the Pendleton Chancery Court, the land in controversy was sold to satisfy a lien thereon in favor Thomas Duncan and others. The lien of Thomas Duncan was junior to that of the others. He purchased the land at the commissioner's sale at a price sufficient to satisfy said liens, and gave bond for the price, with the appellant as his surety. Afterwards, and about six weeks or two months before his death, Thomas Duncan gave the appellant a written assignment of his purchase, and directed the commissioner to convey the land to him.

The appellant seeks by this action to enforce the conveyance of said land, which the court refused, but allowed him a lien thereon for any purchase money that he had paid thereon which remained unpaid.

Now, if Thomas Duncan, at the time he made said assignment, was competent to make it, and was not overreached and defrauded into making it, it must stand and be enforced by compelling the deed to be made to the appellant. But if he was not competent to make the assignment, or was defrauded into making it, the judgment of the lower court was correct.

Was he competent to make the assignment? S. H. Thomas, at the request of Thomas Duncan, wrote the assignment about six weeks or two months before the death of Thomas Duncan, which he signed, and which was delivered to appellant. Thomas states that Thomas Duncan stated that the appellant had paid off the purchase money bond, and he was entitled to the land. Thomas also states that Thomas Duncan, at the time was in his right mind, and he was up, but his health was not good.

The clerk of the circuit court says that the order for the deed by Thomas Duncan to the appellant stated that the full consideration for the land had been paid by the appellant. Mr. Rule, the commissioner that sold the land, states that Thomas Duncan was in his right mind and was up; that he said the appellant had paid off the bonds for the purchase money to the persons that had the prior liens, and had settled with him for his part of the purchase money, and was entitled to the land; that he (Thomas) was not able to pay for it.

Judge Lee, who was attorney for some of the parties in the case to

Digitized by Google

enforce the liens, says that Thomas Duncan, at the time he made the order, was in his right mind, and was capable of contracting; that he said appellant had paid the entire purchase money, including that coming to himself, and was entitled to a deed to the land. The appellant says that the understanding at first between him and Thomas Duncan was that the appellant was to hold the land and appropriate the profits until he was repaid the purchase money that he had paid. That after this they changed the agreement to the effect that he, the appellant, was to take the land absolutely, and the written transfer was executed in accordance with the agreement. It also appears that Thomas Duncan had all his life managed his own affairs and had saved some money. It also appears that the witnesses who testify that he was not competent to contract were not close observers of him, and the most of them, if not all, give it as their opinion that he was not competent to contract without any good reason to support that opinion. Besides, some of them being interested in establishing that fact. On the other hand, we have the evidence of intelligent witnesses who had something to do with him that called their attention to his mental condition, to the effect that he was entirely competent to make the transfer. Also we have the fact that the transaction was entirely reasonable and likely to occur under the circumstances.

Some of the witnesses for the appellees evidently base their opinions largely upon the fact that Thomas Duncan was a very ignorant man, and, therefore, incapable of transacting important business, but we think he was capable of transacting the business in controversy. Besides, the judgment of the circuit court in refusing the conveyance does not decide that Thomas Duncan was not competent to contract, but it decides that he was a "weak, sick man." Evidently the court went upon the idea that this physical health made it easy for him to be defrauded, and that he was defrauded. But the proof utterly fails to show any fraud in the transaction or attempt to defraud. Besides, at the time of the transaction, he was not a weak, sick man, but he was up and about, only his health being not good.

The appellant is entitled to a deed to the land, and the judgment is reversed, with directions to the lower in accordance with this opinion.

McINTOSH V. COMMONWEALTH.

(*Filed Sept.* 22, 1892—*Not to be reported.*)

Criminal law—The evidence is sufficient to support the verdict convicting appellant of the crime of stealing certain saw-logs and the instructions presented the law of the case correctly.

J. J. C. Bach, R. A. Hurst and J. P. Gillum for appellant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

The appellant was indicted, tried and convicted in the Breathitt Circuit Court for stealing thirty-two saw-logs, the property of the Asher Lumber Co.

The evidence clearly establishes the fact that the appellant did wrongfully and fraudulently take and carry away said logs, the

Digitized by Google

property of the Asher Lumber Co., with the fraudulent intent of converting them to his own use and making them his own property without the consent of the owner.

The court's instruction accords with the foregoing view. We see no reversible error in the case.

The judgment is affirmed.

Judge Bennett delivered the following response to petition for rehearing:

The petition for a rehearing is upon the ground that the word "felonious" is not used in the indictment. The indictment charges that the appellant "did unlawfully, willfully, corruptly and feloniously steal," &c.

The petition is overruled.

TYLER V. ONZTS, &C.

(*Filed Oct.* 1, 1892.)

1. *Statute of frauds—Specific performance*—A vendor delivered to a vendee a writing in these words, viz: "Received Jan. 3, 1890, of T. $100, part cash payment of lot No. 4, block 9, N. E., in Middlesborough, Ky., on following terms: $5,100, $2,550 cash, $1,181.25 in four months, $1,181.25 in eight months, with 6 per cent., and three company notes, $62.50 each, in one, two and three years. J. W. Onzts, by Jas. T. Fisher, agent." In this case for specific enforcement of the contract evidenced by said writing, *Held*—

First—That although the vendor alone signed the writing and did not, in terms, covenant to convey the lot, an agreement on his part to so convey upon the terms therein stated must be necessarily implied.

Second—This writing is a "sufficient memorandum or note" of the contract of sale and purchase and is enforceable by either of the parties to it.

2. *Same—Specific execution*—By the terms of the writing the cash payment of the $2,500 was a condition precedent to the vendee's right to demand a specific execution of the contract, but the acceptance by the vendor's agent of the cash payment of $100, simultaneously with the delivery of such contract, shows that the parties to it did not contemplate the immediate payment or tender of the entire $2,500, and since the vendee tendered such payment within ten days thereafter he has not forfeited his right to demand an execution thereof.

3. *Same*—Where the vendee, in his action for a specific execution of the contract, alleges that the vendor is a non-resident of the State and had asserted his refusal to comply with the contract of sale and had placed the it in the hands of another agent for sale for the purpose of selling it to another party, this is a sufficient excuse for his not actually paying or tendering the whole of the cash payment before the institution of the action, being impracticable for him to find any one in the State to whom to make the payment or tender.

4. *Same—Tender*—The tender of the cash payment in the petition does not amount to a deposit in court, but since the chancellor could make such deposit a condition of granting relief the petition should not be dismissed on demurrer because of the failure to make the deposit.

Tyler & Apperson for appellant.

Isaac T. Woodson for appellees.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Lewis.

Digitized by Google

Appellant brought this action January 13, 1890, against J. W. Onzts, alleged to be non-resident, on the following writing:

"Received January 3, 1890, of M. S. Tyler $100, part cash payment on lot No. 4, block 9, N. E., in Middlesborough, Ky., on following terms: $5,100, $2,550 cash, $1,181.25 in four months, $1,181.25 in eight months, with 6 per cent., and three company notes $62.50 each in one, two and three years. J. W. ONZTS,

"By JAS. T. FISHER, Agent."

He states in his original petition, in substance, that he is and has always been ready and now offers and tenders to pay balance of said cash payment, execute notes for the deferred payments and assume said company's notes if defendant will comply with his contract and convey said lot to him; that defendant has refused and is now refusing and asserting he will not comply with his contract to convey said lot to plaintiff, and is offering and attempting to sell it to others, and for that purpose has placed it in the hands of an agent other than Jas. T. Fisher, who was authorized to sell to plaintiff. And, in addition to specific execution of the contract, an injunction restraining defendant selling the lot to another is prayed for.

December 3, 1890, an amended petition was filed, in which it is stated that since commencement of the action appellee, Arthur, made defendant, having actual notice of the sale to, and purchase by, appellant, for the fraudulent purpose of preventing enforcement by him of the contract, procured defendant, Onzts, January 17, 1890, to execute to himself and file for record a deed for the same lot, of which he, Arthur, February 1, 1890, obtained and has since held possession.

The record does not show that Onzts made any defense to the action or has in fact been yet summoned. But to the petition as amended Arthur alone filed a general demurrer that was sustained, and the action thereupon dismissed.

Waiving the question whether it was premature to sustain the demurrer and dismiss the action before Onzts had been brought before the court and made defense, we will consider and determine whether a cause of action has been stated in the petition amended as if he had really appeared and demurred. For it is clear that if Arthur had, as alleged, actual notice of the contract between appellant and Onzts when he purchased the lot, or his purchase was made after commencement of this action, both of which facts must, on trial of the demurrer, be assumed, he did not acquire any right or interest that can prevent the relief appellant seeks, if the writing sued on is evidence of an enforcible contract. And whether it is or not is the first question to be considered.

Section 1, chapter 2, General Statutes, provides that "no action shall be brought to charge any person upon a contract for the sale of real estate, unless the contract or some memorandum or note thereof be in writing and signed by the party to be charged therewith or by his authorized agent."

The test of the validity of a contract under that statute uniformly applied by this court is, that the memorandum or note thereof should be so complete and full the meaning thereof may be ascertained and it enforced without aid of extrinsic verbal testimony.

In Ellis v. Deadman, 4 Bibb, 466, the writing was as follows: "4th January, 1808. Received of Jessie Ellis $——, in part pay for a lot he bought of me in the town of Versailles, it being the cash part of the purchase of the said lot. NATHAN DEADMAN."

Though the writing in that case, which purports to be simply a

Digitized by Google

receipt, was held not to be enforcible under the statute, still the court said that if terms of the agreement had been specified there would be no doubt of the propriety of enforcing a specific execution.

In Fugate v. Hansford, 3 Litt., 262, the writing was: "The trustees of the town of Carlisle, in Nicholas county, will please convey lot 32 to G. L. Howard, who has this day purchased said lot from me and for which I have received value in full. November 2, 1816.

"JAMES FUGATE, JR."

In that case the writing was held sufficiently descriptive of the and sold and contained enough otherwise to entitle the party to specific execution; a statement in the writing of the consideration not being regarded necessary because, as said by the court, the contract was executed on part of the purchaser by payment of the price.

It will be seen that although in both those cases the vendor alone signed the writing and in neither covenanted in terms to convey the and, his implied agreement to do so was held to be sufficient to bind him.

In this case the lot is sufficiently described; the purchase price, also time for paying the several installments, are set out and an agreement to convey upon terms stated may be fairly, indeed must be necessarily, implied. It is true the holder of the "three company notes" mentioned is not clearly indicated, but there is no uncertainty about the obligation of the vendee to pay to or for the vendor amount thereof at the dates specified. It, therefore, seems to us the writing sued on is full evidence of a contract of sale and purchase of land, enforcible under the statute by either party.

Unquestionably payment of the entire sum of $2,500 is a condition precedent of appellant's right to specific execution of the contract and he can not, consequently, maintain this action without making or tendering such payment. But he had not, when the action was commenced, which was within ten days after date of the contract, waived or forfeited his right to the relief asked.

For, although the parties substantially agreed $2,500 was to be treated as a partial payment then due, acceptance of $100 of that amount by the vendor's agent simultaneous with execution and delivery of the writing to the vendee shows they did not contemplate payment or tender of the whole amount presently. Moreover, time is not generally deemed in equity to be of the essence of such contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. Story's Equity, section 776.

There is nothing in the nature or circumstances of the contract in question that makes it an exception to that rule. For the remedies of vendor and vendee are mutual; there had, when the action was commenced, been "no change of circumstances affecting the character or justice of the contract, and compensation for delay of the vendee in making the cash payment as well as for delay in complying with other stipulations, if there has been any, can be fully given to the vendor in the way of interest.

On the other hand, in any view of the case, the vendee had a reasonable time in which to make the complete cash payment that had certainly not expired when the action was commenced, and he could not be fully compensated for loss of $100 paid unless the contract be enforced.

It is true he does not allege in his petition that he had, prior to institution of the action, tendered the unpaid balance of the cash

Digitized by Google

payment to the vendor or his agent. He does, however, state he had always been ready to do so, but that the vendor was a non-resident of the State; had asserted his refusal to comply with the contract and placed the lot in the hands of an agent, other than Fisher, for the purpose of selling it to another party.

It seems to us the facts thus stated should be regarded as sufficient excuse for not paying or tendering the residue of $2,500; for they are such as to render compliance by the vendee impossible because there was no person in this State to whom a payment could be made.

The tender of the cash payment made in the petition does not amount to a deposit in court, but as it is in the power of the chancellor to make such deposit a condition of granting relief the failure should not be treated as sufficient ground for sustaining a general demurrer, especially when filed by Arthur, who, as the record now appears, is not in a condition to defeat a specific execution of the contract.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

WREN'S ADM'R V. L., ST. L. & TEX. R'Y CO.

(*Filed Sept.* 15, 1892—*Not to be reported.*)

1. *Evidence—Contradiction by party of his own witness*—Although a party can not, except in certain instance, impeach his own witness by evidence of his bad character, yet he may contradict such witness by other evidence or by showing that he has made counter statements.

In this case an engineer, introduced by plaintiff, testified that he did not see plaintiff's decedent until the train by which he was killed was within 462 feet of him. Plaintiff asked the witness if he had not testified at the coroner's inquest that he had seen the decedent at a distance of about 1,287 feet and the witness answered that he did not recollect. The court refused to permit plaintiff to prove that the witness had so testified at the coroner's inquest. *Held*—That this was error, and the excluded evidence was so material in this case as to authorize a reversal of the judgment on account of its exclusion.

2. *Railroads—Duty to trespasser on track—Peremptory instruction*—When those in charge of a railroad train discover a trespasser on the track, and the train is at such a distance from him as to afford time for it, it is their duty to give the proper alarm to apprise him of the approach of the train, and then, if in a reasonable time, he does not get off the track, to use all reasonable means to stop the train and avoid injuring him.

In this case the engineer of the train states that at the time he first discovered the trespasser, who was run over and killed, he apprehended from his location and position that he would not get off the track. Some of the evidence tends to show that the train could have been stopped within a distance of 500 feet and that the trespasser was discovered at from 700 to 1,287 feet from the point at which he was killed. *Held*—That in an action by his personal representative to recover damages for his death, alleged to have resulted from the gross neglect of the railroad company's employes, it was error to give a peremptory instruction for the defendant.

Jno. L. Dorsey and S. B. & R. D. Vance for appellant.

Helm & Bruce and Yeaman & Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Holt.

Digitized by Google

John Wren, while sitting upon appellee's track with his face in his hands, was struck by a freight train, running at the rate of about fifteen miles an hour, and killed. He was not in the employ of the company and was, at the time, at a point upon its road where it was entitled to the exclusive right of way. In other words he was a trespasser, and as to him those in charge of the train were under no legal obligation to be on the lookout or to anticipate his presence, but only to use all reasonable care to save his life after knowing of his peril.

The petition avers that the killing occurred through the willful neglect of those in charge of the train. The answer denies this, avers that the deceased was, at the time, a trespasser; that after discovering his peril those in charge of the train did all they could to avoid injuring him, and that his death was the result of his own negligence.

This was denied. The appellant introduced four witnesses who were near at the time of the accident. One of them was the engineer of the train. He testified that he did not discover the deceased until the train had crossed a certain trestle and when it was within about 462 feet of him; that he immediately gave the alarm and all possible effort was used to stop the train before striking him, but without avail.

The appellant then asked him if he had not testified at the coroner's inquest that he discovered the deceased sitting upon the track when about the middle of a certain curve in the road, that was distant from him about 1,287 feet, and from which point the place where the deceased was sitting was in plain view. His answer was that he did not recollect.

The appellant offered to prove by another witness that he had so testified, but the court refused to let it be done. It was not a case where the party introducing a witness had merely failed to prove what was expected of him; but he had testified to a fact prejudicial to the appellant, to-wit, that he was so near the deceased when he discovered him that it was impossible to save him.

A party can not impeach his own witness by evidence of bad character unless he be compelled to introduce him, but he may contradict him by other evidence or by showing that he has made counter statements. Civil Code, section 596.

If, therefore, the evidence was material the appellant should have been allowed to contradict him.

It appears without contradiction that the train was not a heavy one; that it was running at the rate of about fifteen miles an hour, and that it could have been stopped at a distance of from four to five hundred feet.

At the close of the appellant's testimony the court peremptorily instructed the jury to find for the company. Whether this should have been done is the question presented.

One of the other three witnesses who witnessed the accident was the conductor of the train. He testifies that the alarm was given when the train was at the middle of the curve and distant from the deceased 1,287 feet. The other two say that it was at a point which is shown to be distant more than 700 feet from where the deceased was sitting.

According to the evidence of all three the deceased was discovered soon enough to have given an alarm, and then, upon his failing in a reasonable time thereafter to get off the track, to have stopped the train and saved his life.

The testimony of the engineer shows that he apprehended, from

Digitized by Google

the situation of the deceased when he first saw him, that he would not get off the track. It was the duty of those in charge of the train, upon discovering the deceased, to give the proper alarm, and then if, in a reasonable time thereafter, he did not move, and they still had time to stop the train and avoid striking him, it was their duty to do so and save his life.

If those in charge of a train have reasonable ground to believe that a person upon the track is not going to get out of the way then it is their duty to stop it and save his life.

Thus if one be discovered asleep upon the track and the whistle fails to arouse him and those in charge have reasonable ground to believe that he is not going to get out of the way, it is their duty, in the interest of human life, to stop the train.

Of course they are not required to stop the train whenever they see one ahead of it upon the track or some one approaching it. The engineer has a right to believe the person will avoid the danger by leaving the track or not attempting to cross it. To stop for every mere possibility of danger would not only hinder public travel, but it would endanger the safety of those traveling by rail. There is a necessity of making time to avoid collision with other trains, and to require a train to stop whenever a person is seen ahead, no matter how far, would not only interfere with public interest and public travel, but place those traveling upon trains in constant danger. It is to be presumed that the person upon the track will exercise his senses and avoid the danger, but if it be known to those in charge of the train that he is deficient in this respect and incapable of using ordinary care to save himself or, from the surrounding circumstances, they have reasonable ground to believe he is not going to do so, then it is their duty to stop the train and save his life. Upon discovering one upon the track the engineer should give the proper alarm, and if in a reasonable time after doing so the person does not leave the track, and the engineer has reasonable ground to think he is not going to do so, then, if he can, by the use of all reasonable means, stop the train and save the man, he must do so.

It is urged that all the evidence in this case shows that as soon as the deceased was discovered all possible effort was made to stop the train, and that this was the only issue. How far the deceased was from the train when his presence was discovered and whether, after giving the proper alarm and his failure in a reasonable time to get out of the way, there was still time to stop the train and save his life, were questions, however, as to which the question of his proximity to the train was material, and while the testimony tended to show the alarm was at once given and an effort made to stop the train as soon as his presence upon the track was discovered, yet the evidence showing how far he was from the train at the time placed this question in doubt and made it a matter for the determination of the jury, and the case should not have been taken from them by a peremptory instruction.

Judgment reversed, and cause remanded for a new trial.

Digitized by Google

MEFFORD'S ADM'R V. L. & N. R. R. CO.

(*Filed Oct.* 1, 1892—*Not to be reported.*)

1. *Death by wrongful act—Right of action*—The personal representative of one who was not in the employe of the railroad company may recover damages for his death under the provisions of the first section of chapter 57 of the General Statutes.

2. *Same—Who is an "employe" of a railroad*—An agent of a transfer company which does business on a certain railroad is not an employe of the railway company within the meaning of chapter 57, General Statutes.

Root & Root for appellant.

Geo. Washington and Jas. C. Wright for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

This action is by Clarence Mefford's administrator against the L. & N. R. R. Co., in which it is alleged that the plaintiff's intestate lost his life by reason of the gross negligence of the employes of the defendant in operating its train of cars.

It appears from a statement in the petition that the intestate was a transfer agent on the defendant *at the time*, but when *the accident happened, resulting in his death, it is averred that he was not in the employ of the company*, nor do we understand that such an agent is an employe in the meaning of that term as used in the statute. He is not paid by the defendant, but is exercising an independant employment and liable as a member or agent of a distinct corporation, but permitted, for pay or otherwise, to check baggage, &c., on appellee's train.

That the personal representative of one not in the employ of the railroad company may recover under the first section of the act authorizing an action for loss of life was recently adjudged in the case of Givens v Ky. Central R. R. Co., 89 Ky., ——.

As we understand the nature of the relation between a transfer agent and the railroad company, upon which the transfer company operates, it can not be determined on a demurrer that the transfer company or its agent is an employe of the railroad company. What the facts may develop we are not prepared to decide.

The judgment below, in our opinion, should be reversed, and the cause is remanded with directions to overrule the demurrer and for proceedings consistent with this opinion.

GAY, JR., &C. V. CITY OF LOUISVILLE, &C.

(*Filed Oct.* 4, 1892.)

1. *Proof of claims for unpaid taxes against decedents' estates*—Personal representatives of decedents are not permitted or required by law to pay bill for unpaid State or municipal taxes due by the decedent, unless such tax bills are proven by affidavit against the estate as other demands against it are required to be verified. And in an action by a personal representative to sell the real estate of a decedent to pay debts, and for a settlement of his accounts, it was error for the chancellor to order such taxes paid, unless they have been proven as other demands must be proven.

2. *Same—Authority of Louisville Chancery Court*—Even if section 773 of

Digitized by Google

Civil Code, which authorizes the Louisville Chancery Court, in "actions for the sale of real property," to determine summarily, with or without written pleadings, the amount of any State or other tax upon the property to be sold and provide for its payment, applies to actions for the settlement of the estates of deceased persons, which is by no means certain, it does not authorize such courts to order the payment of any such taxes, alleged to be due and unpaid by the decedent, until they have been proven in the manner required by law. The Legislature has no constitutional authority to authorize any court to adjudge such tax to be a valid lien on decedent's property without satisfactory proof being first made that it is a valid and unpaid demand against such decedent.

4. *Same—Infants—Failure to except to decision of court*—The fact that no one excepted to the allowance of the unpaid taxes as a demand against the decedent in this case, does not prevent this court from considering and determining the correctness of such decision, where several of the party in interest were infants.

C. B. Seymour for appellants.

Laf Joseph for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

John Gay, sr., died intestate, leaving several children, some of whom were infants, and an estate, consisting of land and personalty, but not enough of the latter to pay debts, and, consequently, the Louisville Safety Vault & Trust Company, a corporation, having been appointed administrator, brought this action for the settlement of its accounts and for sale of real property sufficient to pay debts.

During pendency of the action the city of Louisville filed, under order of court, tax bills of unpaid municipal taxes for several years, and, without having been passed on and reported favorably by the master commissioner or proved in any way, the lower court adjudged the amount of such taxes, for the years 1883 to 1887, inclusive, to be paid out of proceeds of land belonging to decedent's estate that had been sold under previous judgment.

Section 773, title 19, Louisville Chancery Court, Civil Code, provides that court "may, in actions for the sale of real property, determine summarily, with or without written pleadings, the amount of any State or municipal tax or assessment upon the property to be sold, and shall provide for the payment of the same in the judgment, and if the plaintiff shall fail to ask therefor the purchaser shall be entitled at any time before payment of the purchase price to a credit for the amount thereof."

Even if it be conceded that section was intended to apply to actions for settlement of estates of deceased persons provided for by chapter 3, title 10, which is by no means clear, still, giving to the section a fair and reasonable construction, we are satisfied no more discretion was intended to be given to the chancellor than simply to decide upon validity of tax bills and the question of lien on property sought to be sold without written pleadings.

For it would be without power of the Legislature to authorize a court to adjudge a tax bill in favor of either the State or city of Louisville to be valid and enforcible against the estate of a deceased person without satisfactory evidence of it being a valid and unpaid demand, or at least when it did not so appear *prima facie*.

Sections 35 to 39, inclusive, of article 2, chapter 39, General Statutes,

Digitized by Google

in express terms provides that all demands against the estate of a decedent shall be verified by the written affidavit of the claimant, stating that the demand is just and has never, to his knowledge or belief, been paid and that there is no off-set or discount against the same or any usury therein. And it is, in terms, too plain to be misunderstood or disregarded by courts of justice, further provided that "no demand against a decedent's estate shall be paid by his personal representative, or allowed as a credit by any commissioner or court which is not verified by affidavit as required herein."

It has been sometimes held that unpaid taxes can not be regarded technically debt, but the Legislature has used the comprehensive term "demand," which includes the claim of a State or municipality for unpaid taxes as certainly and fully as the claim of a debt of an individual.

While, therefore, one would not, in view of section 793, Civil Code, be inclined to hold it indispensable for tax bills to be referred to and reported favorably by a master commissioner, we are satisfied the court, before adjudging the amount of them paid out of the estate of a deceased person, should require them verified in the manner other demands are required by the statute to be verified. For why should a personal representative be required to pay a tax bill unless presented to him in such form as would be a voucher? And if he would not be required to pay, upon presentation or demand, the tax bills in question, upon what principle can a chancellor undertake to say they shall be paid out of the preceeds of real estate of the decedent sold under judgment? How could the court in this case say, in the absence of the affidavit required by law and of the dead man to speak in behalf of his estate, that the tax bills, if ever payable, had not been already paid?

It is, however, contended that as no exception to the filing or no objection to payment of the tax bills was made in the court below the judgment must be treated as consented to, and, therefore, can not be disturbed by this court. That position would be correct if it was not for the fact some of the heirs at law of the deceased, Gay, were infants, who could not, in legal contemplation, consent to any actual or seeming violation or disregard of their rights of property.

Where an action has been commenced by a personal representative to sell real estate of a decedent to pay debts, which is an admission the estate is insolvent, there is no necessity for a creditor to present his demand, accompanied by affidavit, for payment to such representative.

But still the court can not render judgment for payment of any demand whatever out of proceeds of the real estate of decedent, unless the affidavit be previously made.

It was, therefore, error to adjudge payment of any part of the tax-bills in question, and that judgment is reversed, and cause remanded with directions to set aside the judgment and require the appellee to pay back the amount of the tax bills, unless, in a reasonable time, the affidavit required by law be made and the chancellor be satisfied they are due and unpaid.

Digitized by Google

HURRY V. KLINE.

(*Filed Oct.* 8, 1892.)

Evidence relating to transaction with a dead person—Bills and notes—In an action against the maker of a note by one who holds it by assignment from the payee named in it, who is dead, testimony of the maker in support of his plea of no consideration, concerning what took place at the time of the execution and delivery of the note between himself and the deceased payee, is incompetent under sections 605 and 606 of the Civil Code. And this is true whether or not the assignee has recourse on the note against the estate of the deceased payee.

R. C. Davis and J. T. A. Baker for appellant.

Muir, Heyman & Muir for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

The note sued on in this case was executed by appellee to J. T. Irvin, who assigned to appellant. In support of his plea of no consideration appellee was permitted, by the lower court, to testify as a witness to what took place concerning execution and consideration of the note between himself and Irvin, who had died before the action was commenced. And the decisive question before us is whether that testimony is competent, as without it his only defense must, as the record now appears, fail.

Section 605, Civil Code, provides that, subject to exceptions and modifications contained in section 606, every person is competent to testify for himself or another unless found by the court incapable of understanding the facts concerning which his testimony is offered.

The exceptions to, and modifications of, that general rule of evidence, which apply to this case, if any do, are, in subsection 2, section 606, as follows: "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen years of age, or by one who is of unsound mind or *dead* when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living *and* who, when over fourteen years of age and sound mind, heard such statement or was present when such transaction took place and when such act was done or omitted; unless

a. The infant or his guardian shall have testified against such person with reference to such statement, transaction or act; or

b. The person of unsound mind shall, when of sound mind, have testified against such person with reference thereto; or

c. The decedent, or a representative of, or some one interested in his estate shall have testified against such person with reference thereto; or

d. An agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person with reference thereto, or be living, where such person offers to testify with reference thereto."

If Irvin had died owner of the note and this was an action by his personal representative to recover judgment thereon, or even if appellant had, by reason of the assignment to him, recourse on decedent's estate, the testimony in question would, we think, be certainly incompetent. But it seems to be conceded that if appellant ever had such recourse it has been lost, and so the estate of the decedent

Digitized by Google

assignor will not be affected by determination of this action one way or another.

Nevertheless, we think there can be, according to the plain language used, no question of cases like this being comprehended by the exceptions to, and modifications of, section 605, that are contained in subsection 2, section 606. For it is there provided, in explicit terms, that *no* person shall testify for *himself* concerning *any* verbal statement of, transaction with or act done or omitted to be done by one who is *dead* when the testimony is offered to be given, except under circumstances and conditions recited, none of which exist in this case.

Yet that is precisely what appellee did do on trial of this action in the lower court, for the statements of, and transactions with, the deceased, Irvin, concerning which he was permitted to testify, had a direct, and without doubt, decisive bearing in his favor upon the only issue involved.

Before thus disregarding or restricting the natural and obvious meaning of the words of a statute the court should be convinced an imperative reason for doing so exists.

We do not now perceive any reason for excluding such testimony in an action by the personal representative of one who is dead that does not exist in full force in a case like this.

The issue here presented is one of fact, involving an inquiry for the simple truth, not at all changed or affected by death, but to be sought for according to rules of evidence intended to operate justly, equally and mutually between the parties, no matter who they may be. It does not, therefore, make any difference whether the personal representative of a deceased payee or the assignee of a note be party-plaintiff in an action to recover on it to permit the defendant to testify for himself concerning what was said and done by the decedent, thereby affecting the issue involved, without the presence or power of any one to speak for the dead man, would give him an unjust and unfair advantage in one case just as much as and no more than in the other, which the Legislature did not intend for him to have, but carefully and particularly framed subsection 2, section 606 to prevent.

In Harpending v. Daniel, 80 Ky., 449, the question was whether, in an action against an executor to recover on a protested check given to a firm, a member of the firm, who had assigned his interest to the other member, could, under the Civil Code, testify to what was said and done concerning time for presenting the check for payment by an agent in reference thereto who was then dead. And it was there held that as the agent with whom the transaction was had was dead the opposing party could not testify on the subject, even if the principal was alive; because, as said, quoting from Hardin's adm'r v. Taylor, 78 Ky., 593, "the evident design of section 606 was to place parties to an action or those interested therein on an equal footing when their rights are being passed on."

There are cases cited by counsel with the purpose of sustaining ruling of the lower court in this case, but, without referring to them in detail, we are satisfied that when property understood none of them sustain the proposition that one party to an action, whether for or against a personal representative or assignee of one who is dead, can testify for himself concerning what the deceased said or did affecting the issue being tried.

We think the evidence of appellee, to which reference is here made, was clearly incompetent, and as it materially prejudiced the rights of appellant, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

Digitized by Google

KENTUCKY SUPERIOR COURT.

QUAINTANCE, &C. V. DARNALL'S EX'ORS.

(*Filed Sept.* 21, 1892.)

Compensation of executors—The statute regulating the compensation of executors for their services does not contemplate any allowance except such as is based on the value or amount of the personalty administered upon.

Of an estate, aggregating in value about $59,000, the personalty amounted to $57,000, the remaining $2,000 being in real estate, the title to which vested at once in the devisees without division or the intervention of the executors. In settling the estate the county judge allowed the executors for their services 5 per cent. upon the value of the whole estate, including the land. In this action to surcharge the settlement, *Held*—That, in so far as the allowance was based on the amount of personalty received and distributed, it is not so unreasonable, in view of the prompt and diligent attention of the executors, that this court is called on to disturb the concurrent conclusions of the county judge and the chancellor. But it was error to allow any thing upon the value of the real estate, as it was in no sense received or distributed by the executors.

Cassidy & McCartney and J. P. Cassidy for appellants.

Stone & Sudduth for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Brent.

In settling the estate of Thomas Darnall, of Fleming county, the judge of the county court allowed his executors, appellees here, for their services, $2,943.10. This was five per cent. on $58,862.16, the amount which, in his opinion, had been received and distributed by them.

There was no contest in that court, but the appellants, Martha Quaintance and others, afterwards brought suit in the circuit court seeking to surcharge the settlement, generally and particularly to reduce the amount of the allowance to the executors and recover of them to the extent they might succeed in so doing.

In the circuit court appellant's petition was dismissed with costs, and from that judgment this appeal is presented. So far as the appeal is concerned the estate of Mr. Darnall aggregated, as we have above stated, $58,882.16. A little money was collected after the suit had been brought in the circuit court, but that fact in no way affects the questions before us. Of the aggregate, $56,837.16 was personal estate and received and distributed as such, and $2,025 was the value as fixed by the testator in his will of a tract of land containing about 47 acres.

So far as it was based on the amount of personalty received and distributed the only question is whether, under the circumstances, the allowance of five per cent. was so unreasonably large that this court is called on to disturb the concurrent conclusions of the county judge and the chancellor. We do not think it is. Aside from the weight which we feel and have often decided is due such determinations the record shows that the executors were remarkably

Digitized by Google

prompt, accurate and diligent in their administration, and we may well conclude that to their prompt and diligent attention is due the fact that the estate was settled without loss, delay or any unnecessary expense.

We are, however, of the opinion that the court below erred in allowing appellees any thing on the $2,025 at which the land was valued. This land was not devised to the executors but directly to the devisees named, in whom the legal title to a defined interest vested at once by virtue of the will without division or the intervention of the executors. So that in no sense was it received or distributed by them.

It also appears to us that the acts regulating the compensation of such fiduciaries for their services do not contemplate any allowance except such as is based on the value or amount of the personalty administered upon. The first act, that of 1797, gave them credit in accounting for reasonable charges and disbursements laid out and expended and such pay for their personal services as the court should deem reasonable. This rule obtained until the adoption of the General Statutes in 1873, then the allowance was fixed not to exceed five per cent. on the first, four per cent. on the second and three per cent. on the third thousand dollars, and two per cent. on the remainder.

In 1876 (and this act is still in force) it was enacted "that the allowance to executors, administrators and curators shall not exceed five per cent. on all amounts received and distributed."

The act of 1797, making the compensation for personal services purely discretionary, throws no light on the question, but the other two acts, by the use of the terms per cent. upon thousands of dollars, all *amounts* received and *distributed*, together with the uniform practice of the courts known to the Legislature before the passage of the act of '76, seem to make it certain that the law does not admit of any compensation for the personal services of administrators, &c., except the percentage upon the amounts distributed as money.

In the case of Renick's executors v. Renick, &c., 13 KY. LAW REP., 600, it appears from the judgment of the lower court there was *divided* by the executor, under suit in *partition* brought by him and prosecuted to a finality, $240,000 worth of real estate, yet both the common pleas court and the Court of Appeals held him entitled to no compensation so far as that was concerned.

If, in administering, the executor is put to expense for the services of others, as for lawyer's advice and assistance, or pay out money in traveling, &c., on the business of the estate, these are matters of account and if necessary and reasonable, ought to be allowed as credits.

Excepting the allowance upon the $2,025 we see no error in the proceeding below, but for that the judgment is reversed, and case remanded with directions to the lower court to give appellant judgment against appellees for $101.25, the amount of excessive compensation received by them, and as the estate appears not to be entirely settled, for further proceedings not inconsistent with this opinion.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

GILLHAM v. CAPERTON.

Filed October 19, 1892. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Yost, affirming.

Weight given chancellor's judgment—The chancellor's finding in this case upon a purely legal issue is to be treated as the verdict of a properly instructed jury.

O'Neal, Phelps & Pryor for appellant; C. B. Seymour for appellee.

DOSS v. COMMONWEALTH.

Filed October 19, 1892. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Brent, reversing.

1. *Local option—Effect of entry of certificate in violation of injunction*—The local option law does not become operative in any county or district which has voted in favor of putting it into operation until after the entry upon the records of the county court of the certificate of the examining board as to the result of the vote. And an entry of the certificate by the clerk in violation of an injunction prohibiting him from making the entry has no effect, and the law can not, therefore, become operative by virtue of such an entry. And this is true although the clerk acted in obedience to an order of the judge of the county court, the judge, as well as the clerk, having been enjoined. Nor is it material that they were not enjoined as judge and clerk, as the injunction operated upon them as persons and not as officers, and was properly so directed.

2. *Injunction—Appeal with supersedeas*—Even if an order striking an injunction suit from the docket is to be treated as dissolving the injunction an appeal from the order with supersedeas continues the injunction in force.

Nunn & Cruce, James & Moore and E. C Flanary for apppellant; W. J. Hendrick, R. Reid Rogers and Blue & Blue for appellee.

THOMAS v. COMMONWEALTH.

Filed October 19, 1892. Appeal from Graves Circuit Court. Opinion of the court by Judge Brent, affirming.

Bail—Where the surety in a bail bond which has been forfeited seeks to be released from the penalty he should not only plead and show facts which excused him from performance at the day fixed for performing his covenants, but should also show that the party having the right to insist upon the forfeiture will not thereby suffer. Therefore, where the surety has not surrendered the accused and process issued for his arrest since the forfeiture has been returned "not found," the surety will not be heard to say for response to a summons upon the forfeited bond that, at the time of the forfeiture, the accused was too sick to appear.

C. H. Thomas for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

FALLS CITY BANK'S ASSIGNEE v. HEAD.

Filed October 26, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Release of surety—When a note with surety was executed for money advanced by the payees to the principal under a contract whereby it was agreed that the principal was to purchase tobacco with the money and ship it to the payees, tobacco warehousemen, who were to sell it and re-imburse themselves out of the proceeds, the surety by his contract became responsi-

Digitized by Google

ble for the delivery of the tobacco to the payees, and was liable for any deficiency there might be if the tobacco did not sell for enough to pay the amounts advanced. As soon as the tobacco was received by the payees they acquired a lien upon it, and as between them and the surety it was their duty when the tobacco was sold to apply the proceeds to the extinguishment of the advances made by them for the purchase; and when, instead of so doing, they paid over to the principal enough of the proceeds to have satisfied the debt, they released the surety. And it is not material that the money was paid to the surety to be used by him in paying another debt which was a lien upon the tobacco.

Grubbs & Morancy for appellant; Strother & Gordon and James A. Violett for appellee.

Utley v. Sisk.

Filed October 26, 1892. Appeal from Hopkins Circuit Court. Opinion of the court by Judge Barbour, reversing.

Husband and wife—Relinquishment by husband of marital rights—In this action upon a note executed by defendant to plaintiff and wife in settlement of his accounts as general agent for his mother, plaintiff's wife, prior to her marriage with plaintiff, the defense being that defendant had, after the separation of plaintiff and his wife, paid the note to the wife, who was authorized by plaintiff to receive the money, it was error to instruct the jury that if, after the separation, plaintiff relinquished to his wife his right, title and interest to her estate, and defendant being informed of these facts paid the money to the wife, they should find for him, there being no evidence to authorize such an instruction. Statements made by plaintiff to strangers can not be taken as a renunciation of his rights as a husband, as they were not made with the intention that they should be acted on, and no one could have had the right to act upon them.

Thomas H. Hines, Thomas G. Poore and James R. Howlett for appellant.

Stamper v. Commonwealth.

Filed October 26, 1892. Appeal from Carter Criminal Court. Opinion of the court by Judge Barbour, affirming.

Local option—As the indictment against appellant for selling liquor in violation of the local option law is good, the instructions fairly presented the law of the case to the jury and the evidence authorized the verdict, there is no reason for disturbing the judgment.

J. D. Jones for appellant; R. Reid Rogers and W. J. Hendrick for appellee.

Tilford v. Forsythe.

Filed November 2, 1892. Appeal from Butler Circuit Court. Opinion of the court by Judge Barbour, affirming.

A partner is not entitled to compensation for services rendered for the firm in the absence of a special agreement to that effect.

In this action for the settlement of a partnership in buying and selling tobacco, the evidence sustains the finding of the chancellor that there was a special agreement to the effect that appellee was to receive compensation for his services.

Thomas H. Hines for appellant; W. A. Helm and Edward W. Hines for appellee.

Harding v. Phillips.

Filed November 2, 1892. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Jurisdiction to enjoin judgment*—The provision of section 285 of the Civil Code that an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any

Digitized by Google

other court than that in which the judgment was rendered, applies not only to parties and privies to the judgment, but to strangers as well.

2. *Pleading*—Where the petition in an action against a sheriff for the delivery of personal property shows that his possession came by virtue of a seizure under a judgment of a court, which has never been set aside or reversed, it is not good, although it is alleged that defendant has wrongful possession of the property. Nor is it sufficient to allege that the judgment under which the property was seized is "fraudulent and void and of no effect whatever," as that is but the conclusion of the pleader.

Hugh P. Cooper for appellant; Samuel Avritt for appellee.

Greenwood v. McHenry Coal Co.

Filed October 26, 1892. Opinion of the court by Presiding Judge Yost, reversing.

1. *Fellow-servants*—While at common law a master is not liable for injuries personally suffered by his servant through the negligence of a fellow-servant, while engaged in the same common employment, yet there is an exception to this rule in Kentucky which makes the master liable where there is gross negligence on the part of the fellow-servant.

2. *Gross negligence* is the want of slight care while ordinary negligence is the want of ordinary care.

3. *Negligence is a mixed question of law and fact*, and both its existence and its degree are questions for the jury, unless all the essential facts are undisputed.

In this action by a servant against the master to recover damages for injuries received through the alleged gross negligence of a fellow-servant, there being evidence tending to show negligence, it was for the jury to determine the degree.

Guffy & Ringo for appellant; J. P. Sanderfer and H. P. Taylor for appellee.

Guthrie v. Turner's ex'ors.

Filed October 26, 1892. Appeal from Trigg Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Construction of will—General intention controls*—In construing a will the testator's intention must, if possible, be ascertained from the whole will, and no clause or part must be rejected which can be given an operation consistent with the testator's general intention. This general intention must, however, govern even though it sets aside some particular part of the will.

2. *Same—Repugnant clauses*—If clauses in a will are repugnant and can not be reconciled the latter provision must control.

3. *Same*—A testator directed, by his will, that his estate be equally divided between his children, after first charging one of his daughters with a certain sum which he had given her. Then followed this expression: "It being my will and desire that all my children shall be made as nearly equal in my estate as possible." *Held*—That the testator, by directing that one of his children should be charged with money advanced to her, did not intend that the others should not be charged with land that had been advanced to them. But, even if such was the testator's intention when he wrote the one clause, that intention can not be carried out in the face of the general intention that all should be made equal, plainly expressed in the next clause. Besides, if there is any contradiction the latter provision controls.

Fenton Sims for appellant; E. A. Burnett for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. DECEMBER 1, 1892. No. 11

KENTUCKY COURT OF APPEALS.

WALKUP, SR., AND WALKUP, JR. V. COMMONWEALTH.

(*Filed Sept.* 17, 1892—*Not to be reported.*)

1. *Criminal law—Continuance*—Where the murder, for which accused was being tried under indictment, had occurred many years ago and the case against him had been pending for a long time and several continuances had been granted the accused and there had been two mistrials, the lower court is invested with such a broad discretion in refusing the accused a continuance, on account of the absence of one of his witnesses, that the court will not hold such refusal to be a prejudicial error, even if it be conceded that the evidence of such absent witness was material and that due diligence had been used to obtain his presence at the trial, and that the presence of such witness could probably be had at a future trial.

2. *Same—Evidence of witness who has become insane since former trial*—On a second trial for murder the accused may prove what one of his witnesses stated on the first trial, and who, subsequently thereto, became insane and so continued up to the time of the second trial.

3. *Same—Contradiction by party of his own witness*—Where a witness merely fails to prove what the party introducing him expected, such party can not make substantive evidence for himself by proving previous statements of such witness, which are at variance with those made by him on the trial.

But if such witness proves what is prejudicial to the party introducing him, then such party may contradict him by other evidence or by showing that he has made statements different from his present testimony.

Thomas H. Hines, Geo. T. Duff and A. W. Scott for appellants.

W. J. Hendrick for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Holt.

Digitized by Google

The appellants, father and son, killed James A. Demombrow in a fight in 1888. There is evidence tending to show that each side had previously threatened the other; that there was bad blood between them prior to the fatal difficulty, and it is quite evident that neither side was averse to the conflict.

The conviction is for murder and must stand if no error of law prejudicial to the substantial rights of the accused was committed, because the testimony is certainly sufficient to support the verdict, tested by the rule that controls in criminal cases.

A continuance was asked upon the ground that an absent witness would state that a threat by one of the appellants against the life of the deceased, testified to by some of the witnesses for the State, was not made.

This witness was present at the former term of the court, and was probably then recognized for the term when the case was tried, but it was not entered of record.

The threat, if made, was not the only evidence of ill feeling upon the part of the accused toward the deceased prior to the killing. Another threat was proven by a brother of the deceased.

But conceding that the desired testimony was material; that due diligence had been used to obtain it, and that the presence of the witness could probably have been had in the future, yet the killing had occurred years before; the case had been pending for a long time; several continuances had been granted the accused and there had been two mistrials.

Under these circumstances the trial court was properly invested with a broad discretion in granting or refusing a continuance, and we can not say that it was abused.

The statements of the deceased, which were admitted in evidence as dying declarations, were competent. The evidence clearly shows they were made *in extremis*, and when the declarant had no hope or expectation of recovery, but believed that his dissolution was at hand.

Upon the former trial one William J. Walkup had given certain testimony for the accused. He had testified to threats of the deceased toward them. Subsequently, the witness became insane, and was so, and confined in an asylum when the trial now under consideration took place.

The appellants offered to prove what he had sworn, and the court refused to permit it.

It was competent evidence. The testimony of a deceased witness, given in an action between the same parties, is admissible. The reason is, that it has been given under oath and with an opportunity for cross-examination.

The tests of truth are not absent, and the reasons that apply in such a case are equally applicable to one where the witness has, after testifying, become insane. 1 Greenleaf, section 163.

The defendants had, however, already testified to what it was proposed to prove this witness had previously testified. Another threat by the deceased was proven, so that this evidence was merely cumulative, and it is clear it would not have produced a different result.

The appellants introduced a witness to prove threats of the deceased. He failed to do so.

They offered to prove that he had done so upon a former trial. The evidence was properly refused.

Where a witness merely fails to prove what is expected the party

Digitized by Google

can not make substantive evidence by proving the previous statements of the witness.

If, however, a party introduces a witness, and he proves what is prejudicial to him, then he may contradict him by other evidence or by showing that he has made statements different from his present testimony. There is some diversity of opinion whether he may do this, but the weight of authority favors it, and it is undoubtedly the rule is this State. 1 Greenleaf, section 444; Champ v. Commonwealth, 2 Met., 17.

It is claimed, however, that this witness not only failed to prove threats of the deceased but that he proved one by one of the appellants' toward the deceased, and that his testimony was, therefore, not only variant from his former evidence, but prejudicial to the accused. He merely testified, however, that upon one occasion the deceased was following one of the appellants along the road with a knife in his hand and in a quarreling manner; that after he ceased to do so the appellant asked the witness why he did not let him come on and said, "if you had I would have shot a hole through him that a dog could have jumped through."

If this case be regarded as having been a threat, yet the contradiction of the witness would not have affected the result of the trial. It is shown that other threats and bad blood between the parties had been made and existed prior to the killing, and a court should be slow to reverse a verdict upon such a ground where a case has been pending so long, and so much opportunity of trial afforded.

Judgment affirmed.

ASHLAND COAL & IRON RY. CO. V. DAVIDSON, &C.

(*Filed Oct. 6, 1892—Not to be reported.*)

Condemnation of right of way. Appeals.—A railway company, which had constructed and operated its road for several years over a certain right of way, under a lease from a part of the owners thereof, brought an action to condemn said right of way. It appealed from the judgment of the county court to the circuit court on the issue as to the value of the land taken and the damages sustained by the owners of it. The circuit court dismissed the appeal because the railway company had failed to deposit in the court the amount of the judgment awarded by the county court. *Held*—That the order of dismissal was unauthorized, and there is no law requiring such satisfaction of the county court judgment as a condition to the hearing of an appeal from it.

R. D. Davie and Wm. Lindsay for appellant.

R. C. Burns and Ralph Leete for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Pryor.

The Ashland Coal & Iron Ry. Co. sought to condemn the land of the appellees for the use of its road, and proceeding, as required by the statute, appealed from the judgment of the county court to the circuit court on the issue as to the value of the land and the damage sustained by the appellees.

It seems that the appellant had entered upon the land of the ap-

Digitized by Google

pellees prior to the effort made to condemn it under a lease from one Ward. The road was being operated on the land when the condemnation proceeding was had, and it also appears that other parties owned the land, or a part of it, who have since united in the lease to the appellants. When the case reached the circuit court on the appeal of the railway company a motion was made to dismiss the proceeding on the ground that the company had failed to deposit the amount of the judgment as rendered by the county court in the circuit court to await the result of the appeal, the appellees conceiving that this was a preliminary step that must be complied with before the appeal could be heard.

Our attention has been called to no statute imposing such a duty on the party appealing from this character of judgment. The appeal is made in this case because (and for no other reason) the damages awarded were regarded as excessive, and to require the corporation to deposit the sum awarded into court would be enforcing a compliance with a judgment that it proposed not to pay. It is true there could be no entry on the land until the judgment was satisfied, and the circuit court, if the party had entered after the judgment in the county court without payment, and against the consent of the owner, might well have required a restoration of the possession before hearing the appeal, but here the appellant had been in the possession for several years, and was operating its road when the judgment was rendered. It had entered under a lease, and while all the parties in interest were not the lessors, still it was such a possession as required the ordinary steps to be taken in order to regain it by the lessors. If a tortious entry, it had been committed long before these proceedings were instituted, and with the road constructed and in operation by the consent of at least a part of those interested, it was not, it seems to us, that character of case requiring such summary proceedings as were adopted by the court below in order to compel the appellant to restore the possession.

The party had the right to appeal without praying the judgment or depositing the money or executing a bond to satisfy the judgment. The court should have entertained the appeal and overruled the motion to dismiss.

For this error, the judgment is reversed and remanded, for proceedings consistent with this opinion.

MERCHANTS' NATIONAL BANK OF LOUISVILLE V. SEARS, &C.

(*Filed Oct. 6, 1892—Not to be reported.*)

Fraudulent conveyances—Evidence—Although the evidence shows that the debtor was attempting to avoid the payment of his debts and made conveyances of some of his property to his children for this purpose, yet this fact alone is not sufficient to overcome the proof in the record that the conveyance of the land in controversy to his son was made in good faith and supported by an adequate, valuable consideration, and the chancellor properly refused to set this conveyance aside.

The evidence shows that the mortgage executed by the debtor was for money advanced in good faith at the time of the execution, and it was rightly held by the chancellor to be valid.

W. L. Porter for appellant.

Digitized by Google

W. P. D. Bush for appellees.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Pryor.

Samuel Sears, while liable as the surety of John H. Page & Co. for a large sum of money, and beirg the owner of a large estate in land, conveyed these lands to his children, with a view, as is alleged, of defrauding his creditors, and the conveyances were held fraudulent by the chancellor on the petition of the appellant, the Merchant National Bank of Louisville, and the land subjected to the payment of the appellant's debt, except the land conveyed to C. L. Sears, a son, and a mortgage executed to one Henderson for borrowed money.

The appellant has appealed from the judgment holding the conveyance to the son and the mortgage to Henderson to be valid. The evidence shows that Samuel Sears, the father and debtor, was attempting to avoid the payment of the debt for which he was liable as the surety, and was vesting the title to his property in his children for that purpose, but we are not prepared to say that either the deed to his son, C. L. Sears, or the mortgage to J. W. Henderson was fraudulent as to creditors. The appellant has called upon all these parties in interest to testify in regard to the consideration passing for the several conveyances (several of which were set aside) and the decided weight of testimony conduces to sustain the validity of both the deed and mortgage now assailed by the appellant. The son, C. L. Sears, had operated the farm of his father for a number of years as a partner; was an energetic business man, economical in his habits and had evidently accumulated means sufficient with which to pay for the Porter land. He held his father's notes for the money, and Porter owing his father for the land C. L. Sears surrendered his notes to his, Sear's, father, in payment of the Porter notes, and then the deed was executed to C. L. Sears. The father, the son, Porter, and others swear to the *bona fides* of the transaction. The notes with the name of the obligor torn off are exhibited, and it seems to us slight circumstances *affecting* the financial integrity of the father ought not to be held sufficient to deprive the son of the proceeds of a life of labor, when there is no doubt of the labor having been performed, with testimony perfectly satisfactory as to his economical and business habits.

To make these parties guilty of wholesale perjury is not warranted by the facts. In regard to the mortgage executed to J. W. Henderson it appears that the appellant, and doubtless from necessity, called on these children, to whom deeds had been made by the father, and which were canceled by the judgment in this case, as witnesses to sustain the charge of fraud, and they all state that the money was actually loaned by Henderson when the mortgage was executed, nor is there any evidence showing that Henderson had any knowledge of the fact at the time his money was loaned that the appellant had any claim against Samuel Sears, and to overthrow the testimony of so many witnesses sustaining the validity of the mortgage, the court has only inconsistencies creating a mere suspicion that Henderson was enabling the parties to place the property beyond the reach of Samuel Sears' creditors, and such circumstances should not be held sufficient to overthrow the positive proof of so many witnesses as to the actual loan in good faith of the money for which the mortgage was given to secure.

Judgment is affirmed.

Digitized by Google

DAVIS V. JENKINS, &C.

(*Filed Oct. 6, 1892.*)

1. *Waiver of homestead and dower by a wife—Mortgages*—A wife by signing and acknowledging jointly with her husband a mortgage of his land, in which it is recited that she "hereby waives and relinquishes right of homestead and dower in and to the real estate mentioned in this mortgage," thereby conveys and relinquishes her inchoate right of homestead and dower in such land, so that she can not thereafter assert such right against such mortgage, although her name does not appear in the granting clause of the mortgage.

2. *Judgment by default—Res adjudicata*—After a husband and wife have suffered a judgment by default in an action to foreclose a mortgage lien on their homestead, the wife can not, by petition filed in said suit at a subsequent term of the court and more than a year after the judgment was rendered, have such judgment set aside, on the ground that she was entitled to a homestead in said land, and that her husband had been a lunatic since the mortgage was executed. Such judgment is *res adjudicata* as to the married woman after the expiration of the term at which it was rendered, and can be set aside thereafter only by proper proceedings to vacate or modify it.

3. *Collateral attack by married woman of certificate of acknowledgment of mortgage—Duress*—In an action against a husband and wife to foreclose a mortgage lien on the husband's land, the clerk's certificate of acknowledgment by the wife is conclusive evidence that she freely and voluntarily executed and acknowledged such mortgage, in the absence of an allegation by the wife of fraud on the part of the mortgagee in obtaining such certificate or mistake on the part of the clerk in making it, and such mortgage must be held valid, in the absence of these allegations, although the wife alleges that her signature and acknowledgment were obtained by duress on the part of her husband.

J. H. Vanmeter, J. S. Sprigg and J. W. Bush for appellant.

S. H. Bush for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bennett.

In 1883 S. H. Jenkins, husband of the appellee, L. A. Jenkins, and said appellee, L. A. Jenkins, executed a mortgage on a house and lot (the property of S. H. Jenkins), situated in West Point, Hardin county, Ky., to secure the payment of borrowed money.

Thereafter S. H. Jenkins, in contemplation of insolvency, made an assignment for the benefit of creditors. The assignee instituted suit in the Hardin Circuit to have the estate settled and distributed among the creditors. Emily Davis, as creditor and mortgagee, was made defendant to that action. She instituted a cross-action against S. H. Jenkins and the appellee, L. A. Jenkins, by which she sought to have her mortgage lien on the house and lot enforced.

Summons on the cross-petition was duly executed on S. H. and L. A. Jenkins, and judgment by default was thereafter rendered on the cross-petition against S. H. and L. A. Jenkins for said mortgage debt and foreclosing the mortgage lien on the house and lot to satisfy said debt. More than a year thereafter, and after the term of court at which the judgment foreclosing the mortgage was rendered, the appellee, by petition, made known to the court that her husband, S. H. Jenkins, had been, since the execution of the mortgage, adjudged a lunatic and was then confined in the lunatic asylum. She also alleged that her name did not appear in the granting clause of

Digitized by Google

the mortgage, and that her husband had procured her signature thereto and acknowledged by duress. Hence she and her infant children were entitled to a homestead in said house and lot.

The court, upon final hearing of that part of the case, set aside the judgment theretofore rendered foreclosing the mortgage and adjudged that L. A. Jenkins, by reason of the matters set up by her, had not relinquished her homestead in said house and lot, consequently, allowed her a homestead therein. From that judgment Emily Davis appeals.

It is true that L. A. Jenkins' name does not appear in the clause granting the title to said house and lot. She had no title thereto, but she did have an inchoate right to homestead and dower in said house and lot which she could not be deprived of except by her own act, exercised in the manner pointed out by the statute. The statute upon these subjects provides that the right to a homestead shall not be waived nor dower relinquished except by a written conveyance thereof, signed by the husband and wife and acknowledged by them and recorded, &c.

Now the title to the real estate was in the husband, S. H. Jenkins, and the wife, L. A. Jenkins, owned no interest therein whatever, she was only entitled to an inchoate right to homestead and dower therein, which she could waive and relinquish by deed signed by herself and husband for that purpose and duly acknowledged and recorded, &c. Now if she joins in that part of the body of the deed conveying the homestead and dower by apt words to convey said interests, that is a compliance with the statute upon that subject.

The mortgage, in reference to the waiver of homestead and dower by Mrs L. A. Jenkins, reads: "And Mrs. L. A. Jenkins, wife of S. H. Jenkins, hereby waives right of homestead and dower in and to the real estate mentioned in this mortgage." S. H. Jenkins and she signed and acknowledged the mortgage, which was recorded. The rule above laid down was complied with.

As said, judgment was rendered by default subjecting the house and lot, which included the homestead, to the payment of the mortgage debt. And, about a year thereafter, the court allowed L. A. Jenkins to set aside the judgment and assert and obtain a homestead in the same.

This court, in the case of Harpending's ex'or v. Wylie, 13 Bush, 158, decided that a judgment by default rendered against a married woman in conjunction with her husband at one term of court, decreeing the sale of their homestead, could not, at the instance of the married woman, be set aside at a subsequent term of court, except by proper proceedings to vacate or modify the judgment; that the judgment rendered at the former term, after that term had expired, was *res adjudicata* even as to a married woman. See also Honaker, &c. v. Cecil, 84 Ky., 203, and Hill v. Lancaster, 88 Ky., 343. According to these cases the appellee, L. A. Jenkins, had no right, upon the state of the case presented by her, to have the judgment subjecting the homestead set aside at a subsequent term of court.

Besides section 17, chapter 81, General Statutes, provides that "unless in a direct proceeding against himself or his sureties no fact officially stated by an officer in respect of a matter about which he is, by law, required to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby or a mistake on the part of the officer."

The statute *supra* relates to the certificate of the officer who is required to make it, and except for the fraud in the party benefited

Digitized by Google

or a mistake in the officer the certificate is conclusive as to the matters therein contained, unless in a direct proceeding against the officer or his sureties. Treble v. Hall, 13 Bush, 61.

It is not alleged nor is there any proof that there was fraud in the mortgagees in obtaining certificate of acknowledgment nor of a mistake by the officer.

Now the certificate of the clerk being conclusive that L. A. Jenkins duly and voluntarily executed and acknowledged the mortgage, and there being no fraud or notice of the alleged fraud by S. H. Jenkins on the part of the mortgagees, and they being otherwise innocent purchasers for value, they are not affected by the alleged fraud and the mortgage must be held valid and as passing the appellees' homestead. See case *supra*, page 66.

The judgment is reversed, and cause remanded with directions to proceed consistently with this opinion.

McGRAW V. COMMONWEALTH.

(*Filed Oct.* 11, 1892—*Not to be reported.*)

Criminal law—Conspiracy to commit murder—Evidence—On trial of appellant for murder, alleged in the indictment to have been committed in pursuance of a conspiracy between appellant and certain persons, the evidence wholly failed to show the existence of such conspiracy, and, therefore, appellant was entitled to the benefit of the testimony of those alleged to have been his co-conspirators.

Since there was a total failure to show such conspiracy, it was error to admit against appellant evidence conducing to establish the guilt of his alleged co-conspirators, and with whom appellant had no connection, and the evidence concerning statements made by them prior to the homicide was incompetent against appellant, not having been made in his presence.

T. L. Edelin for appellant.

W. J Hendrick for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted for the murder of James T. Middleton and convicted. The indictment charges a conspiracy on the part of the appellant, Granville Fee, James Howard and others to take Middleton's life.

The deceased was shot from ambush and killed without warning. There are some facts and circumstances connected with the assassination conducing to create a suspicion that the accused might have been cognizant of the purpose, on the part of others, who have been convicted, to take the life of the deceased, but as the case must be retried it is not necessary or proper that this phase of the case should be discussed. What there is of it is purely circumstantial, and much of the testimony on the part of the State tends to show that the appellant had no connection with the feud existing between the Howards, on the one side, and the Turners, on the other, and finally terminating in the shooting of Middleton.

As the testimony against the accused was altogether circumstantial, it was incumbent on the court to keep from the jury the mass

Digitized by Google

of testimony found in this record establishing the guilt of other parties, and with which (this testimony) neither the acts, conduct or statements of the accused had any connection.

There is no sufficient evidence of a conspiracy, and, therefore, the accused was entitled to the testimony of those indicted with him, and their statements as to what they proposed to do with Middleton were clearly incompetent as against the accused. Statement after statement made by those indicted with the accused was permitted to go to the jury as evidence against the appellant, when he was not even present and when the State had failed to show a conspiracy to murder, entered into either before or after the statements were made.

Conceding that a conspiracy had been established, the court allowed the statements of one of the Howards to go to the jury, made long before the accused knew Howard, and when the accused was living in another State. These statements consisted of threats against Middleton, made before the accused knew either Middleton or Howard. As said by counsel for the defense, this character of testimony, when added to that which was competent, must have had a controlling influence with the jury in the consideration of the case, and when the court had, in effect, said to the jury that a conspiracy existed to take Middleton's life, to which the accused was a party, by refusing to permit any of those indicted with him to testify, there was no escape from a verdict of guilty.

It is difficult, in these feuds, to distinguish between a friend and a co-conspirator, as all who are friendly to one of the hostile clans are regarded as enemies to the other. This man may be guilty, but he should be convicted upon competent testimony, and here we find so many irrelevant and incompetent statements from others permitted to go to the jury as evidence against the accused that a reversal must necessarily follow.

Reversed and remanded for a new trial.

K. C. RY. CO. V. JAMEISON'S ADM'X.

(*Filed Oct.* 13, 1892—*Not to be reported.*)

Railroads—Willful neglect—Brakeman—The petition of appellee alleged that his intestate, a brakeman, was killed by the willful neglect of appellant while endeavoring to open a switch for a freight train in pursuance of an order of the conductor. The evidence shows that it was not the brakeman's duty to open this switch, except when ordered to do so, and there was no evidence conducing to show that any order had been given him to open it. Therefore, there was an entire failure of proof of willful neglect in failing to discover the decedent while he was attempting to open the switch; it was at most an act of only ordinary neglect, for which the railroad is not liable to appellee.

Hallam & Myers for appellant.

Collins & Finley for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bennett.

The appellee's intestate was in the employ of the appellant as

Digitized by Google

brakeman on its train used in and about its yards in the city of Covington.

It is alleged that while said train was employed in removing cars from one track to another he was, as such brakeman, ordered by the conductor, having the train in charge, to open a switch in order that the cars could be transferred from the track on which they were standing to a track to be opened by decedent; that in obedience to the order of said conductor the decedent left said cars and proceeded to open the switch, but by the willful neglect of the appellant the cars were started before the decedent reached the switch and opened it, and before the decedent had had time to open the switch, and before he had given the appellant notice that the switch was ready for the cars to move.

The uncontradicted evidence is, that it was not the duty of the decedent, as brakeman of that yard train, to open the switch, unless ordered to open it; that the train, having in charge said cars to transfer, could take one of two routes to accomplish that purpose, to wit: To go down to Tenth street or to take the "Short Line." In the latter case the switch would have to be opened in order for the train to pass that "line."

The question is, was the decedent ordered by the conductor, or was there any thing said in his hearing by the conductor that he might construe as an order to open the switch? Let us see: The only proof upon that subject is, that the conductor, after leaving Milldale (a place about three miles distant from the place of accident) with the train of cars, said to Mr. Howe, a switchman on the train, that he intended to take the cars in on the "Short Line," in which case the switch would have to be used, but before getting to the switch the conductor changed his purpose and concluded to take the cars down to Tenth street.

Now, while it is a fact that the decedent was on the train at the time the conductor expressed to Mr. Howe his purpose to go on the "Short Line," there is no evidence whatever tending to show, or from which the jury was authorized to infer, that the decedent heard the expression of purpose. It does not appear that decedent was near enough to hear the expression. On the contrary, if he was at the place on the train that his duty, just at that time called him, he was not within hearing of the expression. Surely, under such circumstances, the jury was not authorized to believe from the evidence that he did hear the expression. Now is there any other fact or circumstance that would authorize the jury to believe that the conductor ordered the deceased to open the switch on arriving at the nail factory? Surely not. On the contrary, the appellant could not have gone on the "Short Line" without running into a passenger train, which fact the conductor saw, and which the decedent doubtless did see. It is, therefore, not inferable that the conductor gave an order to enable him to carry out so deadly a purpose. Nor is it inferable that the decedent would have executed the order had it been given.

From what has been said there is, according to our comprehension, no proof to sustain the allegations of the petition as to willful neglect. Nor is there any proof that the appellant had any reason to believe that the decedent's purpose was, if such was his purpose, to open the switch, such being the case, if the appellee was guilty of any neglect (which is not conceded) in not keeping a proper lookout, it was, under the circumstances of this case, that of ordinary neglect only, for which the appellant is not liable to the decedent.

Digitized by Google

The judgment is reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

Judge Bennett delivered the following response to petition for rehearing:

Counsel in petition for rehearing admit that it is not the duty of a brakeman to open a switch unless ordered to do so, which, however, may be expressed or implied, and that he would not ask for a rehearing "but for the fact that he feels satisfied that we overlooked the testimony of Fitzpatrick and Blick, when we concluded that there was no order to use this switch and none to open it." Upon this subject Mr. Fitzpatrick says: "I didn't give any instruction. I said to Mr. Howe, when we started from Milldale, we will put these cars down on the Short Line, towards town, in the cattle yards. He could not say where Jameison was when he said that; did not know whether or not Jameison heard him; he said it only once; that on arriving at the place of the accident he saw that they could not take the cars on the Short Line and said we will go down Tenth street." Mr. Howe says substantially the same, except stronger, in the fact that Jamison worked at one end of the train and Mr. Howe at the other. Mr. Blick certainly says nothing to contradict these witnesses. All agree that at the time Mr. Fitzpatrick expressed the purpose to go on the Short Line he, with Mr. Howe, was on the top of the car and the train was moving, and no one saw Jamieson near.

In view of these uncontroverted facts, we said: "The question is, was the deceased ordered by the conductor, or was there any thing said in his hearing by the conductor that might be construed as an order to open the switch? Let us see: The only proof upon the subject is, that the conductor, after leaving Milldale with the train of cars, said to Mr. Howe, the switchman on the train, that he intended to take the cars in on the Short Line (in which case the switch would have to be used), but before getting to the switch he changed his purpose and concluded to take the cars down to Tenth street. Now, while it is a fact that decedent was on the train at the time the conductor expressed to Mr. Howe his purpose to go in on the Short Line, there is no evidence whatever tending to show, or from which the jury was authorized to infer, that the decedent heard the expression of purpose or that the decedent was near enough to hear the expression."

So the counsel will, doubtless, agree that he is mistaken as to our having overlooked said evidence. On the contrary, it will, doubtless, occur to him that we considered it as best we could.

The petition is overruled.

DICKENS V. CAVE HILL CEMETERY COMPANY.

(*Filed Oct.* 13, 1892.)

1. *Right of owner of lot in cemetery to transfer same* Under the charter and by-laws of the Cave Hill Cemetery Company, at Louisville, owners of lots therein can not transfer the same by devise, and a transfer can be made only by the written consent of said company.

2. *Same—Mandamus*—Said company is clothed with the discretion of giving or withholding its written consent to the transfer of a lot by a lot owner,

Digitized by Google

and must exercise this discretion in such a manner as in its judgment will promote the objects for which the corporation was created.

The discretion in this regard with which said company is invested, is not a duty so strictly ministerial in its nature as that a court of equity can, by mandamus, compel the giving of such written consent to the transfer of a certain lot. If such written consent is improperly withheld, mandamus is not the proper remedy to correct the abuse of its discretion by the company.

Robt. J. Elliott for appellant.

Morton V. Joyes and John W. Barr, jr., for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appelleee is an incorporated cemetery company in the city of Louisville. As such company it has the right to sell lots to persons for the burial of their dead.

Martin A. Dickens, father of the appellant, bought a lot in said cemetery for a family burial ground. At his death he devised all his estate, in general terms, real and personal, to the appellant, except $1 in money, which he devised to his son. The appellant contends that she is, under the will, entitled to the exclusive right to the said burial ground and has the right to sell it, &c. That pursuant to her right and wish to sell one hundred and fifty feet square of said lot, retaining one hundred and thirty-six feet square, she advertised in the papers that she would sell said quantity; that she had persons to call for information as to the terms of sale; that being informed as to the terms they went to view the lot but were prevented from buying and would not buy, because they were informed by the appellee that the appellant had no right or power to sell the lot, but the appellee would and did sell said parties other burial lots in said cemetery; that she then applied to the appellee for permission to sell one hundred and fifty feet square off of her lot, leaving one hundred and thirty-six feet square unsold; that the appellee replied that as devisee under her father's will she did not acquire exclusive right to the lot, but the decendants of the appellant's brother had a joint right to said lot for burial purposes. The appellant, taking issue with the appellee, sought by this action of mandamus to compel the appellee to give its written consent to the sale of the lot. The court, upon demurrer, dismissed the action. The appellant has appealed. The appellee's 13th and 16th rules are as follows: "Proprietors shall not allow interments to be made in their lots for a remuneration, nor shall any transfer nor any assignment of any lot, or any interment therein, be valid without the written consent of the appellee first had and obtained. Nor under any circumstances shall any proprietor of a lot sell any part of his lot unless the part sold and the part retained shall each contain at least ninety feet square." The appellee is also prohibited from selling lots to persons of bad character, &c.

The act of the Legislature of February 21, 1884, amending the appellee's charter, provides as follows: "That the owners of lots shall not sell the privilege of burying in their lots without the previous written consent of the appellee. But they may, by last will and testament, or by writing directed to the appellee, signed by such owners and attested by two witnesses, determine who shall control the right of burial in their lots after their death," &c. That in case no such direction is made by last will or by writing, &c., "the right

Digitized by Google

of burial in any of the lots of the cemetery shall go and descend to the lineal descendants of the original owners thereof," &c.

The act *supra* provides: First, that the owners of lots shall not sell the privilege of burying in their lots without the previous written consent of the appellee. Second, that the owner may, by last will, or by writing attested, &c., say who shall control the right of burial in said lots. Third, in the absence of such direction the right to burial in said lots shall descend to the lineal descendants of the owners.

Neither the charter nor by-laws of the appellee give the owners of lots the right to devise the same, but it gives to them the right to transfer the same, with the written consent of the appellee, and if such written consent was not obtained the transfer was invalid. It seems that the appellee reserved the right all the time to determine what persons and families should be deemed worthy to have a burial place in the cemetery. And, in order to keep the matter under its control, it declared all transfers by the owners of lots invalid, unless it consented to the transfer by writing. Such being the object, the serious question would arise as to whether or not the object would be, in many instances, defeated if the owner was allowed to dispose of his lot by will, which is one way of transferring it, to characters or to objects wholly objectionable to the appellee. Hence, as it seems to us the Legislature, by the act *supra*, removed that serious question by conferring upon the owner the right, by special devise or writing, attested, &c., to say who should, after his death, have the right of burial in his lot. And it further provided that in the absence of such will or writing, the right should descend to his lineal descendants, &c.

Said act further provides that the discretionary power of the appellee as to the transfer of lots formerly existing only by virtue of a rule of the appellee, is authorized by section 1 of this act.

Now the rules of the appellee as to the transfer of lots by the owners, subsequently enlarged and interpreted by the statute *supra*, are referred to for the purpose of showing the substantial, not merely formal, discretionary power of the appellee as to such transfers, and the invalidity of the same, unless the appellee exercised its discretionary power in reference thereto by consenting in writing to the transfer. So the question then arises, is the writ of mandamus the proper remedy to procure that consent in case it is wrongfully withheld?

Section 477 Civil Code says, that a writ of mandamus is an order by a court of competent jurisdiction, commanding an executive or ministerial officer to do, or omit to do, an act, the performance or omission of which is enjoined by law. It is well settled by this court (Cassidy, auditor's agent v. Young, &c., 13 Ky. Law Rep., 512) that to entitle a party to this writ the officer's duty must be strictly ministerial. But if he may act in the premises according to his judgment and discretion, then mandamus will not lie to control his judgment and discretion, even though the judgment and discretion are at variance with what is clearly right or dutiful in the premises. Here, as said, as to whether or not the appellee should consent to the sale of said lot depended upon its judgment as to whether or not its consent was within the purview and meaning of the rules and law *supra* in reference thereto. And if the appellee should abuse or withhold its consent when it ought to give it, it seems to us that the remedies that equity affords in such cases, are ample and sufficient.

The judgment is affirmed.

Digitized by Google

COX, &C. V. ARMSTRONG.

(*Filed Oct.* 18, 1892—*Not to be reported.*)

Judicial sale of land procured by fraud—Damages. Appellants executed their note and a mortgage on their land for $2,500 to appellee, who advanced them $50, and agreed to pay the remainder of the $2,500 as they needed it. Other lien holders having brought suit to enforce liens on said land appellee foreclosed his lien for $2,500 and obtained a judgment and order of sale for that sum, and had the land sold to satisfy same, the appellant not objecting thereto, because appellee agreed to pay them the remainder of the $2,500 due, or not to enforce his judgment if they would consent to the enforcement of his lien as above. In this action appellants sue appellee for damages, because he never paid them any money except the $50, and had their land sold and the sale confirmed and thereby deprived them of the same. *Held*—That appellee is liable to appellants for the value of their land, if he procured its sale by the fraudulent means alleged, although he may have failed to recover from the purchaser of it all the purchase money; and the fact that appellee accepted $12.30 from the purchaser in satisfaction of his judgment and that appellants seek only $1,200 damages, when they are entitled to $2,450, does not evidence any compromise of the matter on their part as to the amount due.

W. W. Clarke for appellants.

C. H. Bush for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Bennett.

On the 18th day of May, 1888, the appellants, as husband and wife, executed a note to the appellee for $2,500, due twelve months after date, the consideration being borrowed money. They also executed to the appellee a mortgage on a tract of land belonging to the wife, to secure the payment of the note, which mortgage was duly acknowledged and recorded. While the note was executed, acknowledged, recorded and delivered, yet the $2,500 was not paid by the appellee at that time, as the following agreement will show: "W. F. Cox and his wife, Mrs. Sallie Cox, have this day executed to me a note for $2,500, due in twelve months, with interest from date until paid, and secured by mortgage, but I have only advanced $50 on the same, and am to let them have the remainder along as they may need it. May the 18th, 1885. ROBERT ARMSTRONG,
"by JOHN FELAND."

It is alleged that after said note had fallen due suit was instituted against the appellants by some other parties to enforce their liens upon said land; that the appellee was made a party to that action; that by cross-action against the appellants he obtained a decree for the sale of the land mortgaged to him to satisfy the said sum of $2,500 and its interest; that the sale of the land was made by the commissioner and Mr. Teer bid it off, and then the equity of redemption was sold and Lizzie Cox purchased it at the price of $2,475.00; that by some arrangement made with Teer Lizzie Cox became entitled to his bid, and the court ordered the sale confirmed and a deed made to her, she having, as the decree recited, satisfied the claim adjudged to the appellee.

It is alleged that the appellee never paid to the appellants any part of the $2,500 contracted to be loaned them except the $50 mentioned in the writing *supra*; that the appellee, knowing that he had not paid

Digitized by Google

said sum, but with the intention of defrauding and cheating the appellants, promised and agreed with them that if they would make no defense and would let judgment go for the whole amount of the face of said note and the enforcement of the mortgage lien to satisfy the same, he would, thereafter, pay them the said sum of $2,500, less $50; or, failing to pay them said sum, would not enforce his judgment when obtained to sell the land; that relying upon these false and fraudulent representations they permitted judgment and a sale of the land for the full amount of said note; that after said sale and its confirmation the appellant, pursuant to his fraudulent purpose, refused to carry out said agreement; that the appellee, after sale of the land to Lizzie Cox "agreed with her to accept, and did accept," from her "in satisfaction of the judgment $1,250." The appellants then claim judgment against the appellee for $1,200, and for $5,000 in damages. Now it is certain that if the appellee, by the fraudulent means indicated, deprived the appellants of the title and right to their land by effecting a judicial sale of it, he is responsible to the appellants for the value of said land, although he might have failed to recover the purchase money from the purchaser, because it is the wrongful and fraudulent deprivation of the appellants' land by the appellee that is the cause of action against him, and his having or not received the purchase money from the purchaser in no manner affects the injury done to the appellants by wrongfully and fraudulently depriving them of their property.

It is suggested that there was a compromise of the matter as to the amount due the appellee, by which Lizzie Cox was to, and did, pay to the appellee $1,250 in full of his claim. Now the only reference to a compromise with Lizzie Cox is that referred to *supra*, wherein it is said that the appellee agreed to accept, and did accept, $1,250 in satisfaction of said debt. It will be seen that the arrangement, so far as the petition shows, was made with Lizzie Cox alone, which did not bind the appellants, unless the amount that the appellants had received being in dispute they agreed to the compromise as fixing the amount that they had received, in which case they would be bound by the compromise. But, as said, there is no allegation, express or implied, that the appellants agreed to the compromise. The fact that they sued for $1,200 when, if their petition be true, they were entitled to $2,450, does not show that they agreed to the compromise. It only shows that they were willing to take that sum from the appellant and look to other sources for the balance.

The old record is not before us. The petition and two exhibits, to-wit, the agreement quoted and a judgment making Sallie Cox a *feme sole* are all the pleadings before us. If it is true that there was such compromise as indicated in this opinion, it can be plead upon the return of the case

The judgment is reversed, and the case is remanded, with directions for further proceedings consistent with this opinion.

GENTRY V. WALKER, &C.

(*Filed Oct.* 20, 1892.)

1. *Judicial sales—Appeals*—Where a judgment in favor of a vendor, ordering a sale of land to satisfy his lien, is entered more than two years before an appeal was taken by the defendant from the order of court overruling exceptions to the commissioner's report of sale and confirming same, the

Digitized by Google

lapse of time is a bar to a consideration of the correctness of the judgment of sale; but the appeal from the order confirming the sale having been taken within two years of the entry of such order, its correctness may be considered by this court.

2. *Same—Vendor's lien*—In an action to enforce a vendor's lien, if some of the lien notes are not due and it appears from the petition that the land is not susceptible of advantageous division, no part of it should be sold until all the notes have become due, although all of them may be held by the same person. In this case, although the judgment erroneously ordering a sale of all the indivisible land when only one note was due, can not be reversed because not appealed from within two years, yet the correctness of the order confirming the report of sale can be considered, and such confirmation of the sale being erroneous, the cause will be reversed so that another order of sale may be had if so desired, both notes being now due.

C. F. Burnam and J. W. Caperton for appellant.

J. A. Sullivan for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Lewis.

February 24, 1887, appellant, Gentry, purchased of appellee, Walker, a tract of land, for which was paid in cash $2,100, and two notes executed for $1,100, due January 1, 1889, and $1,000, due January 1, 1890.

March 8, 1889, this action was brought for judgment on the note then due and sale of the land to satisfy it. Answer was filed in which a counter-claim and set-off for about $98 was pleaded. But, without passing on the merits of defendant's counter-claim, a judgment was rendered September 25, 1889, for amount of the note sued on and also for amount of a note given by defendant to A. M. White, made a party to the action, for $347, and secured by a mortgage lien on the land, and by the same judgment the master commissioner was directed to sell the land or so much thereof as necessary to satisfy unpaid purchase money of the plaintiffs and the mortgage debt of A. M. White.

In pursuance of that judgment a sale was, November 6, 1889, made, the land bringing the sum of $3,000, more than sufficient to pay off both notes given to plaintiff, and also the White debt.

To report of that sale the defendant, at the March term, 1890, of the court, filed exceptions which were then, by judgment or order, overruled and the sale confirmed. From that judgment this appeal was taken December 7, 1891.

It will be seen that more than two years elapsed from date of the judgment on the notes and for sale of the land before the appeal was prosecuted, and of course a bar to appeal therefrom exists. But this is an appeal from the judgment or order confirming report of sale, and as the purchaser of the land, W. J. Shearer, has been made a party and the period within which the appeal could be prosecuted had not expired, there is no reason why this court may not consider and determine whether such judgment or order is proper.

Construing section 694, Civil Code, this court has decided, in Leopold v. Furber, 84 Ky., 214, following Faught v. Henry, 13 Bush, 471, that in an action to enforce a vendor's lien, if some of the notes are not due and it appears from the petition that the property is not susceptible of advantageous division, no part of it should be sold until all the notes fall due, although they are all held by the same

Digitized by Google

person. The meaning of that construction, as well as of the plain intent of the Legislature is that the whole of a tract of land can not be sold to satisfy notes for purchase money, unless all of them are due at date of judgment for sale, but to authorize sale of a part there must be a division of the land.

In this case no division of the land was made or ordered but the whole of it was sold to satisfy not merely the note due but, as stated in the judgment, to also satisfy the note not due, and the sale was actually made before one of them was due.

Though that judgment can not be now reversed or considered, because not appealed from in time, the judgment or order confirming the sale made under can be considered. And as the court clearly erred in everruling exceptions and confirming that sale it must be reversed, and cause remanded with directions to set aside the sale and, if desired, order a resale, as both notes are now due.

BENNETT, &C. V. CADDELL.

(*Filed Oct.* 6, 1892—*Not to be reported.*)

1. *A jury having been waived by the parties in this action at law, the judgment of the court*, upon the issues of fact, must be treated as the verdict of a properly instructed jury.

2. *Ejectment—Division line—Burden of proof*—In an action to recover possession of a tract of land and damages for the cutting and carrying away of timber therefrom by the defendant, the plaintiff must establish his superior title to the land in controversy by a preponderance of the evidence, and when he fails to do so, and the evidence does not establish clearly the rights of the parties, there should be a judgment for the defendant.

In this action concerning the ownership of a small "plat" of four and a half acres, which each party claims through the same remote vendor, the evidence does not so clearly locate the true division line between the parties as to show who has the better title to said land; therefore, a judgment for the defendant was proper.

C. W. Lester for appellant.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Lewis.

June 27, 1877, E. E. Hopkins and W. E. Sharp purchased of John Smith a tract of 143 acres of land, and he, on that day, conveyed to each of them a designated part thereof.

In the deed to Hopkins the consideration for her part is stated at $333.20, and the entire boundary of the original tract is set out and all of it conveyed except, in the language used, "the amount conveyed to W. E. Sharp, which is all that is on the east side of the main top of the ridge and on the end of the ridge next to Worley's, that flat is also excepted to the conditional line marked by the said Sharp and E. Hopkins."

The consideration for his part, as stated in the deed to W. E. Sharp, is $166.80, and the land thereby conveyed is described as "40 acres, more or less, being a part of the tract known as the Jos. Cox tract, * * and being the same land excepted out of the deed this day made to Esther E. Hopkins and being all the land that is embraced in her deed on the east side of the main top of the main ridge run-

Digitized by Google

ning through said land and embracing a flat on the end of the ridge next to Worley's to a marked conditional line made by the said Sharp and Hopkins."

This action was brought by appellants, heirs at law of E. E. Hopkins, against appellee, remote vendee of W. E. Sharp, to recover possession of about 4½ acres within boundary of original tract, and damages for cutting and carrying away timber therefrom.

A jury having been, by consent of the parties, waived and trial of both law and fact submitted to the court, the judgment, upon the issue of fact, must be treated as would be the verdict of a properly instructed jury.

The general direction of the ridge, along top of which the division line between Hopkins and W. E. Sharp runs, is a little east of north, but at a point some distance from Worley's line, precisely how far does not appear, it is broken into two spurs, along the western one of which to Worley's appellants contend the line was intended and should be run. But west of and bordering on that line and on Worley is the small parcel of about 4½ acres in contest, which appellees contend is the "flat on the end of the ridge" excepted from the conveyance to Hopkins and included in that to W. E. Sharp.

Location of "the flat" can not be certainly determined from the language of the deeds, which is somewhat indefinite, and, though it is stated in both of them, there was a marked conditional line, no witness proves a division line was, at the date of the deeds, actually marked. There is, however, some evidence of two or three trees being marked along the line contended for by appellants, and, looking at the plat made by the surveyor, the natural division line seems to be, as they contend, along top of the western spur mentioned to Worley's. But, conceding that was intended to be the location of the division line, it would not, by any means, follow the land in dispute belongs to appellants. On the contrary, that fact tends to show the "flat" was intended to belong to W. E. Sharp. For if it was east of a line running along top of the western spur, that appellants contend is the true division line, there would have been no necessity for excepting "the flat" from the conveyance to Hopkins and conveying it, in specific terms, to W. E. Sharp, because it would have naturally fallen to him.

There is some evidence of a level bench of land between the eastern and western spur, but not of such area and character as answers description of "the flat" mentioned in the two deeds. There is evidence on behalf of appellants tending to show Mrs. Hopkins, while living, claimed the land in dispute, but there is, on the other hand, evidence tending to show she did not claim it.

The testimony of witnesses on neither side is convincing, and appellants, having failed to show title by preponderance of evidence, there was no alternative for the lower court but to decide against them. Besides, we think proper meaning and effect of the two deeds makes it probable that "the flat," which is the land in dispute, was intended by the parties to be conveyed to W. E. Sharp and not to E. E. Hopkins.

Judgment affirmed.

Digitized by Google

TAYLOR'S ADM'R V. SOUTH COV. & CIN. STREET R. CO.

(*Filed Oct. 6, 1892—Not to be reported.*)

Negligence—Infants—Peremptory Instruction.—A boy about seventeen years old, who was neither an employe nor a passenger of the appellee street railway company, without permission of appellee or any of its servants, got on the front platform of one of its cars, while it was in motion, seized the driver's whip and jumped to the ground with it, and whipped awhile one of the mules hitched to the car; he then got on the platform of the car, crossed it, jumped off and whipped the other mule, after which he got on the platform again, from which he fell and was run over and killed by the car. In this action by his administrator to recover damages for the death of decedent alleged to have resulted from the neglect of appellee's servants, *Held*—

First. Decedent's death was caused solely by his own inexcusable and illegal conduct and not by reason of any neglect of appellee's servants.

Second. Since decedent was a boy of seventeen years of age, and possessed of the intelligence and discretion usually found in one of that age, the fact that his father had previously warned the driver to keep his son off the car, does not excuse the boy's wanton conduct or create any additional liability on the part of the company.

Third. A peremptory instruction to find for the defendant was authorized in this case.

Hallam & Myers for appellant.

O'Hara & Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by the administrator to recover damages for pain and suffering and destruction of life of his intestate, J. L. Taylor, by alleged negligence of appellee's servant.

It appears from the evidence introduced by the plaintiff that decedent, then about 17 years of age, voluntarily and without permission, got on the front platform of a street car in motion, seized the driver's whip and jumping to the ground, whipped awhile one of the mules hitched to the car and then getting again upon the platform, passed to the ground on the opposite side, and, having whipped the other mule for some time, got upon the car step, from which he fell, was run over by the car and thereby was killed.

He was, at the time, in no sense either an employe or passenger on the car of appellee, but a trespasser on its property and intermeddler with its business, without, so far as the evidence shows, its knowledge or permission of the driver but rather in spite of him. His fall from the car and consequent injury was caused by his own reckless and illegal conduct in jumping off and on the car and causing the mules to go at such rate of speed as to make it impossible for the driver, after discovering his fall, to stop them in time to prevent his being run over.

We do not perceive any ground whatever upon which an action against the company could have been based if the deceased had been an adult, for his death was the result not merely of his own contributory negligence, but wholly caused by his own inexcusable and illegal conduct. The simple inquiry, therefore, is, whether the decedent had, at the time, sufficient intelligence to know the danger he, of his own accord, incurred and discretion enough to guard against or avoid it.

Digitized by Google

We think the evidence is too clear to admit of a doubt on the subject; for it does not appear he possessed less intelligence, experience and judgment than boys of that age ordinarily have. He had been intrusted by his father with, and then had, control of a grocery store, in which there were several hundred dollars invested, that he managed successfully.

We think it fully appears that his death resulted from his reckless and mischievous disposition and not to any extent from lack of intelligence and discretion. And, in view of that fact, the evidence that his father had previously told the driver to keep him off the car does not constitute any excuse for his own conduct nor create any liability against the company without whose knowledge or consent he went upon its car and needlessly and wantonly beat the mules.

Therefore, the rule requiring an engineer of a locomotive and also street car driver to exercise vigilance in looking out for danger to passengers and persons on the railroad track, and to use reasonable diligence to prevent injury to a person after his peril is discovered has no application to this case, because the deceased not only assumed the attitude of a trespasser but illegally interferred with movement of the car and thereby caused his own death.

As the evidence does not conduce to show any actionable negligence on part of the company or its servant the instruction to the jury to find for defendant was properly given.

Judgment affirmed.

KELLEY, BY, &C. V. THE BARBER ASPHALT CO.

(*Filed Oct.* 8, 1892.)

Master and servants - - Infants - - Contributory neglect — A servant is not bound to engage in work that places his life in peril, and when he voluntarily undertakes such labor, and an injury occurs he can not look to the master for damages upon the ground of negligence, if, by the exercise of ordinary vigilance, he could have avoided the accident. And in undertaking and performing his labor the servant is bound to take notice of familiar natural law, and to govern himself accordingly. If he fails to do so the risk is his own. He is bound to use his eyes, and if he fails to do so he can not charge the consequence upon his master. The foregoing rule applies also to minor servants, provided they are sufficiently intelligent and experienced to apprehend the nature of the labor they are undertaking, and the danger attendant upon it.

In this case a boy seventeen years of age was injured while drawing up building material to the second story of a building. In drawing up such material the boy was compelled to bend over a shaft or windlass, which was in motion, and while engaged in his work his shirt was caught in the shaft and he was drawn around it, and thereby injured. In this action it is held that the danger connected with this work was apparent to the boy, who was one of ordinary intelligence, and he assumed the risk obviously attendant upon the work; the injury, therefore, which resulted partly from his own lack of vigilance, was not one for which the employer is liable.

J. M. Chatterson and O'Neal, Phelps & Pryor for appellant.

Humphrey & Davie for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

The appellant was in the employ of the appellee and, while he was drawing up some material from the first to the second story of

Digitized by Google

the building by the direction of the appellee's foreman, and while he was bending over a revolving shaft or windlass, in order to draw up the buckets containing the material, his shirt was caught fast to the revolving shaft and drew him around it, which caused one of his arms to be broken and other bruises upon his body. He instituted this action against the appellee to recover damages for the injury, alleging that it was caused by the negligence of the appellee in having defective machinery, &c.

Upon the conclusion of the appellant's evidence the court gave the jury a peremptory instruction to find for the appellee. From that judgment the appellant has appealed.

The appellant, at the time of the accident, was in his seventeenth year of age, was about five feet and eleven inches tall, weighed about 140 pounds, intelligent, used to working about machinery and sought work and made contracts of employment on his own account. The shaft or windlass mentioned was about two and a half feet above the second floor and over the edge of the floor where there was an opening to the lower floor, from which the material was to be drawn in buckets to the second floor. The shaft was smooth and was revolved by a leather belt which moved other machinery. In drawing up the buckets the appellant had to bend over the shaft. The buckets, with the material in them, weighed about forty pounds. While the appellant was bending over the shaft to draw up the third bucket of material, he having drawn up two buckets of it, his shirt, being loose and looped, got fastened to the shaft and drew appellant to it and around it, causing the injuries mentioned.

The evidence is conclusive that the appellant was employed to perform any and all kind of work that he was capable of performing about the establishment that he was desired to perform. It also conclusively shows that he was not working with the shaft or windlass, but he was drawing up material with buckets, a work that any person possessing sufficient strength and ordinary sense could perform; that the shaft or windlass was not a defective or a particularly dangerous piece of machinery; that the appellant, in performing his task, had nothing to do with the shaft, he only had to bend over it while it was revolving right before his eyes, and which he was bound to see and did see while he was performing his duty; not only did he see it then but he knew before he commenced to draw up the buckets that the revolving shaft was there and that others had drawn buckets of material up in the same manner that he did; he had good sense and was apparently stout enough to do the work, and having worked about machinery before at other places he evidently had some knowledge that it required some prudence and caution to work about machinery.

It also conclusively appears that the only prudence that was necessary to be exercised in reference to this piece of machinery was to keep off of it, and that the common instinct of safety should have suggested to him to do that, and that exercise of only ordinary prudence would have enabled him to do that. He had drawn up two buckets of material and natural instinct would, and doubtless did, suggest to him whether or not the work was too heavy for him to perform with safety, and if it was too heavy it was his right and duty to quit it, but he did not. And it looks reasonable that he thought he was adequate to the performance of the task, else he would have quit it.

As said he did see the shaft, and that it was revolving and that he would be compelled to bend over the shaft in drawing up the bucket before he commenced to draw up the bucket, and he knew as well

Digitized by Google

as a country youngster would know that if his clothes were caught by a revolving well windlass he would likely be drawn to it and hurt, and that it was safest for him not to get close enough to it for such accident to befall him, or that there was danger in falling by walking on a plank covered with ice or sleet.

It is well settled by this court that an adult employe is not bound to engage in work that places his life in peril, and when labor of that sort is voluntarily assumed and an injury occurs he can not look to his employer for damages upon the ground of negligence if, by the exercise of ordinary vigilance, he could have avoided the accident. Sullivan v. Bridge Co., 9 Bush, —.

The American and English Encyclopedia of Law, 14th volume, page 842, gives the rule in referance to minor servants (which we think is correct) as follows: "In performing the duties of his place a servant is bound to take notice of the ordinary operation of familar natural law, and to govern himself accordingly. If he fails to do so the risk is his own. He is bound to use his eyes, and if he fails to do so he can not charge the consequences upon the master; and this rule applies to minor servants." See also the strong case of Berger v. St. Paul Railroad, 38 Northwestern Reporter, 874.

The above authorities settle the law as applicable to the employment of minor servants in a case like this. But there is no intimation intended as to the law of the case where the master employed an infant and put him to work with machinery without instructing him and who, by reason of his tender years and inexperience, did not know any thing about the danger incident to working with machinery or would not be likely to know or observe any defects therein.

In this case, as said, the appellant was old enough, sensible enough and had experience enough to take notice of the ordinary operation of familiar natural laws and to govern himself accordingly and "use his eyes;" and his failure to do so was at his own peril.

The judgment is affirmed.

BRYANT V. BRYANT.

(*Filed Oct.* 6, 1892—*Not to be reported.*)

1. *Action to subject land—Practice*—At the time this action was commenced to subject appellant's land to satisfy a debt due by him, his interest was an undivided one—the land being jointly owned by the heirs of William Bryant, and so described in the petition. Subsequently it was divided by judgment of the county court, and a judgment of sale was rendered at the same term of the circuit court, at which an amended petition had been filed stating the fact of such division and describing appellant's portion of such land. *Held*—That appellant can not complain that his divided interest was sold instead of an undivided interest, nor because the order of sale was made at the term at which the amended petition was filed.

2. *Same—Nulla bona—Jurisdiction*—Where a judgment has been rendered in a circuit court, and an execution issued thereon and returned no property found, that court has jurisdiction to subject, in an equitable action, whatever interest the defendant may have in real property to the satisfaction of such judgment, without regard to the amount of the judgment.

3. *Jurisdiction—Description of land*—While the petition does not formally allege that the land involved herein lies in the county in which the suit was brought, yet the pleading and exhibits make it clear that the land is located

Digitized by Google

in that county, which is sufficient to satisfy this court that the lower court had jurisdiction of the subject matter of this action.

4. *Action to subject land of execution debtor after return of "nulla bona"—Summons*—In this action it was not necessary to make an endorsement on the summons of the effect of the action, as provided by Sec. 441 of the Civil Code, in order to give the court jurisdiction of the subject matter of the action.

Hill & Denham for appellant.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellee having, in an eqitable action pending and determined in the Whitley Circuit Court, recovered a judgment against appellant for the sum of $26.91 and interest, and caused an execution thereon to issue to the county of his residence, that was duly returned in substance no property found, brought this action, under section 439, Civil Code, to enforce satisfaction of that judgment by sale of land.

The land was, at commencement of this action, jointly owned by the heirs at law of Wm. Bryant, and judgment for sale of the undivided interest of appellant, one of them, was prayed for. But it was, subsequently, divided by judgment of the county court. And one of the errors complained of is, that the judgment of sale was rendered at the same term appellee, by amended petition, stated the fact of such division.

We do not see how appellant was, or could have been, thereby prejudiced, but can readily understand how it was to his interest to have sold a definite parcel, described by metes and bounds, as was done in the judgment, instead of offering for sale his undivided interest in the entire tract.

When a judgment has been rendered in the circuit court, and an execution issued thereon, and returned no property found, clearly that court has jurisdiction, under the section of the Civil Code mentioned, to subject, in an equitable action, whatever interest the defendant may have in real property to the satisfaction of that judgment, without regard to the amount of it. It is, however, contended the Whitley Circuit Court had no jurisdiction, because it is not expressly stated in the petition the land sought to be subjected is in that county.

It is true it is not formally and in terms alleged the land, appellant's interest in which is asked to be sold, lies in the county of Whitley, but it is referred to as a tract of land that by an agreement between the heirs of Wm. Bryant and his widow was allotted to her as dower, which agreement, describing the land, was recorded in the Whitley county court clerk's office, and a copy thereof was filed with and made part of the appellee's petition.

It seems to us the pleadings and exhibits in this case make it so evident the land sought to be subjected lies in Whitley county, no one could have any doubt about it, and that is all which is needed to satisfy this court the Whitley Circuit Court has jurisdiction of the subject-matter, and, as a consequence, of the person of appellant.

Section 442 provides that in such action as authorized by section 439, a lien shall be created on the property of the defendant by the levy of an attachment authorized by section 441, or "by service of the summons, with the effect of the action indorsed thereon, on the person holding and controlling the property."

Counsel contend that because there was not upon the summons in

Digitized by Google

this case endorsed the object of the action, the circuit court did not have jurisdiction to subject the property. The land sought to be sold was fully described in the petition, and it was not, as has been uniformly held by this court in analogous cases, indispensable to make the indorsement on the summons in order to give to the court jurisdiction of the subject.

Judgment affirmed.

MORRIS, SR., &C. V. MORTON'S EX'ORS, &C.

(*Filed Oct.* 15, 1892—*Not to be reported.*)

1. *Holographic wills—Attesting witnesses*—A will wholly in the testator's handwriting is a valid will as to both land and personalty in this State, even though there are no attesting witnesses to it, and where the propounders of a will prove, by two attesting witnesses to it, that it is wholly in the testator's handwriting, and that they attested it in his presence at his request, this is sufficient proof of its execution, although such witnesses did not subscribe their names to it at the same time.

2. *Wills—Mental capacity*—The testimony concerning the mental capacity of the testator is somewhat conflicting, with a decided preponderance to establish his capacity, and the verdict of the jury, declaring the paper in controversy to be the last will of the testator, can not be disturbed.

3. *Same—Evidence*—The fact that one devisee interested in upholding the will was permitted to testify after certain witnesses not interested in the will had been introduced by the propounders, could not have had any controlling influence in this case, or have affected the finding of the jury, and is not a reversible error.

4. *Same*—It was proper to prove certain proceeding of the Cave Hill Cemetery Company, a corporation, by the production of the books of the corporation by the custodian of them.

5. *Undue influence—Instructions*—The instructions concerning undue influence in this case were authorized by the evidence, and are as favorable to the contestants, as they could have properly asked.

6. *Instructions concerning "preponderance of evidence"* An instruction in a civil case requiring the party on whom the burden of proof rests to establish some issue of fact by a "preponderance of evidence" will not authorize a reversal, although the word "preponderance" might properly have been omitted from the instruction.

W. McKee Duncan and E. E. McKay for appellants.

J. S. Pirtle, Helm & Bruce, Barnett, Miller & Barnett and Humphrey & Davie for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellants are contesting the will of John P. Morton on two grounds; first, the want of mental capacity to execute it; second, the exercise of an improper influence over him by the beneficiaries in its execution.

The testator had five sisters and two brothers, some of whom had died prior to his death, leaving children, and the principal bequests are made to his nieces and nephews, except certain special devises made to charitable institutions located in the city of Louisville.

The instrument purporting to be the will of the testator is wholly in his handwriting and was executed by him on the 12th day of

Digitized by Google

June, in the year 1888. It is attested by three witnesses, Ed. D. Hogan (who was dead when the paper was offered for probate), S. Blanche Howard and I. M. Eddy.

The two attesting witnesses, Blanche Howard and I. M. Eddy, testified that they each attested the paper at the instance of the testator and in his presence and that the instrument is in his, the testator's, handwriting. It is contended by counsel for the contestants that the proof of the execution of the paper by the propounders is not such as authorized its probate, and for that reason the motion in the court below to instruct the jury to find against the paper offered as the will of the testator should have prevailed.

We perceive nothing on the face of the will indicating a want of capacity to execute such a paper or that is inconsistent with the right of the owner to dispose of his estate as he deems proper. The two attesting witnesses may not have subscribed their names to the paper at the same time, but each one did attest it in the testator's presence and at his request, and in fact, being in his handwriting, no attesting witnesses were necessary to make the paper a valid will in this State of both realty and personalty, and their attestation was obtained under the advice of counsel so as the mode of execution might conform to the laws of other States in which the testator owned considerable real estate, all of which was embraced in the devise made by the paper offered for probate.

The attesting witnesses were familiar with the testator's handwriting, had been in his employ for years, and it seems to us, the proof being ample and complete as to the execution of the paper, it then devolved on the contestants to show a want of testamentary capacity or the exercise of an undue influence over him in its execution.

All the essential proof of a valid will was made out by the propounders and the burden then rested on the contestants to show why the probate should be denied.

The testimony as to the mental capacity of the testator is somewhat conflicting with a decided preponderance for the propounders. John P. Morton was, no doubt, a man of more than ordinary business capacity, and from his early manhood, until his advanced years prevented his taking an active part, his life was successful in his business pursuits. He had accumulated a considerable fortune and being without children the disposition he was to make of his estate seemed to have weighed upon his mind, and the execution of some three or four wills evidenced to some extent the want of a fixed purpose as to which of his kindred should become the object of his bounty.

The paper in question is in his own handwriting and gives evidence upon its face of a condition of mind enabling him to comprehend his entire estate, and to select of his numerous kindred the objects of his bounty. His will or its contents was known to his intimate friends outside of his own relatives as well as his wife, who was equally interested in the disposition to be made of the estate. He exhibited the will to his lawyer, who had been his confidential and legal adviser for years, and made inquiry as to what the lawyer thought of both its form and substance, adopted suggestions that were made by his attorney that were merely formal and seems to have re-written the will to conform to the advice given him. His long cherished purpose, evidenced by his acts and declarations long before this will or any other was written, to make liberal donations to certain charities connected with the church of which he was a member, was consummated by the execution of this will, and while he may have omitted to devise to kindred who were needy, as in the

Digitized by Google

opinion of some he should have done, still his life of labor devoted to business that resulted in the accumulation of this large property carried with it the right to dispose of his estate in accordance with his own wishes. He was told by his attorney that he had omitted to make devises to certain of his kindred and, in reply, stated, in substance, that it was his own estate he was disposing of and he thought he had the right to select the objects of his bounty. In his condition, as to family and kindred, he must have had favorites among his collateral kindred and those of his wife, and being under neither a natural nor legal obligation to provide for such kindred, their need of assistance should constitute no evidence of a want of mental capacity.

Nearly all the business men who were examined as witnesses speak of his mind being clear and unclouded, and the large pecuniary transactions entered into and consummated by him shortly before and after this will was executed conduce strongly to show that he had a rational and disposing mind. His family physician testifies that the delusions he was under when sick, previous to his will and after, were but temporary and that he had sufficient mind to dispose of his property.

The entire evidence was before the jury and it was for them to say whether the paper was or not the last will of the deceased, and it is perhaps unnecessary to comment at all on the testimony.

It is objected by counsel that Bishop Dudley should have testified in chief before the other witnesses not interested had testified, he being a trustee of some of the Florida property and interested personally upon a certain contingency. It appears that a number of witnesses testified before the Bishop as well as after and his testimony out of the case could have had no controlling influence or affected the result. It was merely cumulative in its character and affords no ground for reversal.

The records of the proceedings by the Cave Hill Cemetery Company was brought into court to show a fact in regard to the election of directors and the persons present at the meetings. The custodian of their books brought them into court to establish some collateral facts. The court restricted the use of the books of the corporation to the showing of certain dates and we see no error in it, and in fact we can not well see how the proceedings of this corporation could be established in any other mode.

There was an objection made to the reading of deeds and certain articles of incorporation of John P. Morton & Co. and other deeds made to Morton, in which he was a party and about which he was the chief adviser, these writings having been executed after the date of the will. This was clearly competent for the purpose of showing the extent of his mental powers after the paper in controversy was executed. They were business transactions, offered for the purpose of showing a rational mind on the part of the testator.

We perceive no error in the mode of argument pursued by counsel for the propounders, and if he misquoted the testimony or read from memoranda that was erroneous as to the statements made by the witnesses, it was the duty of the trial court to correct the error, and this would have been done at the instance of counsel for the contestants if counsel was misrepresenting the testimony.

As to Barnett, one of the counsel for the propounders, remaining in court during the trial, as no objection seems to have been made to this action on his part until after the trial, it was then too late and if made the court should have permitted him to remain.

The instructions offered by each side seem to have been refused,

Digitized by Google

and while those offered by the appellees are not before us we are satisfied the court gave to the jury such instructions as embraced the law of the case.

While instruction No. 1 confines the question of undue influence to the subscription of the paper, instruction No. 2 tells the jury that if any part of the paper was procured by the undue influence of any one they should find that part of the paper not to be the last will of the testator. The court also defined undue influence and told the jury that "*any influence obtained* by any act or means which would give dominion over the will of the testator to such an extent as to destroy his free agency or constrain him to do against his will what he is unable to refuse is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, either by direction or indirection or obtained at one time or another."

There is but little, if any, evidence to base that instruction upon, and it could apply only to one of the devisees and if properly given it was as favorable for the contestants as they could have asked. The last instruction placed the burden on the propounders to show by a preponderance of the testimony that the will was in the handwriting of the testator and subscribed by him, and upon the contestants then to show by a preponderance of the testimony that when the paper was executed the testator was of unsound mind as already defined or that it was procured by the undue influence of others. While the word preponderance might well be omitted from an instruction upon an issue of fact it has never been held to authorize a reversal, but, on the contrary, such an instruction has been sustained by almost every trial, as well as appellate, court in this State and out of it, and no reversal will be had for this alleged error.

The question as to the bill of evidence has been again raised in this court and it is apparent, although the motion to dismiss the appeal was overruled, it is not to be regarded as a precedent. It is doubtful whether the bill is properly authenticated or the affidavits of counsel for contestants sufficent to make it a bill when the judge has refused to sign it. We have thought proper, however, to waive this question and decide this case as it was argued—on the merits.

The instructions offered by the contestants, if correct, are all, or the substance of them, embraced by the instructions given by the court. The case here, the instructions being proper, is purely one of fact and this issue the jury has passed on.

Judgment affirmed.

VARBLE, JR. V. PHILLIPS.

(*Filed Oct.* 18, 1892—*Not to be reported.*)

1. *Construction of will—Defeasible fee*—A testator, after devising certain property to the children of his son, David, provided in his will, "but should either of my said grandchildren die without lawful issue *then living* the rights and interest hereby given such grandchild is *then* to become the right and property of the survivor or survivors of them, and should they all depart this life without having lawful issue *living* at the time of their decease, the property is then to vest in and become the right and property of my surviving children, and the issue of such of them as now are or *may then* be dead. *Held*—That the children of the son, David, all of whom survived the testator, did not take a fee simple estate in the property devised, but a defeasible fee, which might be defeated at any time as to any one of them who died without lawful issue.

Digitized by Google

2. *Sales of land in which there are contingent interests—Constitutional law*—One of the children of David had a right to proceed under the act of August 23d, 1862, to have the property devised to her sold for re-investment. Said act expressly authorizes the sale of land in which there are contingent interests, and it is not unconstitutional.

3. *Wills—Rule of construction*—It is now well settled in this State that "if an estate is devised to one in fee, but if he die without issue or without leaving a child or children, then to another, the first devisee takes a defeasible fee, which is subject to be defeated in the event of his death at any period without issue.

Chas. M. Lindsay for appellant.

Geo. B. Eastin for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

In this case is involved the construction of the will of Thomas Phillips, and the provision out of which the controversy originates is as follows: After making the devise to the children of his son David, who was then dead, he provides, "but should either of my said grandchildren die without lawful issue *then living* the rights and interest hereby given such grandchild is *then* to become the right and property of the survivor or survivors of them, and should they all depart this life without leaving lawful issue *living* at the time of their decease the property is then to vest in, and become the right and property of, my surviving children and the issue of such of them as now are *or may then* be dead.

The children of David Phillips survived the testator. In the month of February, 1873, May E. Christmas, one of the three devisees, and her husband filed a petition in the Louisville Chancery Court against Mary E. Christmas, praying a sale of the land held by Mrs. Christmas under this devise and asking a re-investment of the proceeds, to be held in the same manner as the land.

By an amended petition Richard Christmas, as trustee of his wife, was made a party-plaintiff. The necessity for making him a party as trustee originated from a deed of trust that was executed on the 30th of August, 1855, by Christmas and wife to James Y. Christmas, and by the latter reconveyed to Richard Christmas, the husband, for the separate use of the wife, with power on the part of the wife to dispose of it by deed or will. The parties seem to have ignored this conveyance in trust and filed the petition on February 4th, 1873, for a sale of the land, the title to which was derived by Mrs. Christmas from her grandfather, David Phillips.

The proceeding to sell was had under the act of August 23d, 1862 (Myers' Supplement). That act authorized the sale of real estate and slaves, in which there was a future contingent interest and such was its title. The act applies to cases "in which there may be a contingent interest depending on events which may or may not happen, and the person or persons to take such interest can not, for the time being, *be ascertained* on account of the non-happening of the events on which such interest depends."

It seems to us this act embraces the case before us and was enacted that sales might be made where future contingent interests were involved, but, by reason of the non-happening of the event upon which the contingent interest became a vested one, no one could tell who would take the estate when the event did happen.

This was not a fee-simple title in Mrs. Christmas but a fee subject to be defeated at any time by her dying without a child or children.

Digitized by Google

The intention of the devisor is expressed in plain terms that if his grandchildren, or either of them, departed this life *without lawful issue then living*, not at the death of the testator but at the death of the grandchild, the interest was to vest in the survivors, and, to make the intent plain, he further provides that *if they* all depart this life without leaving lawful issue living at the time of *their decease* the property is to vest in the testator's children. If all died and have no lawful issue living at the time of their death the testator's children get the estate, but if one should die without lawful issue it goes to the surviving children.

The devise can have no reference to the grandchildren dying before the testator, and is plain, we think, that the death at any time of one of the grandchildren without leaving lawful issue terminated that interest and no title could pass from the grandchild, but that interest passed to the survivor under the will of the testator.

We find no authority in support of the position that this devise was an absolute fee, but, on the contrary, from the language used, it was the manifest intention of the testator to vest the title to property devised to his grandchildren in such a manner as that if either died without a child or children the survivors then took, whether that death was before or after the testator.

In the case of Trabue v. Levy, 10 Ky. Law Rep., 346, the intention of the testator was gathered from the entire will as in this case, and the circumstances surrounding the testator at the date of its execution, and it was not intended to antagonize expressly or by inference a rule of law in the construction of wills now too well settled to admit of doubt; that is, "if an estate is devised to one in fee, but if he die without issue or without leaving a child or children then to another, the first devisee takes a defeasible fee which is subject to be defeated in the event of his death at any period without issue."

There may be other parts of the will that would show a different intent, as in arriving at a proper construction the whole will must be considered. All rules of construction are subordinate to the one of *intent* on the part of the maker, and while language may be used in one part of a will creating a defeasible fee another clause may show that such was not the purpose of the testator.

The will before us gives no room for any other construction than such as must necessarily follow from the provision before us as there is no other clause of the will affecting the title to this devised estate. Besides, this provision of Phillips' will was construed by this court many years since (1872), and it was then held that the estate in Mrs. Kellar, who was one of the grandchildren, was a defeasible fee and, further, that those who might take possibly in the happening of the contingency were not necessary parties. Dow v. Kellar, MS. opinion.

As to the constitutionality of the act there can be no question, and the case of Gowan v. McFerran, 79 Ky., 236, has no application. In the latter case the owner in fee was objecting to the sale. Here there was no objection but a consent by pleadings and a consent by Mrs. Christmas after advising with the chancellor that her estate, which was uncertain as to its duration, might be sold with the contingent interest and for the benefit of all parties.

The proceedings were had in accordance with the statute and the sale by the chancellor under the act of August 23, 1862, passed to the purchaser the title, and the appellee being invested with title, the judgment below must be affirmed. Sale v. Crutchfield, 8 Bush, 636; Mills v. Mills, 85 Ky., 486; Parish v. Vaughn, 12 Bush, 97.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

MONYHAN v. NELMS, &c.

Filed October 26, 1892. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

Enforcement of liens by lien-holders made party defendants—Consolidated actions—Service of process—Section 692 of the Civil Code provides a way in which lien-holders, made party-defendants, can come into court and secure judgments enforcing their liens without further services of process, but before they can avail themselves of this extraordinary remedy they must follow strictly the requirements of the law.

To an action to enforce a lien created by mortgage executed by husband and wife upon the wife's land the plaintiff made the "Saturday Night Building and Savings Association" a party-defendant, alleging that it had a lien on the same property. Summons was served on the mortgagors. Thereafter the plaintiff filed an amended petition alleging that the statement in the original petition that the "Saturday Night Building and Savings Association" held a lien, was made by mistake and that the lien was held by the "Ashland Building and Savings Association," which was made a defendant and called on to assert its lien. No summons was served on this amended petition. Prior to this the latter association had instituted its action in the same court, seeking an enforcement of its lien, and in that action summons was served on the husband, but not on the wife. Thereafter the association appeared in the action to which it was made a defendant, and on its motion the two causes were consolidated and judgment rendered for sale of property to satisfy both liens. Before the sale the wife, the owner of the property, moved the court to set aside the judgment and afterward excepted to the report of the sale. *Held*—That the court was not authorized under section 692 of the Code to order a sale of the property in the consolidated actions, when the owner of the property was not before the court in one of them. If in the original petition the plaintiff had made the true lien-holder a party-defendant, or perhaps even if that association had, on the filing of the amended petition, filed its answer and cross-petition, asserting its lien, a judgment of sale could have been rendered without service of process, but this record presents a different proceeding.

Hill & Sharp for appellant; Nelms & Bickers for appellees.

CRADDOCK v. BURBRIDGE.

Filed November 16, 1892. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Barbour, affirming.

Libel Any written slander tending to render the party subject to disgrace, ridicule or contempt is actionable, though it does not impute any definite crime; and if published without lawful justification or excuse, it is immaterial what the intentions may have been.

In this case for the following words published in a newspaper are held to be actionable *per se:* "Last week we had an item to the effect that B —— had put some strychnine on a chicken leg and placed it in a hay stack belonging to A——, and that Mr. A had burned his hay to destroy the result of the poison. Since that time Mr. A. has lost about $500 worth of fine Cotswold sheep, and he attributes the loss to poison from the same source."

G. C. Lockhart for appellant; Prall & Dickson and Huston & Mulligan for appellee.

DENHAM v. ANDERSON.

Filed November 16, 1892. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Validity of ordinance—Forfeiture of stock running at large*—A city ordinance providing for the impounding of stock running at large, and for a

Digitized by Google

forfeiture and sale of the stock under order of the city court to pay the fees and cost of impounding, after notice to the owner of the proceedings for a forfeiture and sale, is valid, provided such an ordinance is authorized by the charter.

2. *Same—Due process of law*—Where such an ordinance requires that the chief of police shall give "reasonable notice" to the owner of the time and place of the proceedings in the city court for a forfeiture and sale, a verbal notice is not sufficient, as such notice is not "due process of law," and it is not to be presumed was within the intention of the framers of the ordinance.

3. *Same*—The fact that the ordinance provides for notice to the owner, "if he is known to the cheif of police," does not authorize a sale without notice where the owner is not known, as the owner, whether known to the chief of police or not, can not thus be deprived of his property without due process of law, and the court must assume that it was not the intention of the framers of the ordinance to thus disregard the fundamental law of the land.

4. *A judgment without service of process*, or appearance of the party to be affected by it, is void. The fact that he has personal knowledge of the proceeding can not confer jurisdiction.

Will C. Curd for appellant; Morrow & Waddle for appellee.

FREEMAN v. SALLEE BROTHERS, &c.

Filed November 16, 1892. Appeal from Pulaski Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Preference of creditors—Fraudulent conveyance—Consolidated actions Where an action by a creditor to set aside a conveyance made by his debtor upon the ground that it was in fraud of creditors was consolidated with an action by another creditor to have the same conveyance declared to operate as an assignment under the statute, upon the ground that it was made with the design to prefer, and the evidence in the consolidated actions established the debtor's insolvency and the design to prefer, the chancellor properly adjudged that the transfer operated as an assignment, and the fact that the plaintiff, who based his action upon the ground of a fraudulent transfer, without consideration, failed to sustain the allegations of his petition, does not affect his right to a *pro rata* share in the proceeds of the property. Nor did the chancellor err in adjudging to the plaintiffs in the consolidated cases all their costs incurred in seeking to set aside the sales.

Will C. Curd for appellant; O. H. Waddle for appellees.

CINCINNATI, &c., R. R. CO. v. RICHARDSON.

Filed November 16, 1892. Appeal from Jessamine Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Duty of railroad as to passengers alighting*—It is the duty of a railroad company to stop its trains at its stations so that passengers can alight upon the platform, and a reasonable time must be given them to leave the cars with safety.

2. *Where a passenger is carried beyond his destination*, without fault on his part, he has a right of action for at least nominal damages, and for such actual damages as he may have sustained. And if, without his consent, he is compelled to leave the train between stations, the jury may, in estimating damages, consider not only bodily pain, but connected with it mental suffering, anxiety, fright and a sense of wrong received as a result of the injury.

3. *Exemplary damages* may be recovered of a railroad company for an injury to a passenger resulting from a violation of duty by one of its employes in charge of the train, if such violation of duty be accompanied with insult or other willful misconduct evidencing a reckless disregard of consequences.

4. *Duty of railroad as to passenger leaving train between stations*—If for any reason a passenger on a railway train is invited to leave the train between stations where the usual means of descent are absent, it is the imperative duty of the employes in charge of the train to stop it at a safe and suitable place where it may be left with safety, and to assist the passenger to alight.

Digitized by Google

5. *Error in instruction cured*—While one of the instructions in this case is faulty, in that it makes the railroad company responsible for damages, even though plaintiff may have left the cars willingly and been properly treated by the employes, yet, when considered in connection with the other instructions, which were explanatory of it, the jury could not have been misled by the error, and, therefore, defendant was not prejudiced.

6. *Instruction not asked*—The appellant can not complain that no instruction defining gross negligence was given, no such instruction having been asked.

7. *Instruction singling out particular facts*—As the instructions presented to the jury the whole array of facts put in issue by the pleadings, the objection that they single out and bring into undue prominence certain facts is not well taken.

8. *Excessive verdict*—Plaintiff, while a passenger on one of defendant's trains, was not given time to leave the train at her station, and was afterward put off beyond the platform on a steep embankment, where she was compelled to jump from three to four feet from the lowest step to the ground. One of her children was helped off the brakeman so carelessly that he rolled down the embankment. Plaintiff testified that she was so greatly frightened by seeing the child roll down the embankment and hearing his cries, and by being left in such close proximity to the train as it passed her that she was confined to her bed during the next day and had not been well since the occurrence. *Held*—That a verdict for plaintiff for $1,500 is not excessive.

C. B. Simrall and Bronaugh & Bronaugh for appellant; Ben P. Campbell and Everett D. Hoover for appellee.

Marion National Bank v. Russell.

Filed November 16, 1892. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Alteration of note*—A note materially altered by the holder is useless for any purpose if the alteration was made without the knowledge or consent of the maker.

2. *Same*—The addition of a place of payment to a non-negotiable instrument is a material alteration.

3. *Same*—When a person signs a note wholly in blank, or blank in certain particulars, he impliedly gives authority to the holder to fill the blanks in accordance with the general character of the instrument. Therefore, where the addition is made in a line left blank for that purpose, and is such an alteration as would not attract the notice or arouse the suspicion of the most prudent man, the maker is liable to an innocent purchaser for value, notwithstanding the alteration. But where the alteration is made in such a bungling and awkward manner as would put any prudent purchaser in inquiry as to its genuineness, the maker is not liable.

In the note sued on here the words "payable at" were printed in its lower left hand corner, with no line following it for the insertion of a place of payment. Under these words in the extreme corner the name of a bank was added after the note was delivered, some of the words added being in a line lower than the signature of the maker. *Held*—That the alteration was made in such a manner as to put any prudent purchaser on inquiry, and, therefore, the court properly refused to instruct the jury that if the plaintiff bank in good faith purchased the note without notice of the alteration they must find for plaintiff. And while the question as to whether or not defendant was palpably negligent in not taking sufficient precautions against the alteration might well have been submitted to the jury, under proper instructions, yet as plaintiff asked no such instruction it can not complain that the question was not submitted.

4. *Same*—The purchaser of negotiable paper takes it at his peril as to its genuineness.

W. J. Lisle for appellant; Rives & Spalding for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. DECEMBER 15, 1892. No. 12

KENTUCKY COURT OF APPEALS.

SMITH, &c. v. SMITH, &c.

(*Filed May* 21, 1892—*Not to be reported.*)

Trusts--Limitation—When a trustee fails to sue upon notes held by him in his fiduciary capacity until after an action thereon is barred by the lapse of time, the right of the *cestui que trust* is so affected by the failure that his right of action is also barred, and his only remedy is against the trustee for his failure to collect the notes.

Bullett & Reeves for appellants.

Husbands & Husbands for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The facts of this case are recited in the opinion of this court in the case of Smith's trustee v. Smith, 10 KY. LAW REP., 437. That was an action by John K. Smith as trustee for his two children, the present appellants, while this is an action by them, they claiming that when the first-named suit was brought they were of age and that their father was not their trustee and occupied no fiduciary relation as to them.

It did not appear in that case that the notes on Wm. H. Smith represented a part of a fund upon which the character of a trust had been impressed, save as to the wife of John K. Smith, and it was doubtful if even that had been sufficiently shown; but if so, upon her death, in 1871, they became the property of John K. Smith, and it appearing that the transaction out of which they arose was a fraudulent one, and he a party to it, a court of equity would not lend itself as a means to collect them. Moreover John K. Smith had, in the meantime, been adjudged a bankrupt.

It is urged for the appellants that it is now shown the fund, by virtue of the trust, belonged to them; that the notes on Wm. H. Smith represented a part of it, and even if a fraudulent transaction was involved in their execution, yet as they were not parties to it,

Digitized by Google

they should not be affected by it, and that the judgment in the suit in the name of their father as trustee, inasmuch as he was not such fiduciary, is not a bar to the prosecution of this action.

Waiving these questions, it appears this is an action for the collection of the two notes given by W. H. Smith to King, and the enforcement of a lien upon the property held by Henry Smith. They were executed on May 15, 1868, and due in one and two years. This suit was brought on January 2, 1889, or over eighteen years after their maturity. Limitatation is pleaded. It matters not that they represented a part of a trust fund, conceding this to be true. When they matured, limitation began to run. If a trustee fails to sue within the statutory period the *cestui que trust* is affected by it, and if entitled to any relief by reason of the delay or neglect, he must look to the trustee.

It is conceded that while the notes were on Wm. H. Smith, yet Henry Smith or his property was to pay them, but whether the party had to look to the one or the other, yet he had to do so within the time allowed by law, which, upon a note, is fifteen years after its maturity.

There is no sufficient evidence that the notes were kept alive by any promises of the one or the other of such a character as to have this effect.

Counsel appear to claim that Wm. H. Smith held the property of Henry Smith in trust for the payment of the debt. If this be so, it can not affect the question. It was the duty of the creditor to assert his claim within a certain time, and Henry Smith is also relying upon limitation.

Even if the debt was to be satisfied by a conveyance of the property in satisfaction of it, yet this action does not seek such relief.

Its purpose is to obtain a judgment for the debt and an enforcement of an alleged lien to pay it.

This remedy can not be resorted to by reason of the lapse of time.

Judgment affirmed.

ANDERSON, &C. V. CITY OF MAYFIELD, &C.

TICE V. CITY OF MAYFIELD, &C.

(*Filed May* 24, 1892.)

1. *Municipal taxation—Assessment*—The provision in a city charter requiring the assessor to make his assessment and return his lists on or before a certain time is not mandatory but merely directory, and for the purpose of expediting the assessment and collection of taxes for the benefit of the city, and in the absence of words prohibiting the making of the assessment after the designated time, such assessment will be considered valid, though made at a later date.

2. *Same—Rights of tax-payers*—A tax-payer can not be excused from paying his city taxes on the ground that the taxes are being improperly expended by the city.

3. *Same*—When the tax imposed is authorized by the city charter, a citizen can not refuse to pay his part thereof on the ground that such tax was unnecessary. The necessity for the tax is a question to be determined solely by the taxing committee, a board created in such city by its charter.

4. *Same—Right to set-off*—The tax-payer can not plead an indebtedness of the city to him as a set off against his taxes, unless expressly authorized by statute to do so.

Digitized by Google

5. *Same*—After the lists were returned by the assessor, the city council, as to certain property, entered opposite the list a certain amount as a sum to be added to the value already fixed by the assessor. The owner of the property was given due notice to appear and show cause against such increased assessment. Then the lists, as thus raised, were adopted by a resolution of the council. *Held*—That it was not required by the charter of the town that the council should, by resolution, raise the assessed values of each piece of property or the property of each citizen separately, one resolution, as adopted, being sufficient.

6. *Same*—When a charter authorizes the levy and collection of an annual *ad valorem* tax "upon all real and personal estate within the limits of said city subject to taxation for State and county purposes," the law in force at the date of the assessment concerning taxation for State and county purposes determines what property is subject to such municipal taxation, even though it was enacted after such charter was adopted.

7. *Same*—But a citizen can not enjoin the collection of such municipal tax on the ground that the State revenue law, in effect at the time of the adoption of the charter, was followed rather than the latter one, unless he avers that he has been injured by the failure to follow the last-named law.

Webb & Johnson and W. W. Tice for appellants.

D. G. Park and R. O. Hester for appellees.

Appeal from Graves Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

These cases involve mainly the same questions and will, therefore, be considered together. They seek to enjoin the sale of property levied upon for city taxes.

The grounds relied upon are quite numerous and only those will be considered which we deem important.

The charter of the city of Mayfield provides that its assessor shall make his assessment and return his lists to the proper office by a certain time. This was not done. The assessment was made after the prescribed period. This provision is not, however, for the benefit of the tax-payer. It is not important to him. Its object is to secure for the city order and dispatch in the collection of its taxes and the transaction of its business.

Such provisions are not regarded as mandatory in the absence of words importing that the required act shall not be done at any other time than that designated. No such negative words are contained in this charter. A person should not be allowed to rely upon the mere non-feasance of an officer when it is not important to that person and thus escape the performance of his own duty.

Even the omission of property in making an assessment, either through the negligence or default of the assessing officer or where it occurs through mistake of law, does not vitiate the tax. If so, as all men are fallible, no tax could ever be collected, and the government would fail. Cooley on Taxation, page 155.

The requirement being merely directory the making of the assessment at a later period did not render it and proceedings based upon it void.

Even if the taxes were being improperly expended, yet the tax-payer can not, therefore, refuse to pay his tax. He can not have relief in this way. He must do his duty and look to the law to compel a proper expenditure.

The tax in question was authorized by the city charter, and in such a case, whether its imposition be necessary, is a matter for the determination of the taxing power.

Digitized by Google

It was attempted in one of these cases to prevent the collection of the tax, provided it was legal, by the assertion of an alleged indebtedness of the city to the tax-payer. This can not be done unless expressly authorized by statute. A tax grows out of a duty and not out of contract. It is not collectible by suit unless expressly authorized. It is not a demand founded upon a contract or a judgment.

Cooley says: "Taxes are not demands against which a set-off is admissible, their assessment does not constitute a technical judgment, nor are they contracts between party and party, either express or implied, but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required." Cooley on Taxation, page 13.

If the rule were otherwise the machinery of government would be liable to interruption. The nature of a municipal tax, the purpose of it, forbids the assertion of a demand as a set-off, unless expressly authorized by statute. This rule is necessary to the continuance of the government. Himmelman v. Spangel, 39 Cal., 389.

It is also averred in the one case that the tax is upon an unauthorized raised value of the property. It appears after the lists were returned the city council as to certain property entered opposite the list a certain amount as a sum to be added to the value already fixed. Notice was then given to the owner to appear and show cause, if he had any, against this change, and the charter provides that after the council shall have completed its revision the tax book shall be received by a resolution of the board.

It is contended that its action should, in such instance, where a change is made from the value returned by the assessor be shown by the record of its proceedings and without an order it is but an attempt to change the assessment. This is not required, however, by the charter. The legislature did not intend so much formality.

It would probably have involved much labor and unnecessary record. The charter merely requires what was done in this instance. It is not averred that the assessment, after revision, was not approved by a resolution of the board, and in the absence of such an averment it must be presumed this duty was performed.

May 17, 1886, a new State revenue law became operative. The assessment in question was made after that date.

The charter of the city of Mayfield was passed May 1, 1884. It provides that its council may levy and collect an annual *ad valorem* tax, not exceeding a certain sum, "upon all real and personal estate within the limits of said city, subject to taxation for State and county purposes, to be applied to general, local and municipal purposes."

The assessor, in making this assessment, followed the State revenue law in force when the charter was enacted instead of the new one. It is contended for the city that this was proper and that the Legislature intended to provide a complete body of law for its government. It is true the charter provides a form of assessment in which are enumerated taxable articles, but it provides that it may be changed by the council by ordinance. This shows that provision was made for a possible change of taxable property.

It is true the new State revenue law did not expressly repeal any provision of this charter, and it is also true that where there is a grant of power to tax to municipalities it is presumed a repeal by implication was not intended by subsequent general legislation.

A local statute will not be regarded as repealed by a general one,

Digitized by Google

which has no negative words, although repugnant, unless there be something manifesting a legislative intention to do so. 1 Dillon's Mun. Corp., section 87.

It is also true that the adoption of one statute by another re-enacts the first one as a part of the latter, and subsequent alterations or modifications of the one so adopted do not become a part of the second statute. In case of adoption the effect is the same as if the adopting statute contained in full the provisions of the one adopted.

If a local law refers to a general law and the latter be subsequently repealed such repeal will not operate as a repeal of the local law so far as it refers to the general law. Nunes, &c. v. Willisch, &c., 12 Bush, 263.

But these rules have no application in these cases. It is evident the Legislature intended, by providing that the taxation should be upon all property "subject to taxation for State and county purposes," that the State law in force when the assessment might be made should govern.

Judge Dillon says: "Authority conferred by the charter of a village corporation to assess taxes upon the freeholders and inhabitants of said village according to law means according to the provisions and principles of the general tax law in force at the time the assessment is made."

This construction of the legislative act is reasonable because changes, which are constantly occurring in the character and value of property, make proper a change of assessment.

The one now under consideration should have been made in accordance with the State law then in force. The appellants fail to aver, however, how they have been injured by this not having been done. It is true they say in a general way that if it had been done more property would have been included and the per cent. of taxation would have been less, and one petition avers that it would have been lessened twenty per cent., but this is merely pleading a conclusion. The pleader should have set forth definitely, by enumerating the changes as to particular species of property or in some way have shown the manner in which it would have benefited him or have shown by some statement of facts in what manner he has been injured. For aught that appears the assessment may have been to his advantage.

The demurrers to the petitions were properly sustained and the judgments are affirmed.

CARLISLE'S ADM'R V. GREEN, &C.

(*Filed June* 14, 1892—*Not to be reported.*)

Equalization of advancements—Devises—A father made advancements in land to his son and to his daughter. The latter lost the land so advanced to her by the superior title thereto of another, and she and her husband were compelled to account for rents thereof. After the father's death, in an action brought by the daughter against the son, who was the father's administrator, for an equalization of advancements and a settlement of the father's estate, a judgment was rendered whereby a certain portion of the land owned by the father at the time of his death was allotted to the daughter to make her equal by way of advancement with the son, and by which a sale of the balance of said land was ordered in order to compensate the daughter for

Digitized by Google

the land she had lost and the rents she had been compelled to pay. Thereafter the son died and left a will devising to his wife the land which had been advanced to him by his father, and devising his undivided interest, which he had inherited in the land owned by his father, to the two children of his sister. *Held*—That the sister can not look to the land devised by the son to his wife for the satisfaction of her judgment for the rents paid by her for the land she lost, but must look to the son's interest in the land owned by the father, which was devised by the son to the daughter's children.

Collins & Finley and D. A. Glenn for appellant.

O'Hara & Bryan and O. S. Tanney for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Holt.

R. M. Carlisle died intestate in October, 1875. He had made certain advancements to his two children, C. M. Carlisle and the appellee, Susan Green. The son became his administrator and after several setttements had been made by him as such representative the daughter and her husband brought this action against him, both as administrator and heir, for an equalization of advancements and a full settlement of the estate.

A portion of the land that had been advanced to Mrs. Green had, after being considerably improved by her and her husband, been lost to them by a superior title in an action brought before the death of her father, and they compelled to account for a considerable sum in the way of rents. Her father, at his death, had but little estate, save a tract of land containing something over two hundred acres. She claimed that she was entitled to be made equal with her brother in amount of advancement and to be re-imbursed the value of the land lost, that had been advanced to her and the money paid by her husband as rents.

To this end a sale of the land owned by her father at his death was sought, it being fully described in her pleading. Issues were formed between the parties, the case was referred to the master, who reported that a certain sum was necessary to equalize Mrs. Green with her brother in advancements, and that she was also entitled to a certain sum for the land that had been lost and the rents that had been paid by her or her husband.

Exceptions were filed to the report and, on January 28, 1886, the court rendered an extended judgment, fixing the rights of the parties, which has never been reversed or modified, save so far as the judgment in question does so.

It directed that enough of the land owned by her father at his death be allotted to Mrs. Green to equalize her with her brother in advancements and the amount of which was fixed; it also fixed the sum to which she and her husband were entitled by reason of the loss of a part of the land that had been advanced to her and the payment of rents, and ordered a sale of the balance of the land after equalizing Mrs. Green in advancements or so much of it as might be necessary to pay it, as well as $1,577.24, with interest from January 1, 1884, owing to C. M. Carlisle.

A little over sixty-seven acres were allotted to Mrs. Green under this judgment by way of equalizing her in advancements and, in February, 1886, C. M. Carlisle died testate, devising and bequeathing to his wife, the appellant, George A. Carlisle, the farm on which he lived (which had come to him from his father as an advancement)

Digitized by Google

and all of his personalty, with the request that out of the latter she pay all of his just debts. This was all of his estate, save his individual interest in the land owned by his father at his death, and this individual interest he devised to the two children of his sister, Mrs. Green, to-wit, E. J. and Rob't K. Green, to be equally divided between them.

After his death the report allotting to Mrs. Green a portion of the land owned by her father at his death by way of equalizing her in advancements was confirmed and, on September 21, 1888, the appellees, over the objection of Mrs. Carlisle, against whom as administratrix of her husband the judgment of January 28, 1886, had been previously revived, filed what they termed a supplemental petition, which recites the history of the case, avers the death of C. M. Carlisle and his disposition of his estate and asks a judgment against Mrs. Carlisle for a sum equal to the value of the half interest of her husband in the land left by his father, less what had been allotted to Mrs. Green, the amount not to exceed, however, one-half the sum that had been allowed them for the land advanced Mrs. Green and lost by superior title and the rents she and her husband had been compelled to pay, and that they be adjudged a lien therefor on the land devised to Mrs. Carlisle by her husband.

It is apparent this move was made to save the devise by C. M. Carlisle to the Green children, and it is claimed that this is proper as he exercised his right to devise his interest in the land that had been ordered to be sold. In other words, as he exercised this right Green and wife may, at their option, look to the balance of his estate for so much of the one-half of their judgment as his father's land would have paid, and let the devise of it stand good to their children.

A demurrer to this pleading was overruled. An answer was filed, relying on the January, 1886, judgment as a bar to the proceeding and claiming that Green and wife must look to it for the satisfaction of their claim. A demurrer to this answer was sustained and the relief asked by the supplemental petition granted, with direction to ascertain the value of C. M. Carlisle's interest in the land which descended to him from his father, less the portion allotted to Mrs. Green, and which he devised to her children.

We are at a loss to know upon what ground, either legal or equitable, the lower court based its action. The will of C. M. Carlisle is not dated and it must be presumed to have been executed the day of his death It speaks as of that day and there was then a *lis pendens*, seeking to subject his interest in the land descended to him from his father to the payment of the Green claim. Not only so but there was then a judgment to sell this land to pay it. It was then an incumbrance upon it and the testator must be regarded as having devised it to the Green children with this lien upon it.

They took it *cum onere*. Its subjection to the judgment does not defeat what must be considered, under the circumstances, to have been the testator's purpose. The alienation stands as he made it, but subject as it then was to the judgment lien He knew of the claim to subject it; that a judgment was then in existence to do so; that it had been partially executed by the allotment of a portion of the land to Mrs. Green, and he, doubtless, devised it, expecting it would be subjected, so far as might be necessary, to that judgment. In any event he only devised his interest, whatever it might be.

The only ground upon which the judgment appealed from can be sustained, if at all, is that the testator devised away absolutely his interest in the land descended to him and provided for the pay-

Digitized by Google

ment of his part of the Green claim out of the balance of his estate; but this view is not sustained by the facts of the case, and the appellees, Green and wife, must look to the January, 1886, judgment for the satisfaction of their claim.

It fixed the rights of the parties, it determined from what source the means to pay the appellees should be derived, it settled every question in the case, it was rendered at their instance, it was not personal in character against C. M. Carlisle, and there should be a reason and plain equity in a request to shift the burden to the property devised by him to his wife, if indeed it can be done at all with the judgment of January, 1886, in force.

One devisee should not be preferred over another without good equitable reasons in the absence of a direction to that effect from the testator. If it be said the devise by C. M. Carlisle to the Green children of the land descended to him was an alienation of it within section 8, article 1, chapter 44, General Statutes, which makes the heir liable for its value to the creditor of the decedent in case of alienation, yet, even if this be so, it was aliened subject to the judgment lien.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

DRISCOLL V. COMMONWEALTH.

COMMONWEALTH V. RICE.

(*Filed Oct.* 20, 1892.)

1. *The Legislature has the constitutional authority to enact laws requiring those who undertake to practice a profession in this State* to give evidence of their qualifications and skill by the exhibition of a license from those who, in the legislative judgment, are competent to determine whether the applicant possesses the necessary qualifications to practice such profession. This authority of the Legislature proceeds from its inherent power to prescribe rules for the protection of the health and safety of the people.

The acts of February 23, 1874; April, 1888, and May, 1890, concerning the practice of medicine by physicians in this State, are valid and constitutional.

2. *Same*—Such acts do not discriminate against any school or system of medicine, and can not be held invalid on that account.

3. *Physicians—Registration*—Under the act of April, 1888, a physician holding a diploma from a reputable medical college, chartered by the State of Ohio, is not authorized to practice medicine in this State unless such diploma has been certified and indorsed by a medical college of this State, or by the State Medical Society, in the manner directed in said act, and registered, &c., in the county clerk's office. The Secretary of the Board of Regents of a medical school of this State had no authority to indorse and certify such diplomas.

4. *Same*—One claiming the right to practice medicine in this State by reason of the length of time he has practiced such profession must have so practiced his profession for ten years prior to the act of 1874 in order to qualify him to so practice thereafter. And the practice of the profession for ten or any other number of years after the passage of that act does not of itself confer such right on one.

Albert A. Stoll and Kinney & Kinney for appellant, Driscoll.

R. C. Davis for appellee, C. W. Rice.

Digitized by Google

Kohn, Baird & Speckert, E. W. Hines and W. J. Hendrick for Commonwealth.

Appeal from Louisville City Court.

Opinion of the court by Judge Pryor.

These two cases involving the same question will be considered together.

An act of the Legislature was passed on the 23d of February, in the year 1874, for the purpose of preventing incompetent physicians and surgeons from practicing their profession within the State, the act reciting *that it is of the greatest importance that none but persons with competent qualifications should be allowed to practice a profession to whose skill and ability the life of the citizen is entrusted, &c.*

This enactment has been amended from time to time, and by the act of April 25, 1888, it is provided that there shall be a registration of all physicians in the county court of each county (that is where they reside), and by section 2, "that on and after the first day of April, 1889, it shall be unlawful for any person to practice medicine in any of its departments within the limits of this State who has not exhibited and registered in the county clerk's office of the county where he is practicing, or intends to commence the practice of medicine, his authority for so practicing medicine as prescribed in this act, the name and location of the college issuing the same, if it be a diploma, the date of the same, together with his age, residence, place of birth and the school or system of medicine to which he proposes to belong;" and by section 3 it is provided that authority to practice medicine under this act shall be "a diploma from a medical school legally chartered under the laws of this State; a diploma from a reputable and legally chartered medical school of some other State or country (certified and indorsed as such by the faculty of a legally chartered medical school in this State or by the State Medical Society); an affidavit from the person claiming the same that such person is exempted from obtaining a diploma under section 2 of the act to which this is an amendment." Sections 2 and 3 of the original act permitted one to practice who had been a practicing physician for ten years, or who had been examined by the medical board and found qualified.

Under the act of April, 1888, a diploma was required from a medical school of this State, or from one chartered out of the State, and indorsed as such by a medical school or State Medical Society of this State. This requisite does not apply, however, to physicians who had practiced ten years within this State prior to the passage of the original act of 1874. The act of April 25, 1888, was again amended on the 24th of May, 1890, dispensing with the indorsement of a medical school or medical society where the diploma was obtained out of the State, and requiring the indorsement to be made by the *State Board of Health.*

This last amendment does not apply to cases where physicians have, prior thereto, by complying with the previous amendments on the subject, entered upon the practice of their profession, and affects only on those who have failed to comply with the provisions of the former statute, or who, since the passage of the act of 1890, have commenced the practice without complying with its provisions.

If Driscoll, who seems to have been practicing his profession before the act of 1890 was passed, had complied with the law in existence prior to that time his right to practice could not be questioned.

Digitized by Google

The act of the 25th of April, 1890, is not retroactive, nor should such a construction be given it.

He produces a diploma from the Starling Medical College, located in the State of Ohio. It is agreed that it is a chartered institution and a reputable college. In the month of March, 1889, he registered in the Jefferson county clerk's office by presenting his diploma with the indorsement of one Kalfus, who was the secretary of the Board of Regents Kentucky School of Medicine. Kalfus had no authority to indorse diplomas, nor was he a member of the faculty of the Kentucky School, still, on his statement that he had the authority to make the indorsement, the appellant, Driscoll, registered. In April, 1889, he also sent his diploma to Dr. McCormick, at Bowling Green, for indorsement, and it was returned without explanation. The appellant seems to have made an effort at least to comply with the law, but failed to have the indorsement as required prior to the act of the 25th of April, 1890, and it is not pretended that he has the indorsement required by the provisions of that act.

It does not appear what system of medicine was taught in the medical school in which the appellant, Driscoll, graduated, and this is immaterial, as the statute expressly provides "that nothing in this act shall be so construed as to discriminate against any peculiar system or school of medicine, or to prohibit women from practicing midwifery, or to prohibit gratuitous services in case of emergency, &c."

So a diploma from a reputable college, in which there may be taught a new system of practice, or in which there may be a departure from the old system, affords no reason for withholding an indorsement by the board of health, and there being no discrimination in this regard, we perceive no constitutional objection to any of the provisions of the act, unless they are so unreasonable as to preclude those qualified from practicing their profession.

We see no reason for denying the right of the Legislature to enact laws for the protection of the people by requiring those who undertake to practice a profession to give evidence of their qualifications and skill by the exhibition of a license from those who, in the legislative judgment, are competent to determine whether or not the applicant has the necessary qualifications to practice the particular profession. The citizen, of necessity, must, when diseased, employ the physician, and the lawyer when his right of person or property has been violated. The entire public is interested in knowing, or in having the means of ascertaining, whether the physician he desires to employ has a sufficient knowledge of medicine as enables him to practice his profession, and for the welfare and safety of the citizens the Legislature may say that you shall not practice medicine unless you have the indorsement of the board skilled in the profession. The patients of the physician must rely on his knowledge of medicine, and his mode of administering it, and the entire public being interested in having physicians learned in the profession, it is competent for the Legislature to prescribe the mode of determining the qualifications of those who propose to embark in the practice.

The constitutional question has been raised and decided by many courts, all holding that where the conditions imposed upon the profession by the law making power, before one can enter upon the practice, are reasonable, they must be complied with or the penalty imposed will be enforced.

The Supreme Court, in the case of Dent v. West Virginia, reported in 129 U. S., has determined the constitutionality of such laws in a

Digitized by Google

case where the statute of West Virginia was very much like that of this State. The right of a State to enact such laws proceeds from its inherent power to prescribe such rules as will protect the health and safety of the people. State v. Gregory, 53 Am. Rep., 565; State v. Medical Society, 50 Am. Rep., 575; Case v. Bauer, 6, E. R., 803; Harding v. People, 15 Pacific Reports, 727.

The judgment as to Driscoll is affirmed, this court further holding that the information filed with the warrant, and upon which that writ issued from the city court, gave to the appellant sufficient notice of the charge made against him.

In the case of the appellant, Rice, unless he has been a practitioner for ten years before the passage of the act of 1874, it was his duty to comply with the provisions of that act. The information on which the warrant was issued, and that must be regarded as the complaint, states that the appellant registered by stating that he had been a practitioner for twelve years prior to the year 1889, when the act required that he should have practiced ten years prior to the passage of the law of 1874. If, therefore, Rice had not practiced medicine ten years prior to the act of 1874, he has been violating its provisions since if he has continued to practice. It is an unreasonable contention to hold that one can become qualified to practice by the mere lapse of time, after the law has been enacted, when he is violating its letter and spirit every day that he fails to comply with its provisions. We think, on demurrer, that the information is sufficient, and the same technical rule should not be applied in such a proceeding as in an indictment; but if it is to be so held, the failure to register as required by the statute is distinctly alleged in the information.

As to Rice the judgment is reversed and remanded for proceedings consistent with this opinion.

Judge Pryor delivered the following response to petition for rehearing:

Counsel for the appellee seems to have overlooked the fact that this case had been decided on a demurrer to the pleadings, in which it is distinctly alleged that the college was not a reputable college from which the appellee received his diploma.

The appellee seems never to have complied with the provisions of the original act of 1874, or attempted to comply with its provisions until long after the amendments to that act were enacted. What defense he is prepared to make we do not know. If he was a practitioner ten years before the act of 1874 was passed, he is entitled to practice his profession; or *if a graduate of some chartered school of medicine* prior to the act of 1874, he is entitled to practice; or if not, he may have complied with the amendments to that act, entitling him to practice.

This court did not adjudge that the overruling of the demurrer deprived him of his defense, if he has any.

TAYLOR V. TAYLOR, &C.

(*Filed May* 21, 1892—*Not to be reported.*)

1. *A receipt in full given by a ward, shortly after his arrival at full age, to his guardian* does not present a bar to an action by the ward to surcharge the guardian's county court settlements and for a full settlement of his accounts.

Digitized by Google

2. *Guardian and ward—Accounts*—A guardian who takes possession of, cultivates and appropriates the proceeds of a farm belonging to his ward. instead of leasing it to another, must account to the ward for the net proceeds so received; but is entitled to credit for the fair value of his services in cultivating the land, and for his expenses in so doing, as well as for taxes paid and improvements made by him.

3. *Same*—A guardian took possession of his ward's land and cultivated it for eleven years, appropriating the proceeds to his own use. In the settlements of his accounts as guardian in the county court, he was charged with much less than the annual rental value of the farm; and in these settlements he claimed credit for much less than he was fairly entitled to—claimed no credit at all for many items of expenses incurred by him as guardian, and was allowed no commissions or compensation. In this action to surcharge the county court settlements and for an accounting, it appears that the guardian kept an accurate account of the proceeds derived by him from the farm, which aggregate a large sum, but that he has no account of his expenses of operating it, and this sum can not be accurately ascertained. It also appears that the guardian was entitled to more credits than he claimed in the county court. *Held*—That, under all the circumstances, it will be a fair adjustment of the accounts to charge the guardian only with a fair rental value of the land, and to allow him as credit only what he claimed in the county court.

J. Q. Ward, Emery Whitaker and J. R. Miner for appellant.

J. B. Clarke and Geo. Doniphan for appellees.

Appeal from Backen Chancery Court.

Opinion of the court by Judge Lewis.

August 26 and 27, 1866, Samuel Taylor and wife died, leaving three children, Eloise eleven, Milton eight and Everitt six years of age; and August 30, 1866, Charles W. Taylor, a brother of their father, and whose wife was a sister of their mother, was appointed guardian of the infants. Samuel Taylor left little personal estate, only about $20 having been received by the guardian, but owned at his death a valuable and productive farm of about 157 acres, worth $70 per acre, to which Chas. W. Taylor removed in the spring of 1876, taking his three wards with him, and had continued possession, control and use of it for eleven years thereafter.

Eloise died March, 1872, under age, and Everitt died June, 1882, being of full age, leaving Milton Taylor sole owner of the farm and rents and profits thereof, not already accounted for by the guardian.

August 19, 1885, Milton Taylor instituted an action in his own right against Charles W. Taylor and sureties in his guardian bonds, asking to have his several settlements with the county court, alleged to have been falsely made, surcharged, and judgment for one-third of the products of the farm received and appropriated by Chas. W. Taylor during the period mentioned to his own use, and to that end he prayed the court to require him to make a full statement of all the crops grown on the farm from 1866 to 1878, inclusive, and the amount of money received by him from sales thereof.

On the same day, August 19, 1885, Milton Taylor instituted against the same defendants two other actions, one as administrator of the estate of Eloise, and the other as administrator of Everitt Taylor, in each of which, for the same alleged cause, he asked the same relief as is prayed for in the first mentioned action. The three actions were consolidated and tried together, and, upon final hearing, judgment was rendered in favor of Milton Taylor for the sum of $5,119.17,

Digitized by Google

which comprises the entire amount he was adjudged by the lower court entitled to recover in the three actions.

It appears that Charles W. Taylor made a settlement as guardian of each of his three wards in 1868, 1870 and 1872, and Eloise having died, he, as guardian of Milton and Everitt, made settlements in 1874 and 1878, all of which were confirmed. It further appears that September 15, 1879, a short time after arriving at the age of twenty-one years, Milton Taylor gave to his guardian a receipt, in which he stated a settlement had been made and he was paid the full amount due him. In 1882, a short time after the death of his brother, he gave him another receipt of the same purport. But, in view of the circumstances under which those receipts were executed, they do not constitute a bar to these actions, nor present any obstacle to a fair settlement of the transactions of Chas. W. Taylor as guardian, and his counsel do not so contend.

The guardian was charged by the county judge with rent of the farm during the entire period of eleven years at the rate of only $300 per year, and, as a result, in each recurring settlement the balance, as found and stated, was in his favor as to each of his wards. But though the aggregate of such balances amounted to a considerable sum, it does not appear that the guardian ever demanded or received any part of it.

The evidence shows very clearly that the guardian was charged in the county court settlements with far less than the actual value of yearly rents of the farm. On the other side he alleges and testifies that he was properly entitled to more than $4,635.28, the aggregate of credits allowed to him in those settlements, there having been many items of credit to which he was entitled, among others his commission and compensation omitted, and those that were charged against his wards having been fixed at less than their value.

In response to interrogations in the petition, he made out and filed a statement of the amount of proceeds of the farm received by him during the entire period of eleven years, being $9,754.45; and the chancellor arrived at the amount adjudged against him, $5,119.17, by deducting from that sum the above mentioned amount of credits allowed in the county court settlements, refusing to allow him any of the additional credits, an account of which was likewise made out and filed.

As the guardian chose to take possession of, cultivate on his own account and appropriate proceeds of the farm, instead of leasing it to another, as might have been done, his ward has the right to recover the net amount of what was so received by him, if it can be with reasonable certainty ascertained. But the guardian in that case should be fairly compensated for services rendered and expenses incurred in operating the farm and in selling and collecting proceeds of crops, as well as for taxes paid and improvements made. Besides, as the mode adopted by the chancellor is entirely different from the basis upon which the county court settlements were made, whereby charges against the guardian are greatly enhanced, he should be permitted to show any additional credits to which he may be properly and justly entitled.

But the chancellor does not seem to have given any credence to his statements or proof of such additional credits, although some of them were fully and certainly shown to be just. Moreover, in our opinion, the state of accounts between the guardian and ward can not be determined upon the basis of settlement adopted by the court with even proximate accuracy without a reference to the master commissioner, which ought to have been made.

Digitized by Google

The evidence in regard to the amount of proceeds of the farm received and appropriated by the guardian is both meager and conflicting, being for the most part based not upon the personal knowledge of witnesses, but upon their opinions, and the chancellor, therefore, assumed the statement made out and filed by the guardian as correct, and made it the basis of his judgment. But while the amount of credits, about $1,300, to which, according to another statement of the guardian, he is entitled, is excessive, many items in that statement are correct and ought to be allowed, if he is to be charged with the proceeds of the farm, instead of reasonable rent. But it will be difficult for even a commissioner to fairly and accurately determine and state the amount of such credits, for the guardian, expecting to pay rent, did not keep an account of the services and expenses incurred in operating the farm, as was done in regard to the amount of the proceeds of the crops; besides, a return of the case undecided and reference to a commissioner will cause additional and needless delay and expense. Then, as under the circumstances of this case, justice can be done as effectually and fully and certainly sooner by adhering to the mode of the county court settlements than upon the basis adopted by the chancellor, we think the amount of recovery should be here and now determined and fixed by deducting the aggregate of all the credits allowed the guardian in the county court settlements from the aggregate of reasonable rent of the farm during the eleven years.

It does not seem to us the ward can reasonably complain of that mode of settlement, for he is thereby getting fully as much as he could or would have received if the farm had been leased, especially as the evidence clearly shows that the guardian cultivated the land in such way as to leave it in as good or better condition than it was when he took possession of it, which might not have been the case if he leased it to strangers.

Nor has the guardian a right to complain, for it is fair to presume he charged his wards in the county court settlements with all he felt, on account of his near relation to them and their dependent and helpless condition, he ought to charge them, and all he would perhaps now claim if his feelings towards his nephew were the same as they then were. And as the amount of rent of the farm with which he was charged in those settlements is so grossly inadequate as that no chancellor could hesitate to change it, he can not conscientiously object to fixing it at a reasonably just sum.

Though the evidence is variant as to the rental value of the farm, we think there is no difficulty in fixing it so as to do injustice to neither; in fact counsel for the appellant, guardian, does not contend he was charged half enough in the county court settlement, but seems to concede that $650 per year is not unreasonable. And in our opinion, as the guardian got credit in the county court settlements by amount of taxes paid and for all the improvements he chose to then charge for that sum is reasonable and consistent with the preponderence of evidence on the subject.

The evidence shows wood was sold off the farm by the guardian, but he made no charge and got no credit in the county court settlements for services as guardian, and manifestly was not only kind and attentive to the wards, but his charges were, as to every item, less than their value.

We are satisfied a settlement of accounts between the parties in the mode just mentioned will be just and equitable, and the judgment is, therefore, affirmed on the cross appeal, and reversed on the appeal, and cause remanded that judgment may be rendered for

Digitized by Google

whatever balance, if any there may be, after deducting from amount of rental value of the land at the rate per year hereinbefore fixed, the amount of credits allowed the guardian in the county court settlements, and interest thereon from the time the action was commenced, and for further proceedings consistent with this opinion.

HARGAN V. PURDY.

(*Filed Oct.* 22, 1892.)

1. *Joinder of actions—Libel and slander*—A plaintiff may allege a cause of action for libel in one paragraph of his petition and in another allege a cause of action on account of slander, and can not be required to elect which of said causes of action he will prosecute.

2. *Libel respecting one in his profession—Pleading*—Since defamatory words, spoken of a person concerning his profession are actionable *per se*, a petition, wherein one alleges that he is a regular physician, duly and legally authorized to practice that profession, and that certain defamatory words were spoken of him by defendant respecting his profession, presents a *prima facie* cause of action.

But if plaintiff undertakes to allege how and by what authority he is entitled to practice the medical profession, and it thus appears that he was not authorized to so practice by the laws of the State at the time of the utterance of the alleged slanderous words, on a general demurrer to his petition such alleged words can not be considered as spoken of him concerning his profession or actionable *per se*; for the only effect of such words were to disable the practitioner from violating the laws of the State.

3. *Physicians—Registration of authority to practice*—The fact that one exhibited to the clerk of the county court in which he proposed to practice medicine his affidavit that he had practiced that profession for more than twenty years before June 23, 1890, and caused said clerk to register such authority to practice medicine under the laws of the Commonwealth, does not show that such person is legally authorized to practice in this State. (Driscoll v. Commonwealth, *ante*.)

Such registration of a person by the county clerk is not conclusive evidence of his authority to practice the profession in this State.

T. J. Watkins for appellant.

F. W. Darby for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action to recover of appellee damages for uttering and publishing concerning him, about July 1, 1890, the following words: "Have nothing to do with him; he is no doctor; nothing but a traveling quack; knows nothing about medicine and but little about any thing else."

There is also stated, or attempted to be stated in the petition, a cause of action for libel on account of alleged printing and publishing in a newspaper substantially the same words. A motion was made by appellee requiring appellant to elect which cause of action he would prosecute. But though not passed on by the lower court that motion ought not to have prevailed, because section 83, Civil Code, expressly provides that several causes of action for injuries to character may be united and prosecuted in the same kind of action.

Digitized by Google

A general demurrer was also filed and sustained, dismissal of the action following. As defamatory words, either spoken or written of a person in respect to his office or employment, as to say of a physician "he is an empiric," or "a quack," are actional *per se*, the petition would have contained *prima facie* a cause of action, if appellant had been contented to state the simple fact that he was a regular physician, duly and legally authorized to practice that profession, and being so employed the words mentioned were spoken of him. But he undertook to state how, and by what authority, he was entitled to practice as a physician. And thus is presented the question to be considered on general demurrer whether he was, at the time the alleged slanderous words were published, legally authorized to practice the medical profession. For if he was then undertaking to practice medicine in violation of the statute of the State he could not, in contemplation of law, have been injured or sustained damages from being called an empiric or quack, or at all events he could not be heard in a court of justice to complain that words had been spoken or written of him, having the simple effect to disable or deter him from violating a penal law.

It is stated in his petition that he had been regularly engaged in the practice of medicine for more than ten years prior to June 23, 1890, on which day he made and exhibited to the clerk of Lyon County Court his affidavit, and caused the clerk to register his authority to practice medicine under the laws of this Commonwealth. In the affidavit mentioned, which is filed with the petition, it is substantially stated that he had been regularly engaged in the practice of medicine for twenty years next before June 23, 1890; that he had attended one course of lectures at Kentucky School of Medicine and part of a course at Louisville University, but did not matriculate in either, and makes the affidavit to show ten years' practice to enable him to register as required by law, having never obtained a diploma from a school of medicine.

Whether he was legally authorized to practice medicine according to the facts stated in that affidavit, which are, on this appeal, to be taken as true, depends upon proper construction of the statutes of this State on the subject.

February 23, 1874, "an act to protect citizens of this Commonwealth from empiricism" was passed by the Legislature, by the first section of which it was made unlawful for any person, for reward or compensation, within this State, to practice medicine in any of its departments, who has not graduated at some chartered school of medicine in this or some foreign country, or who can not produce a certificate of qualification from some one of the board of examiners provided for in the act, and is not a person of good, moral character.

Section 2 of that act is as follows: "Any person who has been regularly and honorably engaged in the practice of medicine, or any of its departments for ten years, shall be deemed to have complied with the provisions of this act. Any person having been so engaged for five years shall be allowed one year in which to comply with said provisions."

By sections 3, 4, 5, 6 and 7 of the act, provision was made for appointment by the governor of five physicians of learning and ability in each judicial district of the State to constitute "the board of medical examiners," with power to examine all applicants who desire to practice medicine in any of its departments, and grant to such of those found, upon examination, to possess a fair, practical knowledge of the various branches of medical science enumerated in the act, a

Digitized by Google

certificate of qualification, signed by at least three members of the board, entitling the holder to practice all the branches named in the certificate, any where in the district of such board, or district adjoining it.

But April 25, 1888, an act was passed amending the act of 1874, by repealing those sections creating "the board of medical examiners" and authorizing an examination of applicants and certificate of qualification. And instead thereof it was provided by section 3 of the act of 1888 that thereafter authority to practice medicine in this State shall be a diploma from a medical school legally chartered under laws of this State; or 2d, a diploma from a reputable and legally chartered medical school of some other State or country; or 3d, an affidavit from the person claiming the same that such person is exempt from obtaining a diploma under section 2 of the act of 1874 and stating where he has practiced.

By section 1 of the act of 1888 it was made the duty of the county court of each county to purchase a book of suitable size, to be known as the "medical register" of the county, and to set apart one full page for the registration of each physician. And by section 2 it is made unlawful for any person to practice medicine in any of its branches in this State who has not exhibited and registered in the county clerk's office his authority for so practicing.

But it is clear the Legislature did not intend the mere fact of a person being registered by a county court clerk in the "medical register" to be conclusive evidence of his having authority to practice medicine in this State by reason of either a diploma or compliance with section 2 of the act of 1874. For the authenticity and validity of a pretended diploma, as well as the verity and sufficiency of the facts stated in his affidavit as to length of time any such person has practiced medicine, may be called in question. Therefore, whether the appellant was legally entitled to register depends upon the intended meaning of section 2, act of 1874.

According to the statement of his affidavit he had not been practicing for ten years when the act of 1874 was passed, consequently he can not, in the lauguage then used, "be deemed to have complied with the provisions of this (that) act." Nor had he then been practicing for even five years. The only inquiry is then, whether this merely practicing for ten or any number of years, subsequent to passage of that act, without having obtained a diploma or certificate from the "board of medical examiners," as authorized thereby, or obtained such diploma under the act of 1888, he is legally authorized to practice medicine. We need not, however, discuss that question, because it has already at the present term been discussed adversely to the contention of appellant in two cases heard together: Driscoll v. Commonwealth, &c.; Commonwealth v. Rice; 1 *Ante*, 1.

We think appellant was not legally authorized to practice medicine in this State when the alleged slanderous words were published, and as a legal sequence, has no cause of action therefor.

Judgment affirmed.

HITE'S DEVISEES V. HITE'S EX'OR, &C.

(*Filed June* 2, 1892.)

Devises—Rights of life tenants and remainderm'n—Equitable conversion—A will gave to the trustees named in it full power and authority to sell, convey

Digitized by Google

and reconvey, in their discretion, any of the real estate devised to them in trust, and to sell, transfer and deliver any or all of the stock, bonds and securities bequeated to them in trust, and also clothed them with authority to invest and reinvest the proceeds of *such* sales in other stocks, bonds and securities and improved real estate. * * * The trustees were directed to manage, control, invest and dispose of the estate committed to them in their discretion, so as to be safe and produce income. The net income arising from the estate was to be paid annually to life tenants designated in the will. In this contest between the life tenants and remaindermen it appears that certain unproductive real property was not sold for reinvestment by the trustees until some time after the testator's death. *Held*—

That the contention of the life tenants that, by the doctrine of equitable conversion, this unproductive real estate should be regarded as converted into interest-bearing estate as of the day of the testator's death, the effect of which would be to require the trustees to pay to the life tenants, as income of the estate, a portion of the sum realized by them from the sale of such unproductive real estate, can not be sustained. The trustees, under the will, were clothed with a discretion as to the time of the sale of such real estate, and it was not the intention of the testator that any income should be paid the life tenants on account of property from which no income was realized.

2. *Same*—But if the trustees, before selling such unproductive realty, have paid taxes thereupon, or for improvements made thereon, out of the income derived from the rest of the trust estate, the sums so paid should be allowed the life tenants out of the amount realized from the sale of such realty.

3. *Same—Stock dividends*—Where certain corporations, in which the testator held stock, have declared out of their earnings and profits certain stock dividends, such stock dividends must be regarded just as money dividends are—a part of the income of the estate, payable as such to the life tenants.

4. *Same*—The fact that the directors of the corporation declared such "stock dividend" is not conclusive evidence between the life tenants and remaindermen that such dividend must be regarded as a part of the capital of the testator's estate and not as a part of the income. The action of the corporation is conclusive only between itself and the shareholders.

5. *Same*—But where a corporation, in which testator held stocks that by his will became a part of the trust fund herein, declares a stock dividend not based on its earnings, but accruing from the profits realized from the sale of certain real estate owned by it at the time of the testator's death, such dividend is not income or profit, but a mere change of form of capital, and belongs to the *corpus* of the trust estate and not to the life tenants.

6. *Same*—The privilege given by a corporation to its stockholders, of whom the trust fund was one, to take additional stock at par, when it is worth much more, did not belong to the life tenants as an incident to the income of such stock. It was an incident to the stock, and the value of such privilege became a part of the capital.

The life tenants, however, will not be required to restore the stocks obtained by them under the privilege, but the value of such option should be ascertained and the life tenants charged with it.

7. *Same—Investments—Distribution*—It was error to hold that when the trustees purchased stocks by way of reinvestment, at more than their par value, they must retain out of the income from such stocks and add to the principal of the estate in their hands a sum equal to the excess above par paid therefor, in order that at the maturity of such stock, when only its par value would be paid, the principal of the trust might not be diminished. The object of such investment was safety as well as the production of income, and it is fair to assume that the market value of some of the stock would increase after being purchased by the trustees, and that in the end the capital would probably be preserved intact.

Shack Miller for appellants.

Digitized by Google

Wm. Lindsay and Humphrey & Davie for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

The questions in this case arise between tenants for life and remaindermen. The will of W. C. Hite provides:

1. "I nominate and appoint my friend, Thomas L. Barret, and my son, William W. Hite, my executors and trustees, and devise and bequeath to them my entire estate, real, personal and mixed, in possession, remainder or reversion, and wherever situated, for the purposes and upon the trusts herein indicated. I give them full power and authority to sell, convey, and reconvey in their discretion any real estate which I may own, or any which they may purchase for my estate. I give them full power and authority to sell, transfer, and deliver any or all of my stocks, bonds, and securities of every kind, and full power and authority to invest and reinvest from time to time, the proceeds of *such* sales in other stocks, bonds and securities and improved real estate, whether situated in this State or elsewhere.

"Whenever sales are made by my said trustees the title shall pass, and the purchaser need not look to the application of the purchase money. It is my will, and I give to my said trustees all power and authority which may be necessary and proper to carry out the purpose and trusts as herein indicated; and I do not desire that they be required to give bond with security, either as executors or trustees; nor do I wish them to file any inventory of my estate in the county court.

"The estate devised and bequeathed to my said trustees is for the use and benefit of my wife, Mary E. Hite, and my children and their descendants and my devisees as indicated in this my will."

8. "After the payment of my funeral expenses and just debts, and the payment of and provision for the legacies and bequests as directed in this will, I desire and direct my trustees to manage, control, invest and dispose of the balance of my estate, of every kind and description, including, after my wife's death, that part of my estate which has been set aside for her annuity, in their discretion, so as to be safe and produce income.

"My trustees shall, ten (10) years after my death, if my trust estate in their hands be sufficient for that purpose, pay over to each of my children ten thousand dollars ($10,000) and if any of my children be dead, leaving children then alive, they shall be paid their parent's part; but should any of my children be dead without issue living, that child's share remains as part of the trust fund. * *

"My trustees shall, between the time of my death and the payment of said sums of $10,000, pay over the net income arising from said general trust estate to my wife, Mary E. Hite, and my children, Mary E. Winston, Nannie T. Hite, Wm. W. Hite, Louis Hite and Allen R. Hite, one sixth each. * * * * *

"If there should be any of my estate remaining after the payment of said sums directed to be paid my children, I desire it to be kept together by my trustees and made productive of income.

"This estate shall remain undivided, and continue in trust during the lives of my wife and children, and during the life of the longest liver of them. At the death of the longest liver, the trust shall cease and the trust estate be divided and distributed among the descendants of my children, according to the provisions of the

Digitized by Google

Statutes of Descents and Distributions as then existing in the State of Kentucky.

"The net income arising from said trust estate shall be divided annually between my wife and children, one sixth to each."

It is contended for the life tenants that under these provisions the unproductive real estate of the testator should be treated as converted as of the day of his death; and that as the trustees sold it from time to time, the entire purchase money realized should not be treated as a part of the principal of the trust fund, but such a sum only as with six per cent. interest per annum from the time of his death would amount to the purchase money; and that the difference between the two amounts should go to the life tenant. In other words, that under the doctrine of equitable conversion such a portion of the purchase money as would equal this interest must be regarded as income and not as capital. The lower court erroneously, as we think, accepted this view.

The intention of the testator must govern. He undoubtedly intended that the trustees should so change and invest the estate as to make all of it productive of income. This is evident from the eighth clause of the will, which directs them to invest and dispose of it "so as to be safe and produce income." He must have known, however, that this could not probably be done at once without sacrifice. This doubtless led to his giving them a broad discretion in the matter; and while he provided that the life tenants should have any net income from his estate, yet he no doubt had in view income actually realized. The estate was large. Much of it at his death was already productive, and it can not well be supposed he expected a part of the principal would be given to the life tenant to compensate for the delay which he knew must occur before the remainder of it could be made so.

The doctrine of equitable conversion is at best an artificial, arbitrary one. It will not be applied unless it is made the duty of the trustee to sell. Conceding, as we think is true, that this is so in this instance, and that the discretion given relates only to the time when it shall be done, yet in view of the character of the entire estate and the will itself, which says the proceeds of the sales are to be reinvested, it is clear to us the testator did not intend income to be paid to the life tenant on account of property from which none was realized.

If it be said, if this be so, then the trustees could, by delay, enrich the remainder even at the expense of the life tenant, yet the testator, as is evident from the will, did not intend the condition of the latter to be better than his own, and if he had lived no income might have come to him for years from this portion of his estate, or from some of his stocks; and nothing should be allowed the life tenant save actual income arising from the testator's estate because this was his evident intention and expectation.

If, however, any taxes upon or sums by way of improving the unproductive real estate have been paid out of the income of the other estate, the same should be allowed the life tenant out of the sales of the unproductive estate. The testator never intended the life tenant to thus protect and add to the value of the real estate from which he was receiving no benefit. The fair presumption is that the testator intended such a reimbursement.

Since the testator's death, certain stock dividends based upon earnings and profits have been declared upon some of the stocks. It is claimed by the remaindermen that they belong to the principal of the estate, while the life tenants assert they are entitled to them as

Digitized by Google

income. The question is beset with difficulties. It is urged by the former that the mere declaration as "a stock dividend" by the company is conclusive in their favor; that, being *stock*, it must be treated as a part of the capital, and that the conclusion of the company to turn all their profit into capital is a matter in its discretion, and conclusive upon the courts.

As between the company and the shareholder, the action of the directors in determining whether the earnings shall be capitalized in stock dividends or paid out in cash is conclusive; but when once declared, although in the form of stock, it is the province of the law to determine whether they belong to the *corpus* of the estate and are to benefit the remainderman, or whether they shall go to the life tenant as income. It is the rule, as settled by the current of authority, that dividends, whether of stock or payable in money, are non-apportionable, and must be considered as accruing in their entirety as of the date when they are declared. If, for instance, the life tenancy has begun when a cash dividend is declared it belongs to the life tenant, although it may result in part from profits previously earned. It goes to him irrespective of the time when it was earned.

No inquiry will, in such a case, be made as to what portion of the profit upon which the dividend was based was earned before or after the death of the testator for the purpose of apportioning it between the tenant for life and the remainderman.

The difficulty attending such an inquiry, the impossibility of attaining and of ascertaining the many sources from which the profit has been derived are the reasons for this rule; but it does not also follow that the declaration of the company as to the character of the dividend determines its legal *status* and to whom it shall belong. It is the law which says that the time when it is declared shall be deemed the date of its accrual, and so it is for the law, when it is once declared, to determine its ownership.

There is great conflict of decision, however, upon this point. The English rule seems to be that the tenant for life is entitled to cash dividends only. This was declared in the early case of Brander v. Brander, 4 Vesey 801, but in a country where entails and perpetuities are favored. It has, however, been followed by many of the highest courts of this country, but the reasoning of their opinions is not satisfactory to us. They are, perhaps, largely the result of regard for former decision, but the question is of first impression in this State. Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit.

If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it whether paid in stock or money. A stock dividend proper is the issue of new shares paid for by the transfer of a sum equal to their par value from the profit and loss account to that representing capital stock, and really a corporation has no right to declare a dividend either in cash or stock except from its earnings; and a singular state of case—it seems to us an unreasonable one is presented—if the company, although it rests with it whether it will declare a dividend, can bind the courts as to the proper ownership of it, and by the mode of payment substitute its will for that of the testator, and favor the life tenant or the remainderman as it may desire. It can not in reason be considered that the testator contemplated such a result. The law regards substance and not form, and such a rule results not only in a violation of the testator's intention,

Digitized by Google

but it would give the power to the corporation to beggar the life tenants, who in this case are the wife and children of the testator, for the benefit of the remaindermen, who may, perhaps, be unknown to the testator, being unborn when the will was executed. We are unwilling to adopt a rule which to us seems so arbitrary and devoid of reason and justice.

If the dividend be in fact a profit, although declared in stock, it should be held to be an income. It has been so held in Pennsylvania and many other States, and we think it the correct rule. Earp's Appeal, 28 Pa. St., 368; Cook's Law of Stocks, sec. 554.

The lower court adopted this view, but it should not be held to include a dividend like that declared by the Birmingham Rolling Mill Company. It was not declared out of earnings, but out of profits made by the sale of a piece of real estate that the company owned at the decedent's death. His interest in it was at the time of his death a part of the *corpus* of his estate, and it is properly capital and not income.

It was also error to hold that the privilege given by a corporation to its stockholder to take additional stock at par, when the stock is worth more, belongs to the life tenant. This right stands upon a different footing from the claim to a stock dividend. It is a mere incident of the old stock. It is a right appurtenant to it, and as such is a part of the capital. It cannot be fairly considered as income, but is inherent in the shares of stock in their creation. While the value of the right must depend essentially upon the success of the business of the company, this does not alter the nature of the right, and the stock is properly a part of the *corpus* of the estate of the owner. This incident of the stock was, at the death of the testator, a part of his estate, and the option merely operated to increase or broaden the capital or change the manner of the investment. It gave the right to a larger interest in the capacity of the company to make profits, but not to the income itself. The life tenant should not, however, be required to restore the stocks gotten under these options, but their value should be ascertained as of the time when the options were given, and the life tenant required to account for the profit as a part of the capital of the estate. Matter of Kemochen, 104 N. Y., 618; Brinley v. Grau, 50 Conn., 73.

The lower court, in adjusting the conflicting rights of the parties, adopted what is called the "sinking fund" theory; that is, it held that where the trustees purchased stocks by way of reinvestment at more than their par value, they must retain out of the income from them and add to the principal of the estate a sum equal to the excess above the par value, else, as was said, at the maturity of the bonds or stocks the principal would be lesssened, as they would then only be worth their par value. This was error, and the appellees question the correctness of the ruling by a cross-appeal.

It is urged that this is necessary to preserve the principal of the estate intact and do substantial justice between the life tenant and the remainderman.

The objects of investment were, however, two-fold, to-wit, safety and the production of income. The investment must be a safe one in order to preserve the capital, and must also be an income-producing one to benefit the life tenant. Investments in stocks above par are not only more productive, but more secure, and both qualities must be kept in view.

Bonds might be bought at a premium and then sold at a still higher one, and then, if enough is also taken from the income and added to

Digitized by Google

the principal to balance the excess above par, at which they are purchased, the remainderman will be doubly benefitted.

Some investments will increase, while some will diminish in value. Bonds might be purchased under par, but their face value collected at maturity and all would be added to the capital. All things considered it seems to us the safe rule is to let these matters balance themselves, as they are likely to do in time.

The testator no doubt contemplated the matter in this light, and we think intended that where an investment was made the cost of it was to be charged to the principal without any deduction from the income of the life tenant. The costs appear to have been fairly apportioned. The annual expenses of collecting and disbursing the income should come out of it, but the expense of conversion and reinvestment was for the benefit of both the remainderman and the life tenant, and it was proper to apportion them.

The judgment is reversed upon both the original and cross-appeal, and cause remanded for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

DENHAM V. ANDERSON.

(*Filed Nov.* 16, 1892.)

1. *Validity of ordinance—Forfeiture of stock running at large*—A city ordinance providing for the impounding of stock running at large, and for a forfeiture and sale of the stock under order of the city court to pay the fees and cost of impounding, after notice to the owner of the proceedings for a forfeiture and sale, is valid, provided such an ordinance is authorized by the charter.

2. *Same—Due process of law*—Where such an ordinance requires that the chief of police shall give "reasonable notice" to the owner of the time and place of the proceedings in the city court for a forfeiture and sale, a verbal notice is not sufficient, as such notice is not "due process of law," and it is not to be presumed was within the intention of the framers of the ordinance.

3. *Same*—The fact that the ordinance provides for notice to the owner, "if he is known to the chief of police," does not authorize a sale without notice where the owner is not known as the owner, whether known to the chief of police or not, can not thus be deprived of his property without due process of law, and the court must assume that it was not the intention of the framers of the ordinance to thus disregard the fundamental law of the land.

4. *A judgment without service of process*, or appearance of the party to be affected by it, is void. The fact that he has personal knowledge of the proceeding can not confer jurisdiction.

Will. C. Curd for appellant.

Morrow & Waddle for appellee.

Appeal from Pulaski Circuit Court.

Digitized by Google

Opinion of the court by Judge Barbour.

Appellee, sued for the taking and conversion of a horse, admitted the taking and sale of the horse, and justified as an officer acting under a city ordinance prohibiting the running at large of stock within the corporate limits of the city. Upon a trial of the issues joined a verdict was, under the direction of the court, returned for the defendant, and judgment having been rendered thereon the plaintiff has prosecuted this appeal.

There is no bill of exceptions, and the only question before us is, whether the answer presents a defense. The ordinance is entitled "An ordinance to prohibit the running at large of hogs and cattle upon the streets of the city of Somerset," and provides, in substance, as follows:

Sec. 1. "It shall be unlawful for the owner of hogs or cattle to suffer or permit them to run at large upon the streets of the city."

Sec. 2. "Any person violating section 1 by willfully suffering his hogs or cattle to run at large upon the streets, shall, upon conviction, be fined not exceeding $5."

Sec. 3. "It shall be the duty of the chief of police of said city, if any hogs or cattle are found running at large within the corporate limits, to forthwith take them up and place them within a suitable enclosure and keep and take care of them. He shall, as soon as they are taken up and impounded, advertise the taking up of the same by posting a written or printed notice at the court-house door in the city, giving a general description of them, for at least five days, and if the owner is known to him he shall give him personal notice of the taking up of the same. Said chief of police shall be entitled to a fee of fifty cents for taking up and taking care of each hog or cattle and the actual cost of keeping same."

Sec. 4. "If the owner of said hogs or cattle shall, before the condemnation hereafter provided, appear and claim the same, the chief of police shall deliver them up to him upon the payment of the fees and cost to which said chief is entitled for taking up and taking care of the same."

Sec. 5. "If, at the expiration of five days from the taking up, no owner appears and claims the stock and pays the cost and charges thereon, the chief of police shall summon a jury to appear before the judge of the recorder's court of the city, on some day not less than ten days from the taking up of such hogs or cattle, which jury shall be empaneled and sworn by said judge, and a trial shall then be had before said judge, and the jury shall determine whether there has been a violation of this ordinance by such hogs or cattle having run at large within the limits of the city; and if the verdict is that the ordinance has been violated, said judge shall make an order, in which he shall describe the hogs or cattle, and direct the chief of police to sell the same to the highest bidder, either separately or in a lot, as he shall deem best, for cash in hand. After deducting the costs and charges of such proceedings, and the taking up and taking care of such hog or cattle, which shall be determined by said judge, the remainder of the proceeds of such sale shall be by said chief of police paid over to the treasurer of the city, which shall be held subject to the order of the former owner of such hogs or cattle."

Sec. 6. "If the owner of such hogs or cattle is known to the chief of police, he shall give him a reasonable notice of the time and place of the proceedings to be had before said judge."

It is alleged in the answer that the plaintiff was, at the time of the taking of his horse, a resident of Somerset, and that he unlaw-

Digitized by Google

fully and willfully suffered it to run at large upon the streets of said city, and that while it was so at large within the corporate limits of the city, the defendant, as chief of police, took it up and placed it in a suitable inclosure and immediately advertised the taking up by posting a written notice at the court-house door in Somerset, giving a description of it. Defendant also gave personal notice of the taking up of the horse to the plaintiff, but plaintiff refused to pay the fees and costs, when defendant, after the expiration of five days from the time the horse was taken up, summoned a jury, which appeared before the judge of the recorder's court, and was duly empaneled and sworn, and after hearing the evidence returned the following verdict: "We, the jury, find the horse described herein guilty of running at large within the corporate limits of the city of Somerset;" and thereupon the judge made an order directing the defendant to at once expose the horse to public sale to the highest bidder for cash, and to deduct from the proceeds of sale the cost of taking up and caring for it, and to deposit the remainder with the city treasurer, subject to the order of the plaintiff; that in pursuance of said order defendant sold the horse and realized therefrom $——; that the the remainder, $——, was deposited with the city treasurer, subject to plaintiff's order; that defendant, as chief of police, gave to the plaintiff reasonable notice of the time and place of the proceeding aforesaid, to be had before said judge.

The main question is, has appellant been deprived of his property without due process of law?

It is conceded that the city had the authority under the provisions of its charter to adopt an ordinance prohibiting stock from running at large within its corporate limits, and to prescribe a mode, consistent with the Constitution and the laws of the State for their sale, in the event of the non-payment of the fees and costs of impounding.

The ordinance in question is in all essentials similar to that of the town of Lancaster, which was approved in McKee v. McKee, 8 B. M., 433. This case was cited and was not disapproved in Varden v. Mount, 78 Ky., 86, and upon the authority of these cases, we are constrained to hold the ordinance valid.

But even if the manner prescribed for enforcing the forfeiture should be held to be illegal, the ordinance, to the extent that it directs the impounding of stock running at large, is undoubtedly valid, and, as held in Varden v. Mount, 78 Ky., 86, that portion of it providing for the forfeiture and sale might be disregarded, and the city remitted to its right to resort to regular judicial proceedings before a competent tribunal for the subjection of the property to sale for the satisfaction of the costs and expenses attending the impoundage.

The ordinance provides that "if the owner of the stock is known to the chief of police, he shall give him a reasonable notice of the time and place of the proceedings aforesaid to be had before said judge." From this language alone it would seem that if the owner was not known, the proceedings enforcing the forfeiture and ordering the sale could be had without notice. But clearly, as held in Varden v. Mount, that could not be done; for, whether known to the chief of police or not, the owner could not thus be deprived of his property without due process of law, and we must assume that it was not the intention of the framers of the ordinance to in this manner disregard the fundamental law of the land.

The case, however, before us is one in which the owner of the horse was known to the chief of police, and the real question is, was the notice which was given sufficient? Was the ordinance followed in its reasonable intendment?

Digitized by Google

No person can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

The terms "law of the land" and "due process of law," as constitutional terms are of equivalent import, and, as applied to a case like this, mean in the due course of legal proceedings, conducted according to those rules and forms which have been established for the protection of private rights. City of Louisville v. Cochran, 82 Ky., 15.

Giving to the defendant's pleadings the most liberal construction, aided by the ordinance and the certified copy of the proceedings before the city recorder, which are made part of the pleadings, it is plain that the "reasonable notice" alleged to have been given to the plaintiff by the chief of police, was nothing but a verbal notice. Such notice was not, in our opinion, "due process of law," and, in the absence of the plaintiff's personal appearance, gave to the recorder no jurisdiction to pass upon the plaintiff's rights. A judgment without service of process or appearance of the party to be affected by it, is void. The fact that he has personal knowledge of the proceeding can not confer jurisdiction.

A judicial determination that a verbal notice given to a party of an intended proceeding against him in a court would conclude him, would give jurisdiction to the court to pass upon his property rights, would result in such uncertainty and confusion that no man could feel safe in the enjoyment of his property. His right, instead of being determined by an infallible record, would be made to rest upon the fallible memory of witnesses. The jurisdiction of the recorder's court is special and limited, and can not be presumed, but must be made to appear by the evidence.

But still further where the charter of the city is read in connection with the ordinance, it is clear that the proceeding for the forfeiture and sale must be conducted in accordance with the ordinary and usual formalities required for the protection of the individual rights.

In article 5 of the charter (Acts of 1887, 1888, page 284), after fixing the jurisdiction of the recorder's court, it is provided in section 6 that the judge of the recorder's court shall issue process in the name of the Commonwealth of Kentucky, as other warrants, except in cases otherwise provided for in this act, and make them returnable before him as judge of the recorder's court, and the same shall be directed to the chief of police, * * * * and shall be executed and returned, &c.

And section 7 provides that the pleadings, practice and mode of procedure in said court shall be governed by the Kentucky Code of Practice in civil and criminal cases, except as herein provided. None of the exceptions mentioned in the charter have any application to the facts of this case.

The proceedings for the forfeiture and sale of the horse clearly come within the jurisdiction of the recorder's court and should have been conducted as prescribed in the charter, and it must be presumed that such was the intention of the framers of the ordinance.

We have no means of knowing the character of notice served upon the owner of the property in the case of McKee v. McKee, but assume that it was such as was prescribed by the law of the land. At any rate we think that the charter in this case does prescribe the character of notice, and as the notice which was given neither conformed to the charter or the law of the land, the judgment directing the sale of the horse was absolutely void.

We have, in order to determine the main question presented, overlooked minor objections that might be urged to the answer. As, for

Digitized by Google

example, the answer alleges that the proceedings before the jury and judge of the recorder's court were had after the expiration of five days from the time of the taking up of the horse, when the ordinance is that the proceedings are to be had "on some day not less than ten days from the taking up."

The ordinance also provides that the judge, when he makes the order for the sale, shall determine the amount of the costs and charges for which the stock is to be sold. This, as the pleadings show, was not done.

To what extent the failure to comply with these provisions of the ordinance would affect the jurisdiction of the court it is not necessary to decide.

The judgment is reversed and the cause is remanded for further proceedings.

CITY OF COVINGTON V. BRAMLEGE, BY, &C.

(*Filed Nov.* 23, 1892.)

1. *Care required of city as to repair of public bridge*—As to its public bridges, a city is required to exercise no greater degree of diligence than to keep them in such repair as will answer all the ordinary purposes of travel.

One of the rods of an iron railing, which protected the sides of a bridge in a city, having been misplaced, leaving an opening in the fence of about eight inches, the fact that the city, although having notice of the opening, did not close it, was not negligence on the part of the city, as the opening did not render the bridge dangerous to those passing over it, the fence being only three and one-half feet high. Therefore, a boy seven years of age having, in crossing the bridge, crawled through the opening in the fence to get his hat, which had been thrown on the outside, and in returning lost his balance and fallen, the city is not liable for the injuries received.

2. *Contributory negligence of child*—Negligence can not be imputed to a child of such tender years as to be wholly incapable of the exercise of care, but it can not be said that a boy, seven years of age, bright and active, able to find his way from one part of the city to another, and trusted alone by his parents, can not, on account of his tender years, contribute to his injuries by his own negligence.

3. *Same*—A child is held only to the exercise of such a degree of care as is reasonably to be expected from children of his age.

W. A. Byrne for appellant.

Cleary & Hamilton for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Presiding Judge Yost.

We are unable to find in this record any evidence by which the jury were authorized to charge the appellant with such negligence or carelessness as would render it responsible for the injuries received by the child, to recover damages, for which this action was brought.

This is the only question we will consider in this opinion, the ground that the verdict was "contrary to law," as put in the motion for a new trial being, as has been so often held, too general to call the attention of this court to the errors complained of.

The appellee, then a child about seven years of age, left his home in Covington to go to his grandfather's, who lived in the same city, and while crossing the bridge on Eleventh street, under which are

Digitized by Google

the trucks of the Kentucky Central Railway, he fell from the coping to the ground below, a distance of thirty feet, breaking his arm and sustaining other painful and somewhat serious injuries.

This bridge is protected on either side by an iron railing constructed in panels eight feet in length, the posts being set in a stone base, and the rods or pickets being about four inches apart. Sometime prior to the accident one of the rods had become misplaced, thus leaving an opening in the fence of about eight inches.

The evidence tends to show that as the boy was crossing the bridge his hat was thrown over the fence, alighting on the edge of the structure, outside of the stone base. In order to recover it he crawled through the opening, and as he was attempting to return lost his balance and fell. It is doubtful whether his fall was caused by his being pushed off the bridge by one of the children, who was with him, or by his losing his foothold in attempting to push one of them from the opening so that he could return. This, however, is immaterial, as the only question is, was the city, whose duty it was to keep the bridge safe for the ordinary purposes of travel, guilty of such negligence in failing to replace the missing rod as would make it responsible for the injuries received by a child of such tender years? We think it clear that it was not. While it might, by the exercise of ordinary care, have known of the defect of the railing, if defect it may be called, still it is established by all the evidence in the case, without any conflict whatever, that the opening did not render the bridge dangerous to those passing over it, but it was a safe and sound structure for all the ordinary purposes of travel. The fence was three and one-half feet high, and the opening, as we have said, scarce eight inches in width. The child could not, while crossing the bridge, have fallen through this opening. In fact the evidence shows that he could not pass it voluntarily without forcing himself through. The city could not be required to provide against such accidents as this. As well could it be held responsible if the child had climbed the fence, and while so doing received his injuries. If responsible for the injuries of a child who leaves the route of travel and crowds through an eight inch opening, and places itself in a dangerous position on the outside, then it would be equally responsible for its failure to build the fence too high for one to climb. We are not at all inclined to concede, as appellees' counsel contends, that a child seven years of age is *non sui juris*, but even if that were so the appellant could have been required to do no more than to keep the bridge safe for the ordinary purposes of travel. This is the law in this State, as announced in the leading cases of the Louisville and Portland Canal Company v. Murphy's adm'r, &c., 9 Bush, 522, a case absolutely on all fours with this one, except that the opening through which the little four years old fell was two and one-half feet instead of eight inches wide. There the court, although of opinion that the child was *non sui juris* and not guilty of contributory negligence, held that the company could not be held to a greater degree of diligence than to keep the bridge in such repair as would answer all the ordinary purposes of travel. The appellee was certainly not using the bridge for any of the purposes ordinary or otherwise for which it was intended. Negligence, it is true, can not be imputed to a child of such tender years as to be wholly incapable of the exercise of care, but can it be said that a boy seven years old, bright and active, able to find his way from one part of the city to another, trusted alone by his parents, can not, on account of his years, contribute to his own injuries by his own negligence? We think not. The application of any definite rules con-

Digitized by Google

cerning contributory negligence to cases of injuries suffered by small children has been found a question of great difficulty. We can safely say, however, that it is now settled by the weight of authorities that a child is held only to the exercise of such a degree of care as is reasonably to be expected from children of his age.

In this case the verdict was wholly unauthorized. A peremtory instruction in fact ought to have been given. The judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

RUTHERFORD'S ADM'R v. RUTHERFORD'S ASS'EE.

Filed November 16, 1892. Appeal from Todd Circuit Court. Opinion of the court by Judge Barbour, affirming.

Assignment for creditors—Parties to action—A debtor who has made an assignment of his property for the benefit of his creditors may institute an action against the trustee, who is not, in good faith, discharging his trust for the purpose of requiring him to properly settle the estate or surrender the trust. But such an action must necessarily be in the nature of an action for a settlement of the trustee's accounts, and the creditors are necessary parties.

Petrie & Forgy for appellant; Ben T. Perkins for appellee.

KENTUCKY CENTRAL RAILWAY COMPANY, &c. v. GERREISS.

Filed November 23, 1892. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Negligence of carrier as to passenger—Burden of proof*—In an action against a common carrier to recover damages for injuries to a passenger alleged to have been caused by defendant's negligence, the alleged negligence being denied, the plaintiff is not, in the absence of any evidence whatever, entitled to a verdict, and, therefore, the burden of proof is upon him and he is entitled to the concluding argument to the jury.

2. *Joint defendants—Impaneling jury*—In an action against two defendants to recover damages for injuries alleged to be the result of their joint negligence in impaneling the jury, the defendants together have the right to strike out only three names from the list.

3. *Negligence of one railroad company while assisting another in moving its cars*—Where an engine owned by one railroad company and in charge of its servants was pulling the cars of another railroad company over the line of a transfer company, the company owning the engine is liable to one who was injured through the negligence of its servants in charge of the engine. And this is true although there was no evidence that these servants were at the time acting for their employer or in the line of their employment, the necessary inference being that they were discharging their duties, and that their employer was in the line of its business engaged in assisting the other railroad company in the movement of its cars over the line of the transfer company.

4. *Instructions to jury*—No objection can be successfully urged to the instructions upon the ground that they assume that the place of the collision

Digitized by Google

was a frequently traveled thoroughfare, as that fact was established by uncontradicted testimony and besides is admitted by the pleadings.

Hallam & Myers for Kentucky Central Railroad Co.; C. B. Simrall for Street Railway Co.; Wm. Goebel for appellee.

CITY OF LOUISVILLE v. CORNELL.

Filed November 23, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. *In an action to enforce a lien for street improvements* in the city of Louisville it is not necessary to file complete and legally authenticated copies of the record of the proceedings of the General Council before a judgment can be legally obtained.

2. *Variance of pleading and exhibit*—As the exhibit filed with the petition in this case, and which purports to be a copy of the ordinance, does not purport to show when it was passed by either board of the council, it can not be claimed that it contradicts the allegations of the petition, showing that two weeks elapsed between the passage of the ordinance by one board and its passage by the other board. Therefore, even if where there is a conflict in the allegations of the petition and the exhibit filed with it, the latter should control, that rule has no application here.

H. L. Barker for appellant; Lane & Burnett for appellee.

L. & N. R. R. Co. v. SPARKS.

SAME v. MCGINNIS.

Filed November 23, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

1. *An entry upon the land of another, to amount to an ouster*, must be made under claim and color of right, otherwise it is a mere trespass. It must be made with the express and manifest intention of taking possession, and must be followed by such acts as indicate an intention to make that possession permanent.

2. *Forcible entry and detainer*—A tenant occupying land adjoining the right of way of a railroad company, by moving his landlord's fence back and leaving a strip of the rented land uninclosed next to the railroad company's land, did not transfer to the railroad company the possession of the strip of land thus thrown out, nor did the acts of the section hands of the company, in placing ties and other railroad material on the land, effect an ouster of the owner. Therefore, the owner, having replaced the fence, the railroad company can not obtain restitution by writ of forcible entry and detainer, as it did not have constructive actual possession of the land at the time of the entry complained of.

Lyttleton Cooke and William Lindsay for appellant; J. F. Bullitt for appellee.

STINCEY, &c. v. BOURNE, &c.

Filed November 23, 1892. Appeal from Carroll Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Separation of conclusions of law and fact*—When the law and facts in an ordinary action are submitted to the court without the intervention of a jury, and the court states its conclusions of fact and its conclusions of law separately, followed by its judgment, immediately following which appear the words "to this judgment the defendant excepts," the exception can not be regarded as extending to the conclusions of law, although they are embraced in the same writing with the judgment.

2. *Same*—An exception to the judgment does not raise the question as to whether the court has erred as to its conclusions of law.

3. *In the absence of an exception to the conclusions of law*, the only questions left for an appellate court are, whether the pleadings sustain the judgment,

Digitized by Google

and whether the evidence is sufficient to support the judgment upon the issue of fact. And the decision of the judge is to be regarded as a verdict of a jury, and not set aside for less cause.

Winslow & Winslow for appellants; W. M. Fisher and Major & McElrath for appellees.

SMITH v. PERKINS, &c.

Filed November 23, 1892. Appeal from Livingston Court of Common Pleas. Opinion of the court by Judge Brent, reversing.

Statute of frauds—Transfer of partnership real estate—Partners owning an estate in land for a term of years, having sold it, one who claims to have become the owner by parol purchase of the interest of one of the partners prior to the sale can not enjoin him from collecting his part of the purchase money, as the parol contract is not binding. The fact that it was partnership property does not alter the statutory requirements as to the evidence of transfer.

John K. Hendrick, W. S. Bishop and W. D. Greer for appellant; J. C. Hodge and J. W. Bush for appellees.

COOPER v. BRAMEL.

Filed November 23, 1892. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Option of vendor to treat contract as lease*—Under a contract for the sale of land which provided that, upon the failure of the vendee to make the payment due at the end of the first year, the vendor might recover possession and the vendee should pay a certain sum as rent for that year, the vendee had, until the payment was due, to elect whether he would treat the contract as a sale or a renting, while the vendor had no right of election until the vendee had failed to make the payment when due. Therefore, prior to the maturity of the note for the first payment, the relation of landlord and tenant did not exist, and the vendor having within that time had the property of a tenant of the vendee sold under an attachment for rent, is liable to him in damages for the wrongful seizure and sale of his property.

2. *Assumpsit for use and occupation of land* can not be maintained where the relation of landlord and tenant has never existed.

3. *Landlord's remedies*—A landlord has the same remedies against an under tenant that he has against the tenant.

Winfield Buckler for appellant; A. Duvall for appellee.

SMITH, &c. v. LEFORCE, &c.

Filed November 23, 1892. Appeal from Whitley Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Admissions by the grantor in a deed* made before or at the time of the sale, if the same would be admissible against him, are admissible against the grantee, notwithstanding the grantor is a competent witness and within the jurisdiction of the court's process. But, as a general rule, the declarations of the grantor made after the delivery of the deed are not competent evidence against the grantee or others interested in the subject of the conveyance. But in this action, in which it is sought to subject land which the debtor has conveyed to another, upon the ground that the conveyance is fraudulent as to creditors, as the declarations of the grantor, the father of the grantees, made before and those made by him after the execution of the deed are so connected that they can not well be separated, all are competent.

2. *A parol contract for the sale of land is not void*, and a conveyance in compliance with such contract relates back to its date, and overreaches the claim of an intermediate attaching creditor. And as the grantees in the conveyance attacked in this case claim that it was made in compliance with a parol contract entered into long prior to its date, it was competent for them to introduce any competent evidence which would tend to corroborate their

Digitized by Google

statements and the statements of their father in regard to the parol contract; and the court erred in refusing to allow a witness to answer appellant's question, whether he had not, as long as three months before the date of the deed, received a letter from the grantor saying he had sold the land to his boys, and wanted him to come and make a survey, that he might convey to each his part. While the letter is the best evidence, and its contents can not be proved if it can be produced, yet it was error to refuse to allow the witness to testify at all.

3. *Fraudulent conveyance—Evidence*—The court should have permitted the grantees to show that a debt of the grantor, which they had assumed to pay, was a lien on the land in controversy, as it tended to show a consideration for the parol contract and the good faith of the parties.

4. *Same*—The fact that the grantees knew their father, the grantor, was in debt, was not sufficient to invalidate their contract for the purchase of the land, provided they bought the land in good faith, for a valuable consideration, and without any knowledge of a purpose upon the part of their father to defraud his creditors.

5. *Reversible errors*—The court will not reverse for an error in an instruction to the jury, when the objectionable feature in the instruction was embodied in one asked by the appellants, although refused.

Hill & Denham for appellants; Crawford & Mason and H. F. Finley for appellees.

L. & N. R. R. Co. v. Commonwealth.

Filed November 30, 1892. Appeal from Simpson Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Indictment—Limitation*—Prosecutions in the name of the Commonwealth to recover a penalty for violation of any penal law must be commenced within one year after the right to such penalty accrued, unless a different time is allowed by the law imposing the penalty.

2. *Same*—Where a prosecution may be barred by lapse of time, the time of the commission of the offense must be averred in the indictment either specifically or by the allegation that the offense was committed within the period during which it may be prosecuted.

An indictment for permitting a nuisance, returned in 1889, in which the only allegation as to the time of the commission of the offense is that the defendant "heretofore, to wit, on the day of 188—, did," etc., is not sufficient, as it did not appear that the offense was committed within one year before the finding of the indictment.

William Lindsay and C. W. Milliken for appellant; G. T. Finn and W. J. Hendrick for appellee

Gay's adm'r, &c. v. Herd.

Filed November 30, 1892. Appeal from Owsley Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

In this action upon a bond executed by a deputy sheriff to his principal for the faithful performance of his duties during the first term of the sheriff, it appears that the deputy also acted as such during the sheriff's second term, and that there was also a deficit for that term, it was error to carry all credits to the extinguishment of that liability and thus throw the whole burden of the defalcation upon the sureties in the first bond, who were in no event responsible for any deficit occuring during the second term. The cause should be again referred to the commissioner, with instructions to ascertain and report the amount with which the deputy is chargeable, as well as the credits to which he is entitled on the business of the first term.

John L. Scott and E. E. Hogg for appellants; J. M. Sebastian for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. JANUARY 1, 1893. No. 13

KENTUCKY COURT OF APPEALS.

HARDIN COUNTY, &c. v. L. & N. R. R. Co.

(*Filed Dec.* 19, 1891.)

1. *Contract—County bonds issued in aid of railroad—Interest—Estoppel*—Hardin county subscribed for $300,000 worth of stock of the L. & N. R. R. Co. to aid in the building of the railway of that company, issuing in payment thereof $300,000 interest-bearing county bonds, bearing date January 1, 1853, '54, '55, for which the L. & N. R. R. Co. issued to the county 30,000 shares of its stock of the par value of $300,000. The charter of the company under which the subscription was made required it "to allow all * * * holders of stock * * * interest on the same from the time of paying for said stock up to the time of making the first dividend, and issue to the holder stock therefor." October 8, 1861, the directors of the L. & N. Co. declared a dividend of a quarter of one per cent., payable in stock as of January 1, 1862, and further provided that "interest on the stock of * * * the several counties * * * be calculated to April 1, 1862, and stock issued for the same and for said dividends, as well as for the original certificates of stock, on the surrender thereof." The company declared another stock dividend of ten per cent. on January 2, 1864, and on June 24, 1864, declared its first cash dividend of six per cent., payable June 30, 1864. In this action concerning the right of Hardin county to stock dividend on the $300,000 of stock between April 1, 1862, and June 30, 1864, *Held*—

1. Although the bonds issued by Hardin county in 1853, '54 and '55 were dated January 1st of each year, the county was not entitled to railroad stock in payment thereof until the delivery of its bonds. It does not clearly appear when the bonds were delivered in each year, but it will be presumed that it was on or before April 1st, because the semi-annual interest on the bonds became due then. Therefore, the railroad company will be required to pay a stock dividend, under its charter, on the stock held by Hardin county, beginning with April 1, 1853, '54 and '55, when the stock must have been delivered.

2. The declaring of the one-fourth of one per cent. stock dividend by the board of directors of the railroad company did not terminate the right of the county to draw interest on its stock, payable in stock. This right did not terminate until the first cash dividend was declared, viz., June 30, 1864.

Digitized by Google

3. The act of May, 1861, amending the charter of the company, did not authorize the directors of the L. & N. R. R. Co. to stop the payment of stock dividends before the payment of the first cash dividend.

4. The fact that one of the three sinking fund commissioners of Hardin county was present at a meeting of the stockholders of the railroad company, at which the report of a committee previously appointed by them was adopted, which recommended to the directors of the company that the one-fourth of one per cent. stock dividend of April 1, 1862, be declared in order that the accumulation of stock interest thereafter might be prevented, does not estop the county to thereafter claim such interest stock.

5. The defense of limitation is not sustained in this case.

6. The right of the county to the relief prayed for herein was not lost or affected by the fact that the tax payers of Hardin county, under the charter of the company, had converted their tax receipts into stock certificates of the company.

W. P. D. Bush, Wintersmith & Cofer, J. P. Hobson, Jno. Mason Brown and P. B. Muir for appellants.

Russell Houston, I. & J. Caldwell and Wm. Lindsay for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

The Louisville & Nashville Railroad Company was, in 1850, by statute of this State, incorporated for the purpose of building a railroad from Louisville to Nashville; provision being made in the charter and acts amending it for subscription of stock by cities, towns and counties into or through which the road extended as well as by individuals. And in pursuance thereof Hardin county, by its county court, subscribed 30,000 shares, equivalent to $300,000, in payment of which county bonds for that amount, bearing interest, coupons attached, were issued, payable in 20 years, one-third of them being dated January 1 of each of the years 1853-4-5.

Section 5 of an amendment to the charter enacted March 20, 1851, is as follows: "Said company shall allow to all subscribers and holders of stock under the company interest on the same from the time of paying for said stock up to the time of making the first dividend and issue to the holder stock therefor; and when stock shall be subscribed for a branch they may provide that said stock shall not be entitled to draw dividends until said branch is completed, but may allow interest on the payments up to the completion thereof and pay it in stock."

October 8, 1861, the board of directors of the company, by resolution, declared a dividend of a quarter of one per cent., payable in stock as of January 1, 1862, and provided that "interest on the stock of the city of Louisville, the several counties and individuals be calculated to April 1, 1862, and stock issued for the same and for said dividends as well as for the original certificates of stock on the surrender thereof." the amount of stock dividend going to Hardin county, under the resolution, being $720.

No dividend, either cash or stock, had before that time been declared, nor was any afterwards until January 2, 1864, when there was another stock dividend of 10 per cent., followed by a cash dividend of 6 per cent., which was declared June 24 and made payable June 30, 1864. But the interest provided for by the section quoted was not allowed by the company to continue on the stock of any city, county or individual after April 1, 1862; the 10 per cent. stock dividend and the 6 per cent. cash dividend first mentioned, as well

Digitized by Google

as all subsequent ones, whether cash or stock, being declared and paid to each holder according to his or its aggregate of stock and interest up to April 1, 1862, added.

This action was brought March 19, 1869, for judgment requiring the company to issue to Hardin county additional stock equal to amount of interest on the sum of $300,000 from April 1, 1862, when it was stopped by the board of directors, to June 30, 1864, when the first cash dividend was declared, less amount of the fractional dividend mentioned and also for the additional dividends the county was entitled to on that basis, but withheld by the company.

The judgment of the lower court dismissing the action was affirmed by this court in 1878, but a rehearing was granted and re-argument ordered, which, however, did not take place until 1885, and decision of the case has been further delayed several years awaiting briefs of counsel.

As will be readily seen the main question in the case is whether the stock dividend of a fourth of one per cent., declared April 1, 1862, was such compliance with section 5 of the act of March 20, 1851, as authorized or justified the board of directors to stop running of interest on the stock therein mentioned.

It is manifest and in defendants' answer admitted that Hardin county was, in meaning of that section, holder of stock to the amount of $300,000 and entitled to interest on it payable in stock of the company. But an incidental question is made by counsel, we will now dispose of, as to the time that interest began, whether January 1 or April 1 of the respective years the bonds were issued. As the county did not become holder of the stock until delivery and acceptance of the bonds in payment of it the date of that transaction rather than date of the bonds should be treated as the time interest on the stock commenced. And in absence of evidence of the precise date of such delivery and acceptance it may be fairly presumed April 1 was the time, because that date and October 1 of each year seem fixed for payment of semi-annual interest on the bonds.

It is evident that subscription of stock by the city of Louisville and counties through which the road would pass was chiefly relied on by the company and without such aid the enterprise would not have been carried out, even undertaken; for of the sum of $2,535,707.60, amount of stock subscribed and paid for up to April 1, 1862, only $135,706.60 was private subscription. It must be, therefore, presumed that the terms and conditions of such corporate subscription of stock were intended to be such as to make as easy as possible the heavy burden of taxation imposed upon each county and at the same time so explicit and obligatory they could not be misconstrued or evaded by either party to the contract.

The only character of dividend mentioned in any of the acts passed previous to the subscription of stock and issue of bonds by Hardin county, or that the board of directors had the authority to make is that referred to and described in section 19 of the charter, approved March 5, 1850, as follows: "That said president and directors shall annually or semi-annually declare and make such dividend as they may deem proper of the net profits arising from the resources of said company after deducting the necessary current and probable contingent expenses, and that they shall divide the same among the stockholders of said company in proportion to their respective shares." And, it seems to us, it would be hard to find language that more accurately and fully describes a cash dividend or more certainly and completely excludes the idea of a stock divi-

Digitized by Google

dend than is done by that then used. Moreover to terminate interest on the stock whenever the board of directors of the company might choose to declare a mere stock dividend, however insignificant, would have been utterly inconsistent with the plainly expressed terms upon which county subscriptions were made as well as subversive of the plan distinctly provided in the various acts for meeting principal and interest of the bonds.

By section 7 of the act of January 9, 1852, it is, in substance, provided that in any case of a county subscribing to the capital stock of the company and issuing bonds to pay therefor, and until the dividends on the stock subscribed shall be sufficient to pay interest on said bonds the county court shall levy a tax on the property of the county sufficient to pay such interest.

Section 12, same act, provides that all dividends received upon the stock held and owned by any county shall be sacredly set apart as a sinking fund, to be only used for payment of the principal and interest of the bonds.

Section 13 provides for levying a direct tax to redeem the bonds in case the dividends on the stock held by a county shall not be sufficient to enable the county to redeem them at maturity by means of the sinking fund.

Section 14 provides that in case a direct tax is levied to redeem the bonds at maturity the commissioners of the sinking fund shall cause to be transferred to the order of the tax-payers the stock held by the county upon delivery to said commissioners of the receipts of the holders thereof of an amount equal to one share of stock.

Section 15 provides that upon the date of the first dividend and thereafter upon presentation and surrender at the office of the company of receipts for taxes paid to defray interest on the bonds given by any county the company shall issue to the holders thereof stock for the same.

But that section was so amended by section 14 of the act of January 17, 1856, that any tax-payer might thereafter, even before the date of the first dividend mentioned in section 15 of the act of 1852, present his tax-receipts to the county commissioner appointed for the purpose, and obtain a certificate setting forth the number of shares and fractions of shares to which the holder is entitled, and upon presentation of such certificate obtain from the railroad company certificates of stock in shares and fractions of shares, and it was provided that he should be entitled to all the rights and privileges of a stockholder, *but that such stock should not bear interest.*

It is plain that the various county subscriptions were made upon the faith and agreement of the company that the stock paid for with interest-bearing bonds should bear interest payable in stock until a cash dividend was declared with which to remove or lessen the burden of taxation, for we have not discovered a single provision in the charter or amendments that authorized the board of directors to stop the interest in any other event or upon any other condition.

The act which it is contended conferred the authority was passed May 16, 1861, and is as follows: "That the L. & N. Railroad Company is authorized to withdraw by purchase fractional shares of stock and interest script and to sell fractions to make full shares; and is also authorized to increase the capital stock of said comany to an amount sufficient to represent the full cost of the road and branches in stock: also to liquidate any of the mortgage or other debts of the company by the issue of preferred stock, entitling the holder to dividends at the rate of 4 per cent. half-yearly, on such stock."

But, in our opinion, that act does not repeal nor is it at all repug-

Digitized by Google

nant to section 5 of the act of 1851, for it does not in any manner relate to the subject of interest on stock previously subscribed and paid for. It is true the capital stock of the company is thereby authorized to be increased to an amount sufficient to represent the full cost of the road, but that might have been done without at all impairing the rights of counties already secured by contract with the company.

Nor do we think the resolution of the board of directors of October 8, 1861, already mentioned, to declare a dividend of one-quarter of one per cent. in stock had necessarily or properly the effect to stop interest on stock which the company had agreed to pay, though it may have been covertly so intended. It is true provision was then made "that interest on stock of the city of Louisville, the several counties and individuals be calculated up to April 1, 1862, and stock issued for the same." But even if intention of the directors to thus summarily put an end to contract rights could be fairly implied from the language used, still in the absence of definite and express terms an effect that would render it illegal should not be given to the resolution, especially as it may be construed so as to be consistent with the statutes.

It does, however, appear that May 27, 1862, the president of the company sent to the county court or commissioners of the sinking fund of Hardin county a statement of the stock dividend of one-fourth of one per cent., and a proposed agreement to be signed by them for settlement of the county's stock account by stopping the interest at April 1, 1862, but that proposition was declined. And there does not seem to have been any further official action taken or direct notice given to Hardin county of the purpose to stop interest on the stock until January, 1864, when the stock dividend was made and declared on that basis, as was also the cash dividend of June 30, 1864.

According to the agreed facts in this case the amount of tax-receipts converted by the tax-payers of Hardin county, or by those to whom they had been sold and transferred, into certificates of stock prior to April 1, 1862, was the sum of $174,419.25, and the amount so converted between that date and June 30, 1864, was the sum of $40,300.84. But though, according to the charter and amendments, such stock certificates were as they accumulated, and at the first and each subsequent making and declaring cash dividends to be deducted from and to that extent lessen dividends on amount of stock originally issued to the county, they were not, as expressly provided by the act of 1856, to bear interest.

It will thus be seen that as a result of the action of the board of directors the stock of Hardin county was, on June 30, 1864, reduced not only to the extent of the entire accumulation of stock certificates up to that date and dividends thereon ratably lessened, but still farther reduced to the extent of interest thereon from April 1, 1862, up to that date, which should have been added to the principal sum but was withheld.

It is, however, contended the county was not prejudiced thereby because what was lost in interest was gained by the tax-payers. That position is not entirely correct, and, if it was, would not excuse violation of a right plainly given by the statutes under which the subscription of stock was made and accepted. But it is not a reasonable assumption that the stock certificates were, at the time, held wholly by tax-payers of the county, on the contrary common observation teaches that tax-receipts usually find their way into possession of speculators who are, not seldom, directors of the company

Digitized by Google

having the best knowledge of their real value as well as power to regulate and control it. Besides, even if the holders of such certificates had been altogether tax-payers of the county the gain to them would not have been any thing like full compensation for the loss to the county of the interest on the original subscription from April 1, 1862, to June 30, 1864. For the county bonds were not due in 1862 and the loss of interest after that date to that extent lessened the fund set apart as required by statute and intended to meet the principal and thus injured both the county and those required to pay subsequent taxes. But there is no issue in this case between Hardin and tax-payers thereof, but the simple question is as to the legal right of the county to the interest on the stock, which was withheld, as we think, arbitrarily and illegally.

The plaintiff is, therefore, entitled to the relief sought unless some one of the grounds relied on is an available defense.

It appears that, October 8, 1861, a committee appointed at a previous meeting made a report to the stockholders, recommending that in order to prevent the further accumulation of interest stock after April 1, 1862, a dividend of one-fourth of one per cent., payable in stock, be made. And the fact one of the sinking fund commissioners of Hardin county was present when the stockholders, by vote, appeared and adopted that recommendation of the committee is pleaded and relied on as an estoppel. The action of that single commissioner is not shown to have been authorized either by the Hardin county court or by the other two commissioners, and can not be regarded as binding on the county, especially as it was utterly without any statutory sanction and in fact in the teeth of the statutes. Besides the action of the stockholders, even assuming Hardin county was fully represented in the meeting, was no more than a mere recommendation to the board of directors. And even the resolution the board adopted, properly construed as already indicated, did not amount to stopping the interest.

So far from doing any act by its county court, or a majority of sinking fund commissioners, amounting to an estoppel, the first distinct and authoritative proposition to stop the running of interest made by the president of the board of directors in 1862 was declined, and, October, 1864, the county court adopted resolutions protesting against it. And it is agreed that various conferences of agents and attorneys of the county and officers of the company took place between that time and the commencement of this action, with a view to compromise the dispute as to interest on the stock for the period mentioned, which proved abortive.

It seems to us that neither the defense of limitation nor estoppel can avail. Nor do we think the acquiescence of other counties in the mode adopted by the board of directors for adjusting the stock and interest accounts can affect or impair the right of Hardin county which is distinct and independent, for they need not have been, nor is there the slightest evidence they were mislead or deceived by the conduct of Hardin county or its officials.

It is contended the company had sufficient resources in April, 1862, to justify declaring a cash dividend, and that as it was thought expedient by the board of directors and was to the true interest of all stockholders, counties as well as individuals, to use the money to pay off debts of the company and better condition of the corporate property, it would be more inequitable to grant the relief prayed for.

We think there is enough in this record to clearly show the condition of the company was not such as to authorize a cash dividend

Digitized by Google

in 1861 or 1862, and that it would have been improper for the directors to have declared any. It is sufficient as to this case they did not do so, and, consequently, the event or condition did not then occur upon which alone the interest on the stock of Hardin county could be stopped, and it having been illegally and to the injury of the county done it is now entitled to the relief asked, which consists in issuing to it stock as of June 30, 1864, in amount equal to the interest on $300,000 from April 1, 1862, to that date, and payment of such additional dividends as the county was entitled to on that basis and interest on amounts from the several dates upon which they ought to have been paid but were withheld.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

COMMONWEALTH V. MCKAY.

(*Filed Oct. 8, 1892—Not to be reported.*)

1. *An attorney has a right to refuse to pay to his client money collected for him* when the client is indebted to the attorney in a sum exceeding the amount collected.

2. *Failure of attorney to account to client for money collected*—In response to a rule issued by the Jefferson Circuit Court against an attorney to show cause why he should not be suspended from the practice of his profession, under article 1, chapter 5, General Statutes, for failing wrongfully to pay over money collected by him for his client, the attorney answered that the client was indebted to him in an amount largely in excess of the sum collected, for which amount he had instituted a suit in the Bullitt Circuit Court, which was then pending. *Held*—That the response presented a good defense, and it appearing that the claim was asserted in good faith by the attorney, the Jefferson Circuit Court could not usurp the jurisdiction of the Bullitt court to determine the merits of such claim.

3. *Same*—The client having, subsequent to the discharge of the first rule, renewed it on the ground that the Bullitt court had decided adverse to the attorney's claim, an answer by the attorney to the second rule setting up the discharge of the first rule absolutely, and averring that he had superseded the judgment rendered by the Bullitt court, and that the case was then pending by appeal in the Superior Court, presented a plea in bar to the second rule. This court can not assume that the answer to the rule set up by the attorney was a sham defense.

Lane & Burnett, Rives & Spalding and W. J. Hendrick for appellant.

Fairleigh & Straus for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

This is a proceeding under article 1 of chapter 5, General Statutes, to suspend the appellee from the practice of his profession for failing wrongfully to pay over money collected by him for his client, Lancaster. The statute authorizes his suspension for twelve months or until the money collected shall be paid.

In the month of October, in the year 1891, a rule was issued against the appellee to show cause why the penalty found in the statute should not be imposed. He appeared and filed a response to the ef-

Digitized by Google

fect that Lancaster was indebted to him in a much larger amount than the sum collected by him, and that he had instituted an action in the Bullitt Circuit Court to recover the indebtedness, crediting on his account the amount of money claimed by his client. There was an issue made, much proof taken and a final order entered in that case discharging the rule, the court holding that the claim of the appellee was asserted in good faith, and the Jefferson Circuit Court, from which the rule went, would not undertake to usurp the jurisdiction of the Bullitt Court in the case then pending between these parties.

In June, 1892, the Bullitt Court having decided adverse to the appellee, the rule was again renewed in the Jefferson Circuit Court and the same defense interposed, with the further averment that the appellee had superseded the judgment rendered in the Bullitt Circuit Court, and the case was then pending by an appeal in the Superior Court. If the answer was good on the first rule it was on the second, and the plea in bar, it seems to us, ought to have prevailed. The proceedings on the first rule were not dismissed without prejudice, but an order, final in its character, discharging the rule upon both the pleadings and proof. The opinion rendered by the court forms no part of the record, and if it did the question presented is, can the attorney decline to pay over money to his client when the latter is indebted to him in a sum exceeding the amount collected? We think it clear that he can, and to adjudge the response of the attorney to be a sham defense would be assuming that he has not only forfeited his right to practice his profession, but lost his personal and professional integrity by asserting a false claim against his client in order to arrest the payment of what he admits has been collected. It may be said, to the credit of the profession, although trustees for their clients without bond, that cases seldom occur where this confidential relation is violated or professional honor less valued than the dollars and cents collected for clients. Whatever may be the result of the litigation pending on the appeal the good faith of the attorney accompanied that record.

Judgment affirmed.

STEMBRIDGE V. BRITSCHU.

(*Filed Oct.* 8, 1892—*Not to be reported.*)

Ejectment—Rights of intruder—Adverse possession—Plaintiffs in ejectment, and those under whom they claim, have been in possession of certain land since 1854, claiming to a well defined boundary——in an action by them against an intruder, who, without any right or claim of title, has entered upon and taken possession of a part of the land near its exterior boundary, such intruder can not successfully plead that the boundary line between plaintiffs and the adjacent land owner is not located as claimed by plaintiffs, and that, therefore, the land in controversy does not belong to them, the defendant not holding any title under such adjacent land owners. Plaintiffs had constructive possession of this land for more than the statutory period, and defendant can not defend his own wrong by the titles of others with whom he has no connection.

S. B. Vance and R. H. Cunningham for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Digitized by Google

Opinion of the court by Judge Pryor.

Henderson & Co.'s grant embraced a large area of land on Green river, and this land having been divided, lot No. 6 was conveyed to David Hart's heirs in the year 1797. This was known as the northern half of the grant. The southern half was allotted to and divided between Richard Henderson's heirs and Bullock's heirs. Hart's heirs had a partition of their half of the land in the year 1811. The title to the land allotted to Henderson's heirs or a part of it passed to various vendees and was finally sold and purchased under judicial proceedings by A. B. Barrett, and a deed made to him by the commissioner, describing the lands by metes and bounds as far back as the year 1854.

In 1869 the heirs of Barret conveyed this land to John and W. T. Barret, and in November, 1869, the Barrets conveyed it to John F. Britschu, who, or his descendants, now owns it. The land sold by the Barrets to Britschu, and deeded through Henderson's heirs, bounds on lot No. 6, allotted to Hart's heirs, and one of the questions made in this case arises as to the dividing line between Hart's heirs and Henderson's heirs. While the wife of Britschu and her children were in the possession of this land under the deed from the Barrets, made in 1869, and not many years before the institution of this suit, the appellant entered within the boundary of the deed made to their ancestor by the Barrets, and within the boundary made by the commissioner to A. B. Barret (from whom the two Barrets derived title) in the year 1854, and having entered, these appellees, the heirs of Britschu, brought this ejectment against him.

It is shown that the heirs of Britschu, and those under whom they claim have been living on this land continuously for many years, claiming to the extent of the boundary of the deed made to their ancestor by the Barrets, but it is insisted that when the defendant entered they had no actual occupancy of the land upon which his entry was made, and that the part of the land upon which he did enter was in Hart's division and had been allotted to one Hillyer. In other words, it is claimed that all the land embraced by the deed of the Barrets to the ancestor of the plaintiffs by the former allotment to Hart's heirs passed no title by possession or otherwise to the plaintiffs, because there was no actual entry upon it. It is conceded there was no actual entry, and the possession of the plaintiffs as to this part of the land being only constructive, it is insisted that the statute did not run as against Hart's heirs or Hillyer, because they could not have had a cause of action until there was an entry on their land.

The defendant, therefore, relies on the title of Hart's heirs or Hillyer to defeat the claim of the plaintiffs upon the familiar rule that the plaintiff must recover on the strength of his own title and not the weakness of his adversary.

There is no pretense that the defendant, Stembridge, has title, or the color of title, or that his possession is in any manner connected with that of Hart's heirs. He occupies the position of a mere intruder, questioning the location of the boundary line between the owners of this large grant of land, made nearly a century since, with the appellees in the possession of a well defined boundary by deed made in 1869, and that boundary made by deed through a commissioner to one of his remote vendors, A. B. Barret, as far back as the year 1854, more than thirty years before this defendant entered.

We can not well see, therefore, how the appellee could have been affected by an erroneous ruling of the court below as to the instructions

Digitized by Google

or the admissibility of testimony. The record shows that he entered without right and without title. The case presented is one of boundary, with some uncertainty as to the real division line, but when there has been an acquiescence for near thirty years in what was regarded as the true line, and the plaintiffs and their vendors in possession claiming to a well defined boundary that does not, from the weight of the testimony, interfere with the title of Hart's heirs, why should the common law judge or the chancellor, for the protection of a mere squatter, with no assertion of claim by Hillyer or Hart's heirs, undertake to fix the real boundary for his benefit? As said by this court in Fowke v. Darnall, courts in modern times have leaned considerable against permitting a defendant, who came in by wrong, from protecting that wrong by the titles of others with which he is unconnected. 5 Littell, 321.

Here the plaintiffs have been in the actual possession of the tract of land sold them by the metes and bounds beyond the statutory period, claiming it as their own, but this defendant claims that a part of the tract is in Hart's allotment, and as no actual entry was made on that part by the appellant, he must remain undisturbed. He will not be protected in that manner for the reason that the boundary, in so far as mere intruders are concerned, must be regarded as fixed by the long continued and uninterrupted claim of the plaintiffs.

In fact, after the lapse of so many years, with the heirs of Hart as defendants, and in the absence of an actual entry by them, it might well be assumed that they have acquiesced in the boundary, as claimed by the appellees.

Judgment below is affirmed.

WALTERS V. RICHARDSON.

(*Filed Oct.* 11, 1892.)

1. *Constitutional law—Title to act*—The act of 1890, entitled "An act to define the county line of Estill county," is not unconstitutional by reason of its title, although such act does not merely make definite and certain a boundary line theretofore in doubt, but so changes the location of a boundary line as to transfer from Estill to an adjoining county one hundred and sixty voters and about $175,000 worth of property. The Legislature, it is presumed, used the word "define" in the title to the act in its enlarged meaning, and the title so understood is not misleading or deceptive.

2. *Same—Parties to actions*—In a controversy between the sheriff of Estill county and one of the voters transferred from that county by said act, a court will not attempt to determine whether or not the Legislature was mislead in passing such act, or that it had before it no facts requiring the boundary to be fixed at the place designated in the act. The Legislature had plenary power of the subject-matter of the act, and the court must assume that it made a full investigation and had thorough knowledge of the facts relating thereto. The validity of an act which is regular and valid on its face, and which affects the entire tax-paying population of two counties, ought not to be determined in this action, to which none of them have been made parties.

W. P. Smith for appellant.

J. B. White and Hugh Riddell for appellee.

Appeal from Estill Court of Common Pleas.

Digitized by Google

Opinion of the court by Judge Pryor.

During the session of the Legislature for the years 1889 and 1890 an act was passed, entitled an "Act to define the county line of Estill county." The recital of that act shows that the citizens of that county were unable, by reason of the uncertainty as to the location of the boundary line, to know whether they were the citizens of Estill or some other county, and then the act proceeds to define the boundary line in such a specific mode as to remove all doubt as to the true boundary line.

The title of the act and all the steps following the title show it to be a valid enactment and subject to no constitutional objection. The legislation is authorized by the title, for the act clearly defines the boundary of Estill county. It is claimed, however, that the title is misleading and deceptive because, upon the agreed facts, the Legislature, instead of defining a boundary that was uncertain, abandoned the uncertain boundary and so changed the line as to take 160 voters from the county of Estill and included them within the territory of the county of Powell, an adjoining county, and with these citizens, taxable property of the value of $175,000 was transferred from the county of Estill to the county of Powell.

The question originated in this manner: The sheriff of Estill county, disregarding the legislative enactment of 1890 defining the boundary of that county, endeavored to collect the taxes of a tax payer who had been included within the county of Powell by the act of 1890, and his property assessed in Estill county as if no change in the boundary had been made. The tax payer enjoined the sheriff of Estill from coercing payment in that way, insisting that he owed his allegiance to Powell county and not to Estill. The sheriff, in answer to the petition of the citizen, the plaintiff, set up the fact that although the legislative act upon its face was regular and proper, the title of the act had been departed from, and instead of defining an uncertain boundary, the boundary of Estill had been greatly diminished and that of Powell greatly enlarged; that the boundary line had been changed and at least 160 voters taken from the one county and added to the other.

A demurrer was filed by the plaintiff to the answer and overruled, and the plaintiff, electing to stand by the demurrer, a judgment was rendered in favor of the sheriff, directing him to collect the tax upon the ground that the act under which the change of boundary was made was unconstitutional. At first impression it would seem to be a great hardship on Estill county to have its boundary changed in that mode and that a fraud had been perpetrated upon the Legislature in obtaining an enactment that did not in good faith accomplish the object in view; but, when conceding that the representative of the people, including the members from those counties, had full and complete power over the subject matter, with the right to make certain or to change the boundary line of either county, can this court rightfully determine, in a litigation between the citizens of Estill county, or between a citizen of Estill and one of Powell county, that the Legislature was misled in fixing the boundary, or had no facts before it requiring, if the position of the appellee be the correct one, the location of the boundary to be at the points designated by the statute of 1890, in order to remove all doubt as to the county in which the tax payer lived? We think not. The legislative department of the government had plenary power over the subject matter, and we must assume that a full investigation was had of the wants of the people of Estill, and the necessity for so defining

Digitized by Google

the boundary as we find it in the act, in order to cure the evil complained of. They may have used the word *define* in its enlarged instead of its restricted sense, and if the facts admitted by the demurrer are true, we must then assume that the Legislature intended the word *define* to have this enlarged meaning.

Where the act is perfectly valid on its face, it would be a dangerous precedent to say that the citizen could present a state of facts in an answer or petition admitted by the opposite party to be true on demurrer, or even by the testimony of witnesses, so as to justify this court in holding the act unconstitutional when it affects not only the parties litigant, but the entire tax-paying population of both counties, none of whom are heard save the parties to the litigation. Besides, we find numerous acts passed by every Legislature defining the jurisdiction of courts of justices, defining the *power* of those in authority, or defining boundary lines, and in all these cases the powers are either enlarged or restricted, the Legislature giving to the word *defined* its enlarged meaning, and while, if the act on its face showed that the meaning was restricted, and the Legislature had paid no regard to the title of the act, we would hold it *unconstitutional;* where we are asked to leave the act and look to parol proof for the purpose of showing that the Legislature did not mean to do that which it has done by express enactment, it would be invading the province of that department of the government and work incalculable mischief. Why, then, did the Legislature use the word defined in its enlarged sense? The answer is, because the fixing of the boundary, if the facts admitted by the demurrer are true, shows that this was the legislative meaning, else they would not have taken a magisterial district from the one county and attached it to the other. In People v. Headley, 36 Michigan, 447, it is said the words to define the extent of a kingdom or country must ordinarily restrict or enlarge the boundary; and further, "we have never heard of any question being made as to the want of authority to enlarge the possessions of another under a power given to define them." 36 Mich., 452.

If, therefore, the Legislature knew, and we must assume it did, that 160 voters were being taken from the one county and added to the other by this boundary, we must also assume that such was the plain intent, and the word *define* used by that body in its enlarged and not restricted sense.

The judgment below is reversed with directions to sustain the demurrer to the answer and for proeeedings consistent with this opinion.

LAUREL COUNTY COURT V. TRUSTEES LAUREL COUNTY SEMINARY.

(*Filed Oct.* 13, 1892.)

1. *Trusts—Action for accounting*—Where the act creating a certain body of trustees to receive and hold property for the benefit of a county seminary of learning re quires said trustees to execute a bond for the faithful performance of duty, and authorizes the county court to sue such trustees for their failure to discharge their duty under said act, the county court may maintain an action in equity aginst said trustees for an accounting and recover judgment in said action for any balance found due by said trustees. The county court is not required to sue on the bond for any balance due to the exclusion of all other remedies.

2. *Same—Liability of one trustee for acts of co-trustee*—Where a surviving trustee is sought to be held liable for the default of a deceased co-trustee, on the

Digitized by Google

ground that the two execute a joint bond for the performance of their duties, the action must be on the bond, and in a suit in equity for an accounting no liability will be imposed on the surviving trustee by reason of the execution of such bond.

3. *Same—Stale claims*—The rule holding all of several trustees liable for the default of one co-trustee, to whom all gave a power of attorney to sell the trust land, and who received and failed to account for the proceeds thereof will be enforced against a trustee more than twenty years after the default, of such co-trustee, who is now dead, especially when it appears that the beneficiary had full knowledge of the fact that the deceased trustee alone had possession of such proceeds and consented to his retaining control of same.

Alcorn & Craft, A. H. Clark and J. H. Tinsley for appellant.

W. O. Bradley and W. R. Ramsey for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1834 the Legislature of this State donated to the county of Laurel, for educational purposes, six thousand acres of land, to be located west of the Tennessee river. A power to locate and sell the land was vested in the county court, and under this power that court gave to Jackson and others one-half of the entire land for locating it. After the division of the land between Jackson and the county court, a part of the land allotted the county in the division was lost in actions instituted under older surveys or patents. In the year 1856, the county court taking no steps, or at last none appearing, to accomplish the purposes of the donation, an act was passed creating the appellees, Farris and Misart and one George Brown, a body corporate, with the power to sell the land, and with the proceeds to erect a seminary of learning in the county of Laurel, in the town of London, and the balance, if any, to be applied to educational purposes, such as purchasing a library and apparatus, &c. The corporation was required to give bond for the faithful discharge of its duties, and the county court authorized to sue the corporators for a failure to discharge the duties imposed by the act. The corporation accepted the terms and the county court invested the corporation with the title, or it derived the power to sell and convey from the act creating the corporation. A bond was executed by the corporators and they proceeded to sell the land by giving power of attorney to Brown, who was one of the trustees or corporators. They all lived in the county of Laurel, and this land was located west of the Tennessee river. This was in the year 1856. The act further vested in the trustees the power to invest any surplus of these sales of land in bank stock or other profitable investment, the principal to remain as a permanent fund. George P. Brown, one of the trustees who sold this land, died in the year 1868, having sold the greater part of this land, and with a part of the proceeds the trustees, long prior to his death, had purchased a site for the seminary, erected the building, and the school for many years was in a prosperous condition. Brown, it seems, retained some $2,500 of the money derived from the lands in his own hands, and when he died a sum exceeding $2,000 remained unaccounted for by him that he had held for many years. He died insolvent, and this action was instituted against Farris, one of the original trustees, and the other appellees, as successors of those who had died, asking for an account and a judgment against them for the money unpaid by Brown, the trustee, who had died, with the interest. The principal sum they have collected

Digitized by Google

from Brown's estate, but the interest, now exceeding the principal, is the bone of contention between the parties.

It is first insisted by the appellees, the court below having dismissed the petition, that the county court had no right to sue for an account. There is nothing in this objection. A bond was required to be executed by the trustees, and the act expressly authorized the county court to sue for any neglect of duty, and while it is argued this right to sue applied alone to a suit on the bond, we think a fair interpretation of the act gave to the county court the power to compel an account and to sue either at law or equity as might be deemed advisable.

The appellees insist that the action should have beeen on the bond, while the appellant maintains that no bond was necessary to make the trustees liable, and a court of equity had the right to compel an account and to render a judgment for the balance in their hands and deny the right of the appellees to force them to an action on the bond. We concur with counsel for the county court that a court of equity could require an account of the acts of these trustees for so long a time, and then render a judgment against them for any balance that might be found due without reference to the bond.

The appellees, for defense, insist that they are not liable for the failure of Brown to pay this money over; that it was a breach of duty on his part, and as co-trustees they are not liable for his acts, and, if liable, they are only responsible as sureties, and after the lapse of more than twenty years the claim has become so stale the chanceller will not enforce it, and the statute of limitation applies.

Mr. Perry, in his work on Trusts, says: The general rule is, that one trustee shall not be responsible or liable for the acts or default of his co-trustee, and he cites the case of Townsly v. Sherborn, where lands were conveyed to two or more upon trust, and one receives all the profits, his co-trustee shall not be charged in chancery for the receipts of him so dying or in default, unless some practice, fraud or evil dealing appear to have been in them to the prejudice of the trust. Perry on Trusts, section 415.

Judge Story, section 1280, in his work on Equity Jurisprudence, says: The general rule is, that they are responsible only for their own acts and not for the acts of each other, unless they have expressly agreed to be bound for each other, or they have, by their voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust." It may be argued that the trustees did agree to become bound for each other in this case by the execution of the bond to the county court. If so, the bond itself is not only the evidence of the agreement, but the action to charge the co-trustee must be on the bond, for upon its terms he agrees to stand. It constitutes the basis of recovery.

In this case it is not pretended that the co-trustee has been sued on the bond, and his liability rests upon purely equitable grounds. As to the sale of the land under the power of attorney, it has been held in some cases that if trustees join in exercising a power of sale, and one receives the money, all will be responsible, if lost by the "one receiving it; but Mr. Perry says this ignores the rule that a power must be strictly executed by all the persons to whom it is given, and if a trustee joins in the power but receives none of the money, omits no duty, and does no act tending to a breach of the trust, he will not be held for a loss occasioned by a breach of trust by other trustees. The great preponderance of authority is, that a sale under a power is not different from the execution of a receipt for the trust money." 1 Perry, 420.

Digitized by Google

Brown, the trustee, who collected this money, was regarded as perfectly solvent. The reports of settlement to the county court showed that he had this money in his hands, and it was as much the duty of one trustee as another to see that this money was invested. Brown had the possession of this fund, and when you attempt to make Farris liable for Brown's defalcation, after the lapse of twenty years from the breach, with a full knowledge on the part of the county court that Brown had this fund, it seems to us the chancellor, in a case like this, should hesitate before fixing a responsibility on one who has received no benefit from the transaction. This entire record shows that it was a holding by Brown with the consent of the beneficiary, fully competent to act, and with the consent of the co-trustees. All the money collected has been accounted for with the interest. The principal retained by Brown has been paid, and it is the interest now sought to be collected. It may well be said, in a case like this and particularly in a court of equity, where you attempt to make a co-trustee liable for the acts of another trustee, that the former stands in the attitude of a surety, and no such stale claim should be enforced.

There was money expended by these trustees after the war in repairing these buildings and erecting domitories for the benefit of the institutions, and it is now complained that this expenditure was improper. The buildings had been used by the soldiers and became much dilapidated, and when in this condition the repairs and improvements were made necessary, and the money having been expended in good faith, and a beneficial expenditure, we see no reason for holding these trustees responsible. In fact these trustees, and particularly Farris, when the county court for the period of twenty years had neglected to reap the benefit from this liberal donation made by the State, took charge of the fund, and as the proof conduces to show, have succeeded in building up an educational institution commensurate with the gift, and had shown themselves benefactors instead of plunderers.

The judgment should be affirmed.

COFFEY, *et al*, V. PROCTOR COAL CO., *et al.*

(*Filed Oct.* 15, 1892—*Not to be reported.*)

1. *Petition for new trial*—After the expiration of the term at which a judgment foreclosing a mortgage lien was rendered defendants, who were duly served with summons in that action, and who failed to answer, are not entitled to a new trial merely because of errors in the judgment or proceedings that would be sufficient to authorize a reversal thereof on appeal, but which do not render such judgment void, and their petition for new trial alleging only such errors ought to be dismissed.

2. *Same—New discovered evidence—Diligence*—Newly discovered evidence after the expiration of the term at which the judgment was rendered will not authorize the granting of a new trial unless such evidence could not have been discovered by the use of reasonable diligence before such judgment was rendered. The evidence must be new, and not merely cumulative in its character.

After the judgment foreclosing a mortgage lien on land was rendered, defendant averred that they discovered that plaintiff had, without right, removed a large quantity of valuable coal and lumber from said land and converted the same to his own use, the value of which ought to be credited on the mortgage debt. *Held*—That this is not a good ground for a new trial, since

Digitized by Google

the defendant, by the exercise of any diligence, could have ascertained these facts before the judgment was rendered.

3. *Infants—Guardian ad litem*—**Nor will a new trial be granted because one defendant was an infant when the suit was instituted and no guardian *ad litem* appeared for him, it appearing that such infant became of age several years before the final judgment was rendered, and was fully aware of the pendency of the suit.**

N. A. Richardson for appellants.

Hill & Denham and J. W. Alcorn for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Bennett.

John S. VanWinkle and the appellants' father and others owned jointly, but in unequal portions, large bodies of land lying in Whitley county, Kentucky, and in the State of Tennessee. In 1881 said VanWinkle instituted suit in the Whitley Circuit Court against the appellants, as the heirs of B. S. Coffey, to subject their interest in the land lying in Whitley county. The petition stated that in 1868 B. S. Coffey executed a writing which upon its face conveyed to Van Winkle his interest in said land absolutely for the consideration of $1,600; but the conveyance was intended to be a mortgage to secure the payment of that sum. The petition asked that the writing be declared a mortgage, and that the lien be enforced upon the land to satisfy the said debt, with interest thereon from 1868, subject, however, to a credit of $500, as of date 1881, which Van Winkle expected to be able to realize out of the Tennessee lands, which sum he was willing to allow as a credit in advance of receiving it. After some amendments were filed making new parties, in view of the sale of said land by Van Winkle, and some additional allegations in reference to the subject-matter of the original action, and the evidence was taken, a judgment was rendered June, 1887, enforcing the mortgage lien upon the land, and it was sold to satisfy the lien for about $1,100 and interest thereon. The appellants were made parties to this action, and were before the court, by summons, but they did not answer. March 12, 1889, and after said term at which the judgment was rendered, and after the sale and confirmation, the appellants filed their petition in the Whitley Circuit Court for a new trial of said case. They set up and urge about ten grounds for a new trial.

It is not worth while to go over all the grounds sereatim. It is sufficient to say that nearly all of them relate to errors in the court's proceedings, none of which render the judgment void, and which could have been corrected on appeal; and, the appellants having failed to appeal from said judgment, they must submit to the judgment and as to those errors; they are not grounds for a new trial after the term has expired. But the appellants allege that Van Winkle, and those claiming under him, before the decretal sale, took valuable timber and coal from the Whitley county lands and converted the same to their own use, the value of which ought to be applied to the mortgage debt. Of course that matter did not appear in the Van Winkle case, and it would be a ground for a petition for a new trial after the term at which the judgment was rendered, in a proper state of case, which state of case is that the new evidence relied upon must be such as the party was unable to discover before the trial by the use of reasonable diligence; but it must be new, not merely cumulative, and of such a character as to satisfy the

Digitized by Google

judicial mind that it will, on another trial, change the result of the former trial. Granting that the evidence in support of this ground is sufficient to change the result on another trial, yet the other essential, to-wit, that it could not have been discovered by the use of reasonable diligence, is wanting, because if the parties committed the acts now complained of, they did it open-handed, and from time to time for years, in reference to the appellants' property, and which the suit admitted was their property; and it is folly to say that they could not have discovered that said acts had been committed, and were being committed, by the use of reasonable diligence.

Now, the evidence of Van Winkle, taken and read in the Van Winkle case, discloses the fact that the Tennessee lands had been sold, under a chancery decree foreclosing said mortgage, to Van Winkle, at the sum of $500, and the title made to him, and the $500 were credited on the Kentucky judgment. Now, there was evidence produced in the case that Van Winkle had proceeded against the Tennessee lands belonging to the appellants, and had purchased them; and if they failed to look after their own interest in reference to said lands, and treated the evidence of Van Winkle as true in reference thereto, and suffered judgment to be rendered upon the assertion that that evidence was true, they can not thereafter be allowed to open the judgment by petition upon the ground of newly discovered evidence which they could not have discovered by the use of reasonable diligence. What is here said applies to all the matters complained of in reference to all the Tennessee lands.

But it is said that the appellants, or some of them, were, at the time of the institution of the Van Winkle suit, infants, and no guardian afterwards appeared for them, the fact of said infancy not appearing upon the record. If that allegation be true, it is likewise true that the youngest of the appellants reached his majority several years before the final judgment was rendered, and that all the appellants were fully aware of the pendency of the suit and its object. Therefore, the plea of infancy avails nothing in this case. We see no grounds for the relief of the appellants.

The judgment is affirmed.

STICKLEY, &C. V. CHESAPEAKE & OHIO R. R. CO.

(*Filed Sept.* 29, 1892.)

1. *Railroads—Damages to abutting property*—Where a railroad is so constructed that the location of the track and prudent operation of the road deprive the owner of a tract of land of his safe and ordinary ingress to and egress from his property, and also injures the dwelling-house on the land, such construction and operation constitutes a permanent injury to the land, and the owner may recover in one action all the past damages resulting therefrom and that must result therefrom in the future.

2. *Same—Eminent domain—Damages*—Since such construction of the railroad is equivalent to a taking of private property for public use without first making the owner just compensation therefor, such owner is entitled to recover in an action all the permanent damages accruing therefrom, although he may have sold such property shortly after the railroad was constructed.

3. *Same—Liability of lessee*—When the railroad is so constructed by one railway company that the land owner is deprived of his property without just compensation, and another railroad company leases and operates the road after it is finished, the lessee, as well as the first corporation, is liable to the owner for the damages suffered by him, since the fact that the first

Digitized by Google

company unlawfully invaded the property did not authorize the second company to hold such property and continue the invasion against the owner's will.

E. L. Worthington and Whitaker & Robertson for appellants.

Wadsworth & Son and Cochran & Son for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

The appellants, in the year 1887, owned a house and lot in the city of Maysville, located on Third and Poplar streets, and fronting on Third street. It is alleged in the petition that during the period these appellants owned the property the Maysville and Big Sandy R. R. Co. constructed a double track railroad on Third street, within six feet of the line of this lot, and to the edge of a narrow sidewalk in front of it. That after the construction of the road, and while the appellants owned the property, the Chesapeake & Ohio R. R. Co. took possession of the road under some arrangement with the Big Sandy R. R. Co., the terms of which are unknown to plaintiffs, and have been since operating the road, and now have the exclusive control of it. This action was instituted against both corporations to recover damages for obstructing the right of ingress and egress to and from this property, and also for an injury to the building, caused by the smoke and cinders thrown into the building by the passing cars. The appellants conveyed this property prior to the bringing of this action, but were the owners when this wrong was committed by both defendants. A demurrer was sustained to the petition, in so far as it claimed damages of the Chesapeake & Ohio Railroad Co., upon the ground that the Maysville & Big Sandy R. R. Co. is alone responsible if any liability exists. The question arises as to the liability of the lessees from the original corporation for the damages resulting from the permanent injury to the building caused by the construction of the road, the lessees or last corporation using and operating the road while the appellants were the owners.

In the case of the L. & N. R. R. Co. v. Orr, reported in 12 Ky. Law Rep., 756, it was held that the statute of limitation might be pleaded against any claim for damages resulting from the necessary and prudent operation of the road, and that where there was a purchase by one corporation of another, the vendee was not liable for the torts of its vendor. In that case there was no state of fact showing that the right of ingress and egress to and from appellants' building had been interferred with; but here it is distinctly averred that the right of property has been invaded by both the vendor, while it operated the road, and the vendee, since its purchase or lease, in obstructing the right of entrance to this dwelling.

It seems to us there can be no good reason assigned for relieving a vendee from all liability for an injury that amounts to an invasion of another's property when his possession is based upon no other title than a tortuous entry by his vendor.

The act of the vendor in appropriating the property being wrongful, that of his lessee is equally so, and while the lessee may not be liable for the mode of the original entry, he is nevertheless liable for appropriating this property to his own use. There is no question of limitation involved in this case. A railroad company who enters upon and appropriates the land of another to its own use without right, can not transfer its corporate privileges to another, so as to

Digitized by Google

justify a continuance of the wrong in its vendee, as if the latter was an innocent purchaser. It is a taking in both instances without compensation being previously made to the owner. It seems to us, however, there is a manifest distinction between a tort committed by the corporation in the careless operation of the road, in so far as it affects its vendee, and a case where the property of the owner has been wrongfully appropriated by the vendor, and that wrongful appropriation continued by the vendee or lessee. The original tort might consist of the annoyance to the owner, by reason of the throwing of soot and cinders into the dwelling, caused by the want of proper appliances to prevent it, and in such a case there is no reason for holding the vendee liable; but where the proximity of the road to the dwelling is such as to prevent the reasonable ingress and egress to and from the premises, or to cause necessarily soot and cinders to enter the dwelling, then it becomes a taking of private property for public use, and for which compensation must be made. Fulton v. Short Route Co., 85 Ky., 640; L. & N. R. R. Co. v. Finly, 86 Ky., 294.

Lewis, on Eminent Domain, says: "No right can be acquired in private property under the process of eminent domain except subject to the duty of making just compensation therefor, consequently the party originally taking or occupying the property can not transfer to another, by lease or otherwise, any right in the property except subject to the same duty." Section 456.

The cause of action, as alleged, is in the plaintiffs, although they may have disposed of the property, and are now divested of title.

The injury alleged in this case is of a permanent character, and a single recovery should be had for the wrongful acts. This court so held in effect in the case of the E., L. & B. S. R. R. Co. v. Combs, 10 Bush, 382, and J., M. & I. R. R. Co. v. Esterley, 13 Bush, 667.

In the case of Fowler v. N. H. & N. R. Co., 112 Mass., 334, where the action was for damages caused by the construction of a railroad in such a manner that at times the current of a stream of water would be thrown on the land of the plaintiff, the court held it was proper to treat the injury as permanent, and entire damages should be assessed with reference to past and future injury. Where the party seeks to recover damages of this sort permanent in their character, he in effect consents to the taking, and risks the recovery in damages for the compensation, and as said in Heard v. Middlesex Canal Co., "the just compensation to be made for damages to land was, in our opinion, intended as an indemnity, not for successive, constantly accruing damages, recoverable as they may afterwards be suffered, but for all the damage the land owner may suffer from all future consequences of the careful and prudent operation of a railroad, it being the immediate damage done to the land of the owner by changing its permanent condition and injuring its present value. 5 Met. (Mass.), 81. The appraisement, says Mr. Mills, "embraces all past, present and future damages which the improvement may thereafter reasonably produce." Mills on Eminent Domain, section 216.

When this railroad was constructed the damages could have been readily estimated, and the right of recovery being in the appellants when the damage was sustained, it did not pass by a subsequent conveyance to their vendee. Besides, the vendees of the plaintiffs took the property (if damaged) in its depreciated condition, and there is no rule of law or equity that would permit them to recover damages they never sustained. There has been some criticism on the doc-

Digitized by Google

trine requiring a recovery in one action for that which is a permanent injury. In its application in cases involving the consent of the right of eminent domain, the doctrine must be regarded as sound, and when a corporation enters and constructs its railway without the payment of compensation, and the owner sees proper to hold the company responsible at law for damages for the construction of the road, it seems to us it is a consent to the taking, and a recovery must apply to all damages for the permanent injury sustained by reason of the prudent operation of the road; if the rule were otherwise, a separate action could be maintained for each and every time the cars of the corporation passed over the owner's land.

The correct rule is, "that all damages connected and flowing from a single cause of action must be recovered in one action," and is elementary, and, recognizing this rule, the cause of action in this case is in those who were the owners at the time the damages were sustained, and not in the present owners.

Can the action be maintained against both corporations? We think it can, and that they are jointly liable for the permanent injury to the property, such as a deprivation of the reasonable use of the street as a means of egress and ingress to and from the building, and for such other permanent injury as necessarily results from the prudent operation of the road. It is an invasion of the right of property, as much so as if the track had been laid within the appellants' inclosure without their consent, and while the one company is not liable for the mere neglect of the other in running its trains, causing temporary injury, it is evident that, where the construction and operation of the road is an invasion of and an appropriation of the right of property without the owner's consent, he has a clear right to recover damages by way of compensation for the unlawful appropriation.

The doctrine of the case of Railroad Co. v. Hamilton, reported in 40 Ohio State Reports, 496, is that the two companies are jointly liable, and there is certainly a liability on the part of the appellee, because it entered and appropriated this property while owned by the plaintiffs without making any compensation and against their consent.

The entire question arises on the demurrer to the petition, and the facts alleged being admitted by the demurrer, the court erred in holding that no cause of action existed against the Chesapeake & Ohio R. R. Co.

The judgment is, therefore, reversed and cause remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

BELKNAP, &C. V. CITY OF LOUISVILLE, &C.

(*Filed Oct.* 27, 1892.)

1. *Location of boundary line of city—Construction of charter*—The charter of Louisville, enacted in 1868, locates one of the boundary lines of the city in such an indefinite and uncertain manner as to render it uncertain whether the lots owned by appellants are within or without the corporate limits For more than twenty years a certain location of the boundary line was adopted and acted on by both the city and the lot-owners. It also appears that said line, so adopted and acted upon, was by subsequent acts of the Legislature recognized as the true line In this action by said lot-owners, to enjoin the appellee from assessing their lots for municipal taxation: *Held*—That the

Digitized by Google

practical construction given to the charter for so many years, which has been recognized by the Legislature, will not now be disregarded so as to relieve appellants of municipal taxation.

Lewis N. Dembitz for appellants.

Henry S. Barker for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellants, about sixteen in number, owners respectively of lots or parcels of land in Jefferson county, brought this action October 27, 1890, against the City of Louisville and D. F. Murphy, city assessor, for a judgment defining and fixing one of the boundary lines of the city so as to exclude and free from municipal taxation their several lots, which they allege are included by a line incorrectly run and claimed by the city, and thus illegally made subject to such taxation, and enjoining Murphy assessing them for taxation.

March 9, 1868, "an act to extend the boundary line of the city of Louisville was passed by the Legislature, whereby the city boundary was set out and defined, that part of it now in controversy being thus described: The place where the disputed line begins, the parties agree, is at intersection of a line drawn from Shipp avenue 210 feet south, and one from Third street 210 feet west, and it runs according to call of the statute; "thence southwardly and parallel with Third street to the south line of the House of Refuge land, and following the boundary of said land to Shipp avenue."

The House of Refuge land appears to have been at that time a tract of about eighty acres, the title of which was in the city of Louisville, and there is no dispute about the location of the south line thereof. Third street, the general course of which is south from Ohio river, at date of the act of 1868, terminated at Shipp avenue, the general course of which toward Third street appears from the surveyor's map filed to be southwest; and a line 210 feet south of and parallell with it was by the act made part of the city boundary. To run the line in dispute strictly according to the call is impossible, because Third street did not then extend south beyond Shipp avenue; but there was at that time a thoroughfare called "Third Street Road," the course of which, however, is about south 10° 50′ west, instead of the general south course of Third street; and the line claimed by the city of Louisville runs parallel with that road, leaving the several lots of appellants within the corporate limits; but that line does not strike the south line of the House of Refuge land; instead, it extends beyond the southwest corner of that land, and is made to intersect at less than a right angle an imaginary line thereof extending beyond the corner. The line claimed by appellants, if run parallel with a line of Third street, extended the proper distance, would strike the south line of the House of Refuge land; but it is argued by counsel of appellees with some plausibility that if it had been intended the line should be so run, language clearly indicating such purpose would have been used, as in every other case where a line is made by the statute to extend beyond the termination of an existing street and parallel with such street extended the needed expression was used.

The indirect and circuitous course of the city boundary from where it leaves Shipp avenue indicates an intention of the Legislature to include within the city limits the House of Refuge land; yet if the

Digitized by Google

line is fixed as appellants claim, a very considerable part of it will be excluded, while a comparatively small part is outside the line claimed by appellee.

We thus have a condition of uncertainty as to the proper direction one of the boundary lines of a city shall run, necessarily subject to a dispute between parties interested, and determinable only by authoritative construction of the statute.

We do not see why in such case a practical interpretation adopted and acted on by the lot owners as well as the city more than twenty years should not now be given by the court. Such has been the doctrine held by other courts. Milne v. Mayor, 13, La., 69; Hamilton v. McNeil, 12 Grat., 389; People v. Farnhan 35 Ill., 562. In this case it does not clearly appear by whose authority the line was established in pursuance of the act of 1868; but by an act approved March 3, 1870, it was provided that the boundaries of the city of Louisville should remain as then established until changed by law; and by the same act the general council was required to cause a map to be made of the entire city within the boundary fixed thereby with streets, avenues, lanes, roads and all other public ways laid out by actual survey, showing the extension thereof to the boundary line with regular squares. Such map was made as required by the act, and, according to the disputed line, was laid down as now claimed by appellees, and so as to include the lots of appellants. They have ever since, until this action was commenced, acquiesced in the boundary so defined and fixed, enjoying whatever benefits were thereby conferred and submitting without protest to burdens imposed. Moreover, though there is nothing in the record before us authorizing more than a presumption that the Legislature intended by the act of 1870 to provide that the line precisely as now claimed by appellee should remain as then established; still, by subsequent statutes, the boundary, as shown by the city map, was recognized as the actual and legal boundary; and by an act passed in 1884, property was directed to be assessed according to maps of the city. There then exists more than mere legislative construction of the act of 1868, for direct legislative authority was, after that date, given for assessing the lots of appellants for taxation, to enjoin which was the prime object of this action. We are, therefore, of the opinion the boundary line claimed by appellee has been fully and legally established.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

CHINN V. COURTNEY, TRUSTEE.

(*Filed Nov.* 30, 1892.)

1. *Dividends on bank stock—Rights of life tenant and remaindermen*—When a dividend upon its stock is declared by a corporation it belongs to the person holding the stock at the time of the declaration, whether the holder be a life tenant or remainderman, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company.

2. *Same*—When the corporation, instead of declaring at the usual times the ordinary annual or semi-annual dividends, declares stock dividends or extraordinary dividends, such dividends do not become part of the *corpus* of

Digitized by Google

the estate, but belong to the life tenant. But the facts of this case do not bring it within that rule.

George Denny, jr., for appellant.

J. D. Hunt for appellee.

Appeal from Fayette Circuit Court.

Opinion of the Court by Judge Barbour.

In August, 1870, Catherine Lawson conveyed to her two nephews, David Coleman and Andrew May, a tract of land and all of her personal property, consisting of live stock, money, bank stock and all other claims and demands due her, reserving to herself a life estate in the property and its profits for her natural life. In November, 1870, the grantor, by writing, made David Coleman her trustee, investing him with power to control and manage her estate, to collect debts and dividends due her, Coleman binding himself to pay her the annual profits, issues, interest and dividends during her natural life, and at her death to pay Andrew May one-half of said bonds and notes, as aforesaid, or one-half of the remainder of them at that date, in the event she should have used more than the annual profits and interest thereon. After the execution of these writings Catherine Lawson married the appellant, J. G. Chinn, and died intestate January 1, 1889. At the time of her death the trust estate consisted, in part, of 102 shares of the capital stock of the Northern Bank of Kentucky, and 48 shares of the capital stock of the Bank of Kentucky. On the 7th of January, 1889, six days after her death, each of the banks declared a semi-annual dividend. The orders of the two banks declaring their dividends were as follows. That of the Northern Bank of Kentucky was:

"Ordered, that a dividend of $3 on each share of the capital stock be declared and paid to the stockholders out of the profits made during the six months ending the 31st of December, 1888."

That of the Bank of Kentucky was:

"Ordered, that a dividend of 4 per cent. be declared out of the earnings of the Bank of Kentucky for the past six months, payable to the stockholders on demand."

The principal contention on this appeal is whether the administrator of the life tenant or the remainderman is entitled to these dividends.

No stress has been made in the argument upon the language used in the several writings as indicative of the grantor's intention in the event of the contingency which has arisen. We will, therefore, not attempt to give a construction to the language used, but will simply determine the question whether, where one entitled to the dividends on bank stock for her life dies before the dividend is declared, but after the period for which it is declared to have been earned, her administrator or the remainderman is entitled to it.

In support of appellant's contention counsel cites the case of *ex parte* Rutledge, decided by the Court of Appeals of South Carolina in 1824(1 Harper, Eq. 65). In that case the life tenant—the person entitled for life to dividends on certain bank stocks—died a few days before a *semi-annual* dividend on the stock became due, and the court held that the dividend should be apportioned and part paid to the executor of the life tenant. This case is reported in 14 Am. Dec., 636, and is regarded as the leading case in favor of the apportionment doctrine. But Mr. Freeman, in his note to that case, citing

Digitized by Google

numerous cases, says that the opinion is contrary to the generally accepted rule, and that in many instances the reasons assigned for the decision have been urged in support of an opposite conclusion. That it is difficult to ascertain the time when the earnings of a corporation were made, and that they are variable of necessity, are expressly stated as the grounds on which the courts have declared that dividends are not apportionable. Field on Corporations, §104, and Cook on Stock and Stockholders, §552 to §560, in effect say that the time when the benefits of the corporation's business were realized is not regarded in determining to whom the dividends should be paid in the absence of any statutory enactment or provision in the deed of settlement or the by-laws of the corporation; and, as a general rule, it may be laid down that dividends in a corporation are not apportionable, but that they belong to the owner of the shares when they are declared payable. In Richardson v. Richardson, 75 Mo., 570; 46 Am. Rep., 428, the court says: "And we would entirely reject the qualification of the rule admitted in some instances by some courts that the life tenant is not entitled to so much of the dividend as was earned in the lifetime of the testator. Too much difficulty and uncertainty would attend the practical operation of such a test; nor do we appreciate any particular legal or moral merit in it. We think the true rule to be that when a dividend upon its stock is declared by a corporation, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life tenant or remainderman, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company."

In March v. R. R., 43 N. H., 520, the court said: "The purchaser of a share of stock in a corporation takes the share with all its incidents, and among them is the right to receive all future dividends: that is, its proportionate share of all profits not then divided, and as we understand the law and the usage of such corporations, it is wholly immaterial at what time or from what sources these profits have been earned. They are an incident to the share to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made." Numerous cases sustaining this view are cited in 99 Am. Dec., 758, in the note to Goodwin v. Hardy, 57 Me., 1403. The decided weight of authority sustains the chancellor's judgment denying to the administrator of Catherine Lawson any part of the dividend in question, and our Court of Appeals, in Kent v. Deposit Bank of Owensboro, 12 Ky. Law Rep., 668, adopts the rule laid down by the great majority of the courts elsewhere. In that case the main question was as to whether the husband was, under the statute in relation to bank stock held by married women for their use, entitled to the stock as heir or distributor of his deceased wife. He was held not to be entitled to it. But he further insisted that he was entitled to the dividends (and while the opinion does not say so in terms, it must necessarily have referred to dividends earned wholly or in part before the wife's death). In response to this contention the court said: "Even if the husband, as administrator, could recover a dividend declared during the life of the wife on this stock, yet he must aver in his petition that it was so declared. This he has not done. It does not appear in any way when the dividend sued for was declared. Certainly dividends declared since her death, being but incidents of the stock, pass with it to the heirs." This case, it seems, should be and we deem it conclusive of the question against the appellant.

Appellant further contends that the accumulations which arose

Digitized by Google

from the trust fund and were invested in bank stock should not go into the *corpus* of the estate and pass to the remaindermen, but should pass to the life tenant, and cites authorities to this effect. The cases cited hold that when the corporation, instead of declaring at the usual times the ordinary annual or semi-annual dividends, declares stock dividends or extraordinary dividends, such dividends do not become part of the *corpus* of the estate, but belong to the life tenant. But the facts of this case do not bring it within this salutary rule. The facts, as agreed, are these: "The fund, as it now exists in the hands of the trustee, consists in large part of investments which have from time to time been made, since the conveyance, out of the proceeds of portions of said fund as they existed at the time of said deed; and that the stock and securities in which said investments were made have advanced in value since they were purchased; and that such of the present securities as constituted part of the fund at the date of said deed have also enhanced in value since said time."

The agreed facts relate to the whole estate, the only part of which before us is the stock of the two banks we have named. The appellant, in the court below, succeeded in part in his contention. We can not, therefore, determine how much, if any, of these investments were made in the bank stock in question; whether any of it represents these investments or any part of them we are unable to say. There is nothing to show that any stock dividends or extraordinary dividends upon the bank stock were ever declared in the lifetime of Catharine Lawson; nor can we know what part, if any, of the earnings of the bank stock were withheld by the banks and set apart as a part of the surplus fund.

The judgment is affirmed.

PADUCAH STREET RAILWAY COMPANY V. ADKINS' ADM'R.

(*Filed December* 7, 1892.)

1. *Peremptory instruction*—Where there is a scintilla of evidence tending to support the plaintiff's cause of action a peremptory instruction should be refused.

2. *Street railways—Injuries to children*—A street car company is not liable where a child suddenly throws itself in the way of a car and is run over before the employe in control of the car can prevent it.

3. *Same*—When children, no matter how small, are on a street traversed by a railway, and at such a distance from the track that they can not, if they remain there, be injured by a passing car, the law does not require the driver or person controlling the car to arrest its speed, or to anticipate that they will place themselves on the track, or so near it as to be struck by the car as it passes. And as the plaintiff's intestate in this case, a boy five years and four months old, was standing five feet from the track up to the time he broke away from his companions and attempted to cross the track, it was error to instruct the jury that if the boy was "in the immediate vicinity of the track, or so near it as to endanger one of such age," it was the duty of the motor-man "to use extraordinary care in the employment of his means to check the speed of the car to keep it under his control so as to stop it if necessary to avoid injury to the child." As this instruction authorized the jury to infer that the motor-man was negligent in not arresting the speed of the car when he first saw the child standing at a distance of five feet from the track.

4. *Same—Contributory negligence.*—As the child was in no danger prior to the time he attempted to cross the track, the only question for the jury was

Digitized by Google

whether the motorman, when he discovered, or ought to have discovered, that the child was about to attempt to cross the track in front of his car, used all the means then at his command to stop the car in time to avoid striking or injuring the child. And in this view of the case there was no occasion for presenting the question of contributory negligence.

5. *Same*—An instruction assuming, as a matter of law, that the child was too young to be capable of exercising any care for its own protection was erroneous. In all cases where the child is not wholly incapable of exercising some degree of care for its protection, the question is one of fact, and should be submitted to the jury, provided there is any occasion for instructing the jury as to contributory negligence.

6. *Instructions to jury*—An instruction by which the court, after defining ordinary care, told the jury that "extraordinary care is such care as an extraordinarily prudent man would use under the circumstances proven in the case," was misleading. If, after seeing the child's danger, the motorman used all the means at his command to stop the car, nothing more was required of him.

7. *Evidence*—The court erred in refusing to allow defendant to ask a witness as to statements made by him to certain person a short while after the accident, as those statements were inconsistent with the statements made by the witness in his testimony.

Burnett & Dallam and Humphrey & Davie for appellants.

Rhey Boyd for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Barbour.

Loyd Adkins, a child five years and four months old, in attempting to run across the street railway track in front of one of appellant's electric cars while it was in motion, was struck by the car and so injured that he died within a few hours thereafter. The appellee, as administrator of the child, brought this action, charging that his injuries and death were the result of the negligence of the appellant's employes in the management and operation of its car. The appellant traversed the allegations of negligence and pleaded contributory negligence on the part of the child. A trial having resulted in a verdict and judgment for the appellee, the company prosecutes this appeal, urging, as grounds for reversal, that the court erred in overruling its motion for a peremptory instruction, and in giving and in refusing instructions.

The evidence for the plaintiff was, in substance, this: Loyd, with his brother Leslie, who was nine years old, and Altha Hayman, eleven years old, and four other small children, were on the south side of Trimble street, in the city of Paducah, just west of Tenth street, going westward. The electric car was approaching them from behind. They were walking along slowly (as Altha Hayman says) nearly down in the gutter. At that distance from the track, it is manifest that they were in no danger from the car. Altha Hayman says that before the car reached them—but at what distance is not clear—Loyd said, "I am going to run across the track before the car comes;" she and one of Loyd's older brothers and one of the other children tried to hold him, but he broke loose and ran across the track nearly to the gutter on the other side. He then attempted to re-cross immediately in front of the car when he was struck. She says that the car was not running fast after it crossed Tenth street; that "the motorman rang the bell as he crossed Tenth street, and on until Loyd was struck; he had one hand on his brake, and the other on that thing they call switch-box, I think;

Digitized by Google

he tried to stop the car all he could; he put on brakes and turned that other thing around just before the boy was struck." William Cochran was one hundred and fifty feet from the accident. It occurred, he says, about 2 o'clock, P. M. The car was between Eighth and Ninth streets when he first saw the children, some of whom were on the north and some on the south side of the track. The Adkins boy was on the north near the north rail of the track when the car was about Tenth street, but what distance from the track he does not say. He did not see the boy any more until just as the car struck him. When the car struck him it shoved him along some five or six feet, but did not pass over him. From Sixth to Tenth street the car was running about ten or twelve miles an hour. He does not undertake to state at what speed it was running when it struck the boy. He says he did not expect an accident. H. C. Warren testified that it was twenty-two steps from where he saw blood on the rail to Tenth street, and fifty-three steps from the blood to the end of the switch near Tenth street. This was all the evidence for the plaintiff bearing on the question of negligence. The defendant proved that before the car reached Tenth street the motorman turned off the electric current, as he was required to do at this crossing by the rules of the company. This precaution was required because there was a switch in Trimble street, about one hundred and fifty feet west of Tenth street, where the down-town car passed the up-town car. The evidence for the defendant—and there were a number of witnesses who saw the whole occurrence—if true, exonerates the defendant from all blame. In considering the motion for a peremptory instruction the defendant's evidence must be eliminated, and if, upon any construction which the jury were authorized to put upon the plaintiff's evidence, or by any inference they were authorized to draw from it, the conclusion of negligence can be justified, or, as it is sometimes expressed by the Court of Appeals, if there was a *scintilla* of evidence tending to support the plaintiff's cause of action, the case should be submitted to the jury. Whether the child had, just before it was struck, run across the track, and whether from that circumstance the motorman should have anticipated that he would turn and attempt to re-cross, and whether, after thus seeing the danger which the child was about to place himself in, he could, with the appliance at his command, have stopped, or so retarded the speed of the cars as to have avoided injuring the child, were proper questions for the jury. Therefore, following the rules so often laid down by the Court of Appeals, and which show such a reluctance to withdraw from the jury cases presenting questions of negligence, we can not say that the court erred in refusing the peremptory instruction.

The court gave but two instructions. In the first, the jury were told that the child was too young to be capable of exercising reasonable care for its own protection, and could not be charged with contributory negligence, and that it was the duty of defendant's employe to use ordinary care in keeping a lookout to discover the danger of such child, and if the child was in the immediate vicinity of the track, or so near as to endanger one of such age, and the employe knew, or by the use of ordinary care could have known it, it was his duty to use extraordinary care in the employment of his means to check the speed of his car to keep it under his control so as to stop it if necessary to prevent or avoid injury to the child; and, if he failed to use such care, and by reason thereof ran the car over the child, they should find for the plaintiff.

The principal objection urged to this instruction is that it assumes,

Digitized by Google

as matter of law, that the child could not be guilty of negligence. But passing from this question for the present, we will consider other objections, which, it seems to us, are fatal to the instruction.

There is no pretense that the motorman was not keeping a lookout. That he saw the children before he reached Tenth street is proven beyond controversy. Every witness, both for the plaintiff and the defendant, except Cochran, one of plaintiff's witnesses, placed the children, including the unfortunate boy, at not less than five feet from the track—at a distance where there was no danger to be apprehended from the car as it passed, and, while Cochran says the child was on the north side of the track and near it, he does not say what the distance was. Yet, with this uncontradicted evidence the court assumes, or, at least, allows the jury to find that the child was so near the track as to endanger its life, without regard to the length of time it was in that position, thus allowing the jury to infer that the motorman was negligent in not arresting the speed of the car when he first saw the children. In other words, notwithstanding all the evidence is that, until it broke loose from its companions, the child was at least five feet from the track, and in no danger, the court permits the jury to find that at such a distance it was in danger. The error of this part of the instruction is manifest when it is read in connection with the first part, which tells the jury that the child was too young to be capable of exercising reasonable care for its own protection.

When children, no matter how small, are on a street traversed by a railway, and at such a distance from the track that they can not, if they remain there, be injured by a passing car, we know of no law which requires the driver, or person controlling the car, to arrest its speed, or to anticipate that they will place themselves on the track, or so near it as to be struck by the car as it passes. As said in the Citizens' Street Railway Company v. Casey, 56 Ind., 405, when the child injured was only two and a half years old, "We do not think it is the duty of a street-car driver to stop his car, or to constantly creep along at a snail's pace for fear or in anticipation that some child may possibly throw itself under his horse, in the absence of any thing indicating the probable occurrence of such an act. * * * If he was bound to stop in this case, then he would be bound to do so in every case where he saw children standing beside the track, and the result would be the abandonment of the cars by the traveling public. It seems to us that he was not bound to slacken his speed (it then being but ordinary) till there was a necessity for it. The plaintiff was standing beside the track, where she was out of danger, and where it was common for children to stand as the cars passed. She evinced no disposition to enter upon the track or to approach to a dangerous proximity to it. The presumption was that she would not. In such a case it seems clear that it was not negligence in the driver to continue his usual rate of speed till the plaintiff did commence to move upon the track."

In the case before us, until the child undertook to cross the track there was nothing to indicate to the motorman a necessity for stopping the car, or even slackening its speed. Certainly no one should be held liable for an injury produced entirely by want of discretion on the part of the child who suffers from it. No court should hold a street-car company liable when a child suddenly throws itself in the way of the car and is run over before the employe in control of the car could prevent it. As we understand the evidence which was before the jury, the only question for them to decide was: Did the motorman, when he discovered or ought to have discovered that the

Digitized by Google

child was about to attempt to cross the track in front of his car, use all the means then at his command to stop the car in time to avoid striking or injuring the child? If he did, the defendant is not liable. If he did not, it is liable. It seems to us that there was no occasion for presenting the question of contributory negligence to the jury, and that an instruction upon that point would have been calculated to confuse rather than enlighten the jury. That the child was negligent, or, rather, daringly reckless—that it had no right to run or try to run across the track as it did—must be conceded. But whether the child was negligent or reckless or was not, when its danger was discovered it was the duty of the motorman to use all means at his command to save it from injury; and the simple question was, did he fail to do this? In this connection, in our view of the evidence we see no reason for the second instruction, which, after defining ordinary care, says that "extraordinary care is such care as an extraordinarily prudent man would use" under the circumstances proven in the case. The car and all its appliances were in perfect order, and if, after seeing the child's danger, the motorman used all the means at his command to stop the car, nothing more should be required of him. The instruction was misleading.

As the question of contributory negligence has been so fully argued, and, as upon a new trial, a different state of facts may be presented, we will briefly consider that question.

Thompson, in his work on Negligence, says that the most fruitful source of controversy is at what age an infant is to be regarded as *sui juris*, and, therefore, capable of exercising some degree of care for its protection. Negligence can not be imputed to a child of such tender years as to be wholly incapable of the exercise of care. (City of Covington v. Bramlege, 14 Ky. Law Rep., *ante*, 395.) But the difficulty is in determining at what age or period of the child's development it can be said that the question ceases to be one of law and becomes one of fact.

The cases upon the subject are numerous, and there is no uniformity in the adjudications. The later cases, however, seem to hold that, in all cases where the child is not wholly incapable of exercising some degree of care for its protection, the question is one of fact, and should be submitted to the jury; and we think that is the better rule.

As said in Railroad Co. v. Gladman, 15 Wall, 401, of a child three years of age less caution would be required than one of seven, and of a child of seven less than of one of twelve. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. We are of the opinion that the court erred in assuming as a matter of law that the child was too young to be capable of exercising care for its own protection.

The court erred in refusing to allow the defendant to ask the witness, Cochran, as to the statement made by him to Thompson and Forbis a short while after the accident, as those statements were inconsistent with the statements made by him in his testimony.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

SEASONGOOD, MENDELSON & CO. v. OWENSBORO & NASHVILLE R. R. COMPANY.

Filed November 30, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, reversing.

Liability of carrier as to passenger's baggage—The contract by a railroad company to carry a passenger includes a contract to carry his baggage, and the responsibility of the company for its safe conveyance and delivery is that of an insurer or common carrier of goods. This liability continues, however, only until the baggage is ready to be delivered to the passenger at his destination, and until he has had a reasonable opportunity to receive and remove it. The carrier is then liable as a bailee for hire and not merely as a gratuitous bailee, and is bound to exercise ordinary care for the preservation of the baggage. The owner is, therefore, not bound to show gross negligence in order to recover for the loss of his baggage, after it has reached its destination, and he has had a reasonable opportunity to remove it, and it was error to so instruct the jury in this case.

James E. Gaither for appellant; Wilbur F. Browder for appellee.

COMMONWEALTH v. HOWARD, &c.

Filed November 30, 1892. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Proceeding against sheriff and sureties in revenue bond—Variance—Void judgment*—The proceeding by notice and motion under the provisions of article 2, chapter 2, General Statutes, against a sheriff and the sureties in his revenue bond to compel the payment of taxes collected by the sheriff, which he has failed to account for or pay into the treasury, is a summary one, and there should be at least a substantial compliance with the statute.

In this case, as the notice was addressed to the sureties, describing them as "sureties of James L. Howard, sheriff of Harlan county," while the motion was made in the name of the Commonwealth as plaintiff against "Milton E. Howard, sheriff of Harlan county," and the other sureties as defendants, Milton E. Howard being in fact one of the sureties, there was a fatal variance, and a judgment by default rendered against the defendants on the motion was void and properly set aside by the court at a subsequent term.

2. *Judgment dismissing motion not a bar*—A judgment dismissing the motion upon the refusal of the Commonwealth to amend can not operate as a bar to a future action or motion against the sheriff and his sureties upon the same liability.

W. J. Hendrick and R. Reid Rogers for appellant; John W. Rodman for appellees.

MIDDLESBOROUGH TOWN COMPANY v. HELWIG.

Filed November 30, 1892. Appeal from Bell Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Damage to one lot by filling another*—The owner of a low marshy lot, in a city or town, over which the surface water falling and accumulating upon an adjacent upper lot flows to a common outlet, has the right to fill his lot so as to render it fit for building upon without becoming responsible in damages to the upper lot owner for injuries sustained by the consequent backing of the water upon his lot.

2. *Water courses*—A ravine or gully, which is simply an outlet for surface water at certain seasons of the year, having no well defined bed or channel with banks and sides, can not be termed a natural water course, and is not, therefore, governed by the well settled rules applying to natural streams.

Digitized by Google

Rozel Weissenger, J. R. Sampson and Chapman & Nicoll for appellant; Isaac T. Woodson and Ira Julian for appellee.

MAXVILLE, WILLISBURG & LOUISVILLE TURNPIKE ROAD CO. v. BARNES.

Filed November 2, 1892. Appeal from Nelson Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Corporations—Acquiescence of stockholders in contract*—After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents every reasonable presumption should be made to hold the transaction binding upon the company. And in such cases the acquiescence of the stockholders may often be presumed. Proof of circumstances from which the court or jury can reasonably infer that the act in question was known among the stockholders and was acquiesced in by them will constitute at least *prima facie* evidence of ratification.

Appellant, a turnpike corporation, employed appellee to build them a bridge, for one-half of which appellant was to and did pay, the other half to belong to appellee, and he to be entitled to collect for his own use one-half the tolls paid out at a gate leading to the bridge. This agreement was carried out for several years, when the parties began to disagee as to their rights, and suit was brought to settle the matter, but was compromised, the parties agreeing upon a construction of the contract which recognized appellee's right to one-half the tolls. Appellant carried out its agreement for several years longer, when differences again arose, resulting in this suit by appellee to compel appellant to comply with its contract. *Held*—That, although the contract made by the president and directors may have been in disregard of the rights of stockholders, the stockholders are bound both by ratification and estoppel.

2. *Premature submission*—That the case was submitted before it regularly stood for trial is not ground for reversal until a motion has been made in the court below to set aside the judgment.

Nat W. Halstead for appellant.

John S. Kelley for appellee.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY CO. v. CARRICO.

SAME v. HAMILTON.

Filed November 2, 1892. Appeal from Marion Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Venue of action against common carrier*—This action against a common carrier upon a contract for the transportation of live stock was properly brought in the county in which the contract was made. And the defendant, being a railroad company, summons was properly served upon the defendant's agent stationed nearest the county seat of the county in which the suit was brought, although in another county.

2. *A corporation can be proceeded against by constructive service*—Only when it has no agent in this State known to plaintiff upon whom a summons can be served.

3. *Pleading*—In an action against a common carrier to recover damages for injury to live stock being transported by it a denial of knowledge or information sufficient to form a belief as to whether it injured the stock is not good.

Hugh Cooper for appellant.

Rives & Spalding for appellee.

DROEGE v. WOODS.

Filed November 16, 1892. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Assessments for street improvements—Defect in pleading cured*—Though there be defects of substance even in a pleading, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required on the

Digitized by Google

trial proof of the facts imperfectly stated or omitted, and without which it is not to be presumed the jury would have given the verdict or the court have rendered the judgment, such defect or omission will be cured by the judgment.

In this action to enforce a lien for the cost of street improvements, the petition was defective in failing to allege that the plaintiff did the work he contracted to perform, the allegation that the city engineer certified to the council that he had done the work not being sufficient. But as the defendant, instead of standing upon his demurrer, answered denying all liability for the claim asserted, and the evidence shows that the work was done by plaintiff according to the terms of the contract, the defect in the petition was cured.

2. *Same—Parties to action*—The lien of a contractor upon abutting property for the cost of a street improvement can not be destroyed or impaired by the owner selling the property after the work is placed under contract. And when the property has been sold and the proceeding is against the purchaser, if for any reason the original owner should be made a party to the proceeding, it is incumbent on the defendant to take the initiatory steps to that end.

3. *Same*—When real estate in a city is, by the charter, made liable for tax assessed against it or its owner, a lot which is sufficiently described in the assessment is liable, although the assessment is not made against the owner of the legal title.

Wm. Goebel for appellant.

D. A. Glenn for appellee.

L. & N. Railroad Co. v. Constantine.

Filed December 7, 1892. Appeal from Gallatin Circuit Court. Opinion of the court by Presiding Judge Yost, reversing in part.

1. *Passengers on a railroad train must be allowed a reasonable time to leave the train* with safety after it arrives at the place of their destination, and if, after it has come to a stop in order to enable passengers to leave it, it is, without notice or signal, suddenly moved, causing injury to those alighting, the company is responsible for the injuries thus sustained.

2. *Contributory negligence*—If the plaintiff of her volition jumped from the cars while they were in motion, she was guilty of such contributory negligence as will defeat a recovery. But the preponderance of the evidence shows that she made no effort to jump.

3. *Excessive verdict*—As the plaintiff's bruises received in her fall have resulted in permanent injury, rendering her unable to do "any work of any consequence," a verdict for $2,000 is not excessive.

4. *Punitive damages*—As the evidence establishes a case of ordinary neglect only, the judgment, in so far as it was rendered on the separate finding of the jury, fixing punitive damages at $250, is reversed.

Winslow & Winslow for appellant.

Gaunt & Downs for appellees.

Ambergy's adm'r, &c. v. Baker, receiver.

Filed December 7, 1892. Appeal from Letcher Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Sheriffs—Refusal to settle accounts concerning county levy—Where the county court has appointed a commissioner to make a settlement of the sheriff's accounts concerning the county levy, and the sheriff fails or refuses to appear and make a settlement, the only remedy of the county court is the institution of an action in its own name to compel a settlement and for a judgment for any sum found due upon the trial of that action. Upon the refusal of the sheriff to attend, the commissioner can not proceed to make an *ex parte* settlement, and a receiver appointed by the county court has no authority to sue to recover what may be found due upon such a settlement.

S. B. Dishman for appellants; John L. Scott for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. JANUARY 15, 1893. No. 14

KENTUCKY COURT OF APPEALS.

SMITH'S EX'TX, &c. v. MCMILLAN, &c.

(*Filed Oct.* 25, 1892—*Not to be reported.*)

Contribution by heirs to pay ancestor's lien debts—Where the land of a father, upon which liens existed to satisfy debts of the father, has been divided among his heirs, each heir should be made to contribute to pay the lien debt, and if any one of the heirs fails to contribute his part, then his allotment of land should be sold to pay the same. The allotment to one heir should not be sold to pay the entire lien debt.

O'Rear & Bigstaff, V. B. Young and W. W. McGuire for appellants.

Appeal from Rowan Circuit Court.

Opinion of the court by Judge Pryor.

Smith, a creditor of W. I. McIntyre, subjected to the payment of his debt a tract of land that had been allotted to McIntyre in the division of his father's estate, and, being the purchaser, had a deed made to him by the commissioner. He then brought this action against the parties in possession to recover the land.

The defense is, that in 1878 the attorneys of McIntyre's heirs brought suit to enforce an attorney's lien for services rendered the heirs in an action to eject one Filson from the land, who claimed to hold under a paramount title, and that the land in controversy was sold to satisfy the attorney's lien.

The action against Filson was instituted before Smith subjected the land of Wm. McIntyre, but the action by the attorneys to enforce their lien was not instituted until after Smith had obtained his judgment and purchased the land under it. Smith was not a party to the action by the attorneys and seems to have had no notice of the pendency of their action. The land was sold under the judgment for the attorneys and purchased by one Goodpaster, who, after his purchase, sold to Robert McIntyre, a brother of Wm. McIntyre.

Digitized by Google

All the proceedings in the action of Smith against Wm. McIntyre were destroyed by the burning of the Rowan county clerk's office, and in proceedings to substitute this destroyed record, it appeared that Smith's judgment was valid, with the exception that some parties who were made defendants were not summoned. These were the heirs of the ancestor of Wm. McIntyre. It appears that an order was made entering their appearance to Smith's action, but they claim it was without any authority from them, and this the testimony conduces to show. The liens on this land of the ancestor of these parties were entitled to preference over Smith's claim, but there is no reason why Smith's or Wm. McIntyre's interest should pay the whole of it, and if all the land was sold to satisfy the lien, Smith was a necessary party to the proceedings. As the case is now in a court of equity, each heir of Van S. McIntyre should contribute to satisfy this lien, and if they fail to do so, then the land ought to be sold; that is, each one's allotment to pay his part.

This includes the lien of the attorneys and any other valid liens existing when Smith bought.

If Robert McIntyre had purchased the interest of the other heirs, he is liable to contribute their portion. In other words, each heir's interest should help discharge the lien.

Judgment reversed and remanded for proceedings consistent with this opinion.

The parties can amend their pleadings to conform to the views herein expressed.

DUDLEY, &C. V. WEINHART, &C.

(*Filed Oct.* 20, 1892.)

Devise to one with power in another to cancel or change the devise within a certain time—A testator may confer upon his widow power to change or cancel, within a certain time, any of the gifts or devises made by him in his will, wherein it is provided that such gifts and devises shall not confer any right or interest until the expiration of such period. Such a power to change or cancel devises is not an attempt to confer upon one a power to revoke a testator's will after his death; it is a mere power of appointment, to be exercised within a stated period, and a designation of beneficiaries in case the donee fails to exercise the power.

A testator made many devises and bequests to his relatives, and then in a subsequent part of his will gave his wife power to change or cancel, within a certain time, any and every gift or devise made therein. The will provided "and further, although not in terms so stated at each item, it was and is * * intended that every gift or devise hereinbefore entered is subject to be changed or cancelled by my wife," by writing, executed in a certain way, and recorded in the county court before the gift or devise is to take effect, which is thirty days after the will is probated. *Held*—That the wife may, within the period and in the manner indicated, cancel or change the devises made in the will.

R. C. Gray and Geo. B. Nelson for appellants.

Richard P. Ernst for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

Charles Eginton, a wealthy citizen of Covington, Ky., died testate in September, 1890. His will, after providing generously

Digitized by Google

for his wife and granddaughter—he had no living children—provides for the family of his brother, William Eginton, and for the family of his half-brother, Thomas McGrath, and for certain nieces and nephews of his wife, and others.

The testator, in part 9 of his will, gave his wife the power, within a certain time, to change or cancel any and every gift or devise made in his will. The power is as follows: "And further, although not in terms so stated at each item, it was and is, nevertheless, intended that every gift or devise hereinbefore entered is subject to be changed or canceled by my wife," provided she, in her own handwriting, attested by two competent and disinterested witnesses, and recorded in the county court before the gift or devise is to take effect, and which was not to go into effect or pass any right until the thirtieth day after the will is probated, declares otherwise.

His wife, within the time and in the manner prescribed, did exercise the power conferred upon her and changed part 5, item 5, of the will, which gives to the children of William Eginton the remainder interest of fifty shares of the stock of the Bank of Kentucky, the wife, under the will, being entitled to a life estate therein, and she gave the same to Lizzie P. Dudley and others. She also changed and canceled that part of the devise which gave to the grandchildren of William Eginton eleven hundred dollars in cash, but she made no disposition of that sum.

The lower court held that the power given to the wife to change or cancel the devises was in effect an attempt to give her the power to revoke the will after the death of the testator, which could not be conferred upon her, for under section 10, chapter 113, of the General Statutes, in reference to the revocation of wills, it is provided in substance that a will can not be revoked except by the testator himself in his lifetime in the manner therein indicated; therefore her attempt to change the devises was void. On the other hand, the appellants contend that the power conferred upon the wife to change the devises was not a revocation of the will, but was a power of appointment given by the will which was a consistent part of it. The same contention on both sides is made here, and which we have to decide.

Now, a general power of appointment is a power given by the maker of a deed or will, called the donor of the power—to another person called the donee of the power—in the name of and by the authority of the donor to create a new estate in any one out of the estate of the donor without diverting any estate previously granted or devised subject to such power, or by divesting an estate previously granted subject to such power and bestowing on another person. Such power has always been exercised and held valid as being the will of the donor of the power, and not as a revocation or destruction of his will in the sense of the statute *supra*; for it is perfectly competent for a testator to give another person the power to dispose of his property according to his own judgment and discretion. In such case the will and discretion of such person would be the will of the testator. If the testator had devised some estate to certain persons subject to be divested or defeated and its destination changed by the exercise of a power given to another person, the exercise of such power would be the will of the testator, for he may attach such conditions to the devise, the happening of which will defeat it, and defeating the devise is upon such. The condition that the donee of the power might thereafter present is the same as if the testator had inserted in the will the identical conditions as a defeasance of the present estate. See Johnson v. Yates, 9 Dana, 500, where it is said

Digitized by Google

"that the appointment operates as if it had been inserted in the original deed;" also in accordance with these views is the case of Lillard v. Robinson, 3 Litt., 415, wherein it was held that the devisee of a life estate would, under a power of appointment, defeat the devisees in remainder under the will; also in the cases of McCullough v. Anderson, &c., 11 KY. LAW REP, 939, and Herbert, &c., v. Herbert, &c., 85 Ky., 134, the same doctrine is announced. These cases proceed upon the ground that a testator could defeat the expressed objects of his bounty by a defeasance in the nature of the power of appointment to the uses of another person.

The judgment is reversed with directions for further proceedings consistent with this opinion.

MULLINS V. FAULKNER, &C.

(*Filed Oct.* 20, 1892—*Not to be reported.*)

Adverse possession—Boundary—Limitation—A vendee, who entered upon a tract of land nearly seventy years ago, claiming under a deed of record, and who has had possession of the land ever since by himself and his heirs, has thereby acquired a perfect title to the extent of his boundary, even though the entire boundary claimed by him is not included in the deed under which he entered, or even if the attorney in fact, who executed such deed for the vendor, was not properly authorized by the vendor to execute such conveyance.

W. J. Perrin and J. T. Simon for appellant.

W. M. Rardin and James F. Ellis for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Pryor.

It clearly appears from the testimony that nearly three-quarters of a century since one Abram Vastine purchased two hundred and fifty acres of land of one Bailey, as the agent of the heirs of John Crittenden; that he entered upon the land, raised a family, died, leaving his children in possession, when they had it partitioned, and twenty-five acres was allotted to Mrs. Ackerman, a daughter of Vastine, who is also dead, leaving the plaintiffs—her children—or heirs at law. The defendant (appellant), who is claiming this land, holds it under a purchase made of one hundred acres of land under a decree against the unknown heirs of one Miller, rendered in the year 1872. He now claims that this land in controversy was embraced by the deed made to him, and outside of the boundary of the Bailey deed to Vastine.

The question then is, what land the deed to Vastine covers, and it is plain, from the testimony, that it embraces the land recovered. It is immaterial whether there was a power of attorney from Crittenden's heirs or not to Bailey, his sale and conveyance to Vastine near seventy years ago, and an entry by Vastine on the land, and his continued possession since by him and his heirs, enables those holding under him to maintain this ejectment.

If the line in controversy is not the real Crittenden line the appellees are entitled to hold to the extent of their boundary under the deed from Bailey to their ancestor made in 1826. Besides, the weight of the evidence shows the Crittenden line to be as contended

Digitized by Google

for by the appellees. The instructions were more favorable to the appellant than they should have been.

If the appellees and their ancestor entered on this land in 1826, and have been in the possession since, claiming to the boundary of the deed, a subsequent entry acquired no title, unless by an actual inclosure the lapse of time gave title to that extent. There was no entry before or after Vastine entered under any superior grant.

We think the record shows that Mrs. Ackerman was a child of Vastine. The partition deed shows it, and the son who testified speaks of his mother, and Vastine as being his grandfather.

The law and facts authorized the recovery, and the judgment is affirmed.

McDERMOTT, BY, &C. V. KY. CENTRAL RY. CO.

(*Filed Oct.* 22, 1892.)

1. *Railroads—Duty to trespasser on track in switch-yard*—The failure to ring the bell of an engine moving backward in a switch-yard, or to give any other warning of its approach, or to have anyone on the lookout on the engine, is not a violation of any duty the railroad company owes to a trespasser on one of its tracks in such switch-yard, And if such trespasser is injured by such engine before any of the railroad employes discover his presence on the track, he has no right of action against the company for the damages sustained by him.

2. *Same—Infants*—The fact that the trespasser so injured was an infant does not change or modify the application of the rule above stated, because signals of approaching trains must be given, and oversight of the tracks exercised uniformly and habitually or not at all, and for the protection and safety of all trespassers or none.

3. *Same—Peremptory instructions*—Even if the above rules were not applicable to this case, the infant, who was injured while trespassing on the track of a switch-yard, could not recover, because it appears from his own testimony that he was familiar with the movements of the trains in such switch-yard, and knew that the engine that injured him was daily moved along the track on which he was trespassing at the time of day the injury was inflicted, and that he saw it on a turn-table preparing to go upon the same track he immediately went upon. A peremptory instruction was properly given in this case.

C. J. Bronston and Ward & Dickson for appellant.

G. C. Lockhart for appellee.

Appeal from Bourbon Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellant, an infant suing by his father, brought this action to recover for an injury to his foot, resulting in amputation just above the ankle, caused by one of appellee's locomotives running on it. But the lower court having, at conclusion of plaintiff's evidence, instructed the jury to find for defendant, which was done, the single question presented on this appeal is whether there was evidence conducing to show legal liability for the injury complained of.

It appears that the railroad track upon which appellant, then about eight years of age, got hurt was one owned by appellee, leading from Paris, where it occurred, to Maysville, there being three other tracks near the depot. Of these the most western—Kentucky Central—

Digitized by Google

leads to Covington, and between it and Maysville track is a switch-track to a turn-table and another switch-track to some place not made clear by the evidence.

The father of appellant resides and keeps a boarding-house and saloon where the Winchester turnpike crosses the Kentucky Central railroad, about four hundred feet from the depot toward Lexington, and had directed an elder son to go to the depot for the purpose of meeting his mother, who was expected to come that afternoon on the Kentucky Central from Covington. Appellant, though not required, nor having permission, accompanied his brother, as did also their little sister, but the train not arriving on time, the eldest boy, for some private purpose not connected with business of the company, proceeded from the depot to appellee's blacksmith shop, which had to be reached by going along on or beside the railroad tracks, and appellant went to the oil-house west of the Covington track, their sister returning home.

After remaining at the oil-house a short time appellant started to follow his brother, going across the Covington and two intermediate tracks, but whether it was necessary for him, in order to reach the shop to also cross or go upon the Maysville track, does not clearly appear from the evidence.

The engine No. 10, which did the injury, had that afternoon pulled the Maysville train to Paris, and was with tender attached, when appellant left the oil-house, upon the turn-table, and before it left there he had crossed the three tracks and probably reached the Maysville track. After going from the turn-table track to the Maysville track engine No. 10 was backed on the latter toward cars it was designed to be hitched to, and at a short distance from intersection of the two tracks the tender struck appellant, who, as he testifies, had stopped on the track to pick a cinder from his foot, his face being turned away from the backing engine. The evidence shows no warning by bell or whistle was given of the retrograde movement of the engine, nor was there any person on it at the time except an employe termed hostler, whose business, it seems, is to do the necessary switching of engines and cars about the company's yard.

But it was developed by the evidence offered for plaintiff that the place to which he was going, as well as the one he was at when hurt, is within the company's yard, to which he had no right nor could safely go; and although there was some testimony showing that persons occasionally passed from Vine street along or upon the track to the depot, it does not appear that such passway was then being regularly used, or ever was used, by license of the company express or implied. On the contrary, a sign-board had been put up by which persons, other than employes of the company, were notified to keep off the tracks at and in vicinity of the place appellant was injured, and he had been several times driven away, force being at one time used for that purpose.

There is no evidence the person in charge of engine No. 10, while at the turn-table, saw appellant crossing the tracks, and it is apparent he did not see him on the Maysville track prior to the injury, because the tender obstructed his view. Nor was the engine moved at either an unusal time or rapid rate of speed, but at the usual time and in the customary mode; it was backed so slowly as to be stopped within length of the tender after notice was given of appellant's presence on the track. It is, therefore, clear that if appellee can be charged with any negligence at all it consists in the failure to give warning of the movement of the engine, and to have a person in a position to see the track ahead of it.

Digitized by Google

It is a well settled rule that the engineer of a moving railroad train must give distinct signals of its approach to a station or public crossing, and keep a lookout for persons lawfully crossing the track, and there are circumstances under which legal liabilities will arise for running a train on even a trespasser, but the general right of a railroad company to use its own property in its own way can not, any more than that of a natural person, be unreasonably restricted, the only difference being that a greater degree of care and diligence is required in operating railroads, so as to avoid injuring persons or property of others, than is generally needed in the conduct of less hazardous business of individuals. And as a matter of right, as well as in the interest of the public, a railroad company should have the same immunity from hindrance and interference with management of its business by trespassers and intruders that any other corporation or natural person is legally entitled to. It thus results that an engineer of a moving train, whether passenger or freight, is required to give signals of its approach to certain places, and diligently keep in view the track ahead of him, for safety of those who have a right to go on or across the track and of passengers and property being transported, not for protection of a trespasser on the track, whose death or injury the company can be made legally liable for only in case his peril was discovered, or by diligent attention of the engineer to his duty to others, might have been discovered in time to prevent the train running on him. Accordingiy, as moving engines and cars to and fro in the yard of a railroad company is indispensable to safe and proper conduct of its business, it should be no more obliged to specially look out for presence of those who may go there without right than for trespassers on the main track away from the yard. For to require the bell rung or whistle blown at every movement of an engine in the company's yard to and from a coal chute, water tank or turn-table, however slowly or short the distance it might have to go, or that an extra employe be placed upon every backing engine simply to warn or look out for presence of persons having no right or reasonably expected to be there when not at all necessarry for safety of persons or property legally entitled to care and protection by the company, would be unreasonable and oppressive; and the fact that such trespasser is an infant does not affect the legal rights of the company, because signals of approaching engines must be given and oversight of the tracks exercised uniformly and habitually or not at all, and for protection and safety of all trespassers or none. In this case, however, appellant, though only eight years old, is, as shown by his own testimony, unusually intelligent and familiar with daily movement of trains about Paris. He knew time of arrival of each train; by what engine, according to number, it was drawn, and that No. 10 went each day to the turn-table, thence back to the Maysville track in just the manner and about the time it did on the day he was hurt—in fact, he saw it on the turn-table as he went from the oil-house across the tracks. The evidence makes it clear he had, at the time, capacity enough to understand and avoid the danger he placed himself in, and it was, therefore, incumbent on him to exercise necessary care for his own protection.

In our opinion the evidence does not show, or tend to show, the injury to appellant resulted from actionable negligence of appellee or any of its servants.

Neither the case of Shelby v. C. N. & T. R.R. Co., 85 Ky., 224, nor Conley's adm'r v. C. N. & T. R. R. Co., 90 Ky., 402, is like or conflicts with an opinion in this. In the first-named the person killed was not a trespasser, but went upon the track near a through freight train for a

Digitized by Google

legitimate purpose connected with business of the company when he was struck by a detached car cut off from the engine, and, without any one upon it, permitted to go at a rapid rate of speed three hundred yards near a passway regularly used by persons in the town where it occurred. But it was then held, as here, that a railroad company is not required to anticipate the presence of a person who intrudes into its private yard. In the other case cited Conley, while on or attempting to cross the track near a regular passway over it in a town on a dark night, was run on and killed by cars detached from the engine and suffered to move on a down grade. And there was, not only a failure to place light on the front part of the cars, or use other means to give warning of their approach to the passway, but as the section of the train to which the engine was attached had already passed, it was a reasonable supposition the track could be safely crossed. It was, therefore, held that a case of actionable negligence was presented, notwithstanding the deceased might have been technically a trespasser. But a distinction was recognized between such case and one where the injured party knowing existence of danger purposely or negligently puts himself in the way, as did appellant.

Judgment affirmed.

TOHERMES V. BEISER, &C.

(*Filed Oct.* 22, 1892.)

1. *Homestead—Adjacent lots*—Where the owner of two adjoining city lots has for many years resided upon and claimed one of them, which is worth more than $1,000, as his homestead, he will not be permitted to elect to claim his homestead in the other lot, upon which he has never resided and which he has always leased to tenants, and thereby defeat the claim of any of his creditors.

2. *Same*—Nor does the fact that he has voluntarily created a lien upon the house and lot on which he resided before the creation of the debt for which the adjacent lot is sought to be subjected, change the legal aspects of his homestead claim, it appearing that the owner did not claim a homestead in such lot until after the action on such debt was instituted and summons thereon executed upon him when he moved to it and began to occupy it as a residence.

Orlando P. Schmidt for appellant.

Jas. P. Tarvin for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

About the year 1872 appellee, Beiser, became owner of two distinct lots of land in central Covington, numbered 35 and 36. Upon the last named he erected a dwelling-house and occupied it with his family, and upon the first he also erected a dwelling-house, afterwards occupied by tenants, from whom he received rents.

Upon lot 36 there were created liens for about $1,700, full value of it, and when this litigation commenced there was also a mortgage lien in favor of Dudley upon lot 35, though not for its full value.

Prior to December 27, 1888, appellee, Beiser, became indebted to appellant, Tohermes, about the sum of $235, for which an action

Digitized by Google

ordinary was instituted early in December, 1888, and judgment rendered at the ensuing January term. Upon that judgment execution was issued and levied upon lot 35, and at the sale made in pursuance of such levy appellant, Tohermes, became purchaser at the amount of his judgment.

Soon thereafter he commenced this action in equity, making the mortgagee, Dudley. a party for the purpose of subjecting lot 35 to pay first the Dudley debt, the superiority of whose lien was conceded, and then to satisfy his debt. But by the judgment appealed from the proceeds of sale of lot 35, which had been previously made by commissioner of court, were applied so far as necessary to pay Dudley and the residue, instead of being applied to pay the debt of appellant, was directed to be paid to appellee, Beiser, the debtor. Payment of such residue to him, instead of appellant, his creditor, was adjudged by the lower court upon the theory he had a homestead right in lot 35 that was subordinate only to the mortgage lien of Dudley, voluntarily created by him.

Section 10, article 13, chapter 38, General Statutes, provides in substance, that before a coercive sale of land, occupied as as a homestead, such part thereof as the defendant may select, not exceeding $1,000 in value, shall be set apart to him. And by section 12 it is provided that in case land, so occupied as a homestead by the defendant, yet subject to coercive sale, shall exceed in value $1,000 and be not divisible without diminution of its value, the proceeds of such sale to the value of $1,000 shall be first and to exclusion of the creditors, demands paid to the debtor.

It has been held by this court that a debtor may select any part of a tract of land occupied by him as a homestead, which he desires to be exempted from coercive sale, even though the dwelling-house be on the part not so selected and retained for a homestead. And a debtor may even voluntarily sell off that part of his land upon which the dwelling-house is situated, retaining a homestead right in the remainder, though there be at the time no dwelling-house on it. But in this case the debtor selected and occupied as a homestead for many years lot 36, worth over $1,000, which was distinct from lot 35, that he had continued to lease to tenants for about an equal length of time, never at any time occupying or claiming it as his homestead until December 27, 1888, when he moved into it, after appellant's debt was created and after the action to recover judgment therefor was instituted and process thereon actually served on him. The fact he had voluntarily created liens on lot 36 prior to his indebtedness to appellant does not change the legal aspect of the case. For it is to be presumed credit was given to him by appellant upon the faith that lot No. 35 was entirely free from his homestead right, never having been previously occupied or claimed by him as such. And he did not, in law or fact, have any homestead right or interest whatever in lot 35 at the time his indebtedness to appellant was created. Nor did appellant, so far as this record shows, have actual notice of the incumbrance on lot 36, even if such notice could affect him.

To permit a debtor to sell and remove from one lot or distinct tract of land worth more than $1,000, and for many years claimed and occupied as his only homestead, and to remove to and claim as such homestead another lot or distinct tract, that was subject to his debts at the time they were created, never was intended by the Legislature, and would afford facility for fraud and bad faith never contemplated.

Digitized by Google

The judgment is reversed and cause remanded, with directions to apply the proceeds of lot 35 now in dispute toward payment of appellant's debt.

COMMONWEALTH V. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY.

(*Filed Oct.* 25, 1892.)

1. *Railroads—Certain lease of road in effect a sale*—A lease by a railroad company of its partly finished road, and all its rights and assets to another company for one thousand years, in consideration of the agreement of the latter company to finish the road, with no provision made in the lease for the reversion of the road, is equivalent to a sale and consolidation of such road.

2. *Exemption of railroad from taxation*—The charter of a railroad which provides that its stockholders shall "give said stock in for taxation under the equalization laws of this State, * * * but no further tax shall be imposed on said company or road," confers on said company a personal right of exemption from taxation, which it could not vest in another railway company by a sale of the road.

W. J. Hendrick and Reid Rogers for appellant.

H. A. Taylor for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

It appears by the agreed facts in this case that, by an act of the Legislature of this State, the Hickman & Obion Railroad Company was incorporated in 1854; that section 24 of said act provided: "That all persons residing in this State and owning stock in said road shall give said stock in for taxation under the equalization laws of this State from and after the completion of the road, but no further tax shall be imposed on said company or road;" that the said road was thereupon partly constructed by the Hickman & Obion Company; that afterwards said road was leased to and consolidated with the Nashville & Northwestern Railroad Company.

By the agreements of November 13, 1855, and of January 19, 1856 (the latter supplemental only), the Hickman & Obion road leased to the Nashville & Northwestern Railroad Company, for the period of one thousand years, the exclusive right of transporting and conveying passengers and freight over its said road, together with the depot grounds, road bed, bridges, culverts, materials, privileges and its assets after the payment of its debts, the latter to be used by the said Nashville & Northwestern Railroad Company in the completion of the said Hickman & Obion road; the fifty thousand coupon bonds issued to the Hickman & Obion Railroad Company were transferred to the Nashville & Northwestern Railroad Company, and that company issued its own stock to the Hickman & Obion in lieu thereof; also any other stock due the stockholders of the Hickman & Obion Railroad Company was to be surrendered and stock issued for it in the name of the Nashville & Northwestern Railroad Company; also the Hickman & Obion Railroad Company was not required to keep up its organization longer than was necessary to settle its indebtedness. All of its rights and privileges were completely merged in the Nashville & Northwestern Railroad Company, and the consideration for all of this was that the Nashville

Digitized by Google

& Northwestern Railroad Company was to complete the Hickman & Obion railroad within a specified time. Thereafter, by a proceeding in the chancery court for Davidson county, Tenn., foreclosing a mortgage that the State of Tennessee held on the Nashville and Northwestern Railroad Company, the said road, including the lease, was sold, and certain persons bought it, which sale was confirmed; and thereafter they sold the road and lease to the appellee, the Nashville, Chattanooga and St. Louis Railroad Company, and it has had the exclusive control and operation of said road, including the part lying in this State, ever since (a period of over twenty years).

In an action by the State against the appellee to recover taxes on that part of the road lying in this State, the appellee resists the right of the State to the taxes upon the ground that by said act of the Legislature that part of the Hickman & Obion railroad lying in this State was exempt from taxation, and that admitting that said exemption was a personal privilege which could not be vested in another by sale, unless expressly authorized by statute, which it is not contended in the case here, there was not a sale of the Hickman & Obion road, but only a lease to and consolidation with the Nashville & Northwestern Railroad Company, which was not such a transfer of the title of the Hickman & Obion road as to defeat the personal privilege of exemption from taxation. Now, it is true where two or more railroads are consolidated into one united line and one company by authority of law, and each retaining its right of property, privleges and exemptions, but uniting into one line and one company for business advantages, such consolidation does not deprive either of the privileges and exemptions given it by its charter; but the same exist and belong to each, notwithstanding the consolidation. See 2 Rorer on Railroads, 1501; also the authorities cited by the appellee is to the same effect.

On the other hand, if the several companies are not authorized by law to transfer their property to and consolidate it into one new company, each retaining its chartered privileges and exemptions, and such companies transfer all their property to and consolidate it with a new company, such transfer creates a new corporation, and is equivalent to a sale of the companies' property to the new corporation, which will have the effect of depriving each company of any exemptions from taxation that may be contained in its charter, and of denying the same to the new company; because, as said, it parts with the title to its property to the new company, and the exemption being a personal privilege, it does not follow the transmutation of the title to the property unless expressly authorized by law. See Commonwealth v. Masonic Temple Company, 87 Ky., 349; St. Louis, Iron Mountain & Southern Railway Company v. Berry, 113 U. S., 467; St. L., I. M. & S. R. R. Co. v. Berry, 843 Ark., 509. In this case there was a complete transfer and surrender of all the Hickman & Obion's property to the Nashville & Northwestern Company in consideration of the latter's completing the former's road within a certain time.

Now, as to the lease of the Hickman & Obion property to the Nashville & Northwestern Company, did the lease carry with it the exemption of the Hickman & Obion property from taxation in the hands of the lessee? We think it did not, for it is well settled that where the lease is equivalent to a sale of the property, the right of exemption from taxation is, for the reasons indicated, extinguished. Here, as said, there was an absolute transfer of the Hickman & Obion's property for one thousand years in consideration of com-

Digitized by Google

pleting the road within a certain time and no provision made for the reversion of the property. It seems to us that such transfer was equivalent to a sale; or, at least, it was such transfer of property as would defeat the exemption from taxation. See Huck v. Chicago & Alton Railroad Company, 86 Ill., 352.

Therefore, to view the transaction as a consolidation or lease, or both, the right to exemption from taxation was defeated thereby, and as the appellee is operating said road presumably rightfully, and as the right of exemption was extinguished by the transactions indicated, it must pay the taxes demanded.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

MECHANICS TRUST CO. V. COBB, &C.

(*Filed Oct.* 27, 1892—*Not to be reported.*)

Jurisdiction--Settlement of insolvent corporation—Sales of land—A court of Jefferson county, in which an action is pending for a settlement of the affairs of an insolvent corporation and for its dissolution, has jurisdiction to order the sale of land belonging to the corporation, but located in another county, for the purpose of satisfying a mortgage lien held thereon by a creditor of the corporation, and of applying any balance derived from such sales to the other debts of such corporation.

Section 62 of Civil Code does not require the order of sale in such case to be made by a court of the county in which the land is located.

D. A. Wehle for appellant.

James S. Pirtle, Stone & Sudduth, John C. Miller and James B. Kirby for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The Belknap & Dumesnil Stone Company, having its principal place of business in the city of Louisville, becoming insolvent or unable to conduct its business, one J. M. Cobb, a large stockholder, instituted this action in the Law and Equity Court for the purpose of winding up the business of the corporation by selling its plant, machinery, lands, stocks, &c., to pay its debts. A receiver was appointed and proceedings had looking to the complete dissolution of the corporation. The Mechanics Trust Company was made a defendant, and holding a mortgage as trustee to secure certain bonds, it joined in the prayer for the receiver, and filed an answer and cross-petition, asking that its mortgage be foreclosed. The lands embraced by the mortgage are in Warren county, in this State, and by consent of the parties in interest a sale was ordered by the Law and Equity Court of these lands, with a view to a final settlement of the affairs of the insolvent corporation. It seems that this consent order for the sale of the Warren county land was made before there was a judgment dissolving the corporation, and being only preparatory to the dissolution, it is claimed that the Louisville court had no jurisdiction to order a sale of these lands, and the sale should have been adjudged by the Chancery Court of Warren county, as provided by section 62 of the Civil Code That provision of the Code has no application where the action is

Digitized by Google

to settle an insolvent partnership or corporation, and the court had jurisdiction either for the protection of creditors or those interested as stockholders or partners.

If the Louisville Law and Equity Court had jurisdiction to settle the affairs of the corporation by deciding a dissolution, such being the object of the action, it then had the jurisdiction to take charge of and adjudge the sale of any of the corporate property within the county of Jefferson or out of it for that purpose. The jurisdiction in this case had attached. The parties were before the court, and the chancellor could not have granted complete relief if the right to decree a sale of the land in Warren county was denied him. A sale might be premature when the insolvency was denied and made an issue in the case and exceptions taken to the sale on that ground, but no such question is raised here.

The case of Webb v. Wright, 2 Bush, 126, is decisive of this case, and when conceding the jurisdiction of the Louisville Law and Equity Court to wind up the insolvent corporation, and of this there can be no doubt, you then concede the juris liction to sell the land in Warren, as no settlement can be made without it.

Judgment affirmed.

CLAY, JR., &C. V. NEWTON, &C.

(*Filed Oct.* 27, 1892—*Not to be reported.*)

1. *Res adjudicata—Action to quiet title*—Plaintiff in an action in 1871, to quiet title, alleged that it had, many years before, been his intention to convey a tract of land to a trustee to hold for plaintiff for life, with remainder to his children; that in a conveyance in 1850 of adjacent land by him he had recited that he had so conveyed this land to the trustee in trust, but that, in fact, his intention to so convey in trust was abandoned, and that no trust deed was ever executed. He sought to remove the cloud from his title occasioned by the recital in the conveyance mentioned that said trust deed had been executed. The children were defendants, and all were adults except one, for whom a guardian *ad litem* made defense. The court adjudged that there was "no incumbrance of trust" upon said land, and that "it was the plaintiff's property in fee-simple." *Held*—That this judgment, not being appealed from, is now conclusive on the defendants thereto, even though they now assert and prove that, in fact, said trust deed had, in fact, been executed.

2. *Same—Parties to action*—Although the trustee named in said alleged trust deed was not made a party to the suit to quiet title, the judgment rendered was not void but only erroneous. The children were parties to the suit and the beneficiaries of the trust, and since they did not appeal from the judgment against them until the time for appeal had expired, the judgment is now conclusive upon them.

Falconer & Falconer and J. A. Sullivan for appellants.

J. D. Hunt, Z. Gibbons, J. H. Nelms and H. Marshal Buford for appellees.

Appeal from Fayette Court of Common Pleas.

Opinion of the court by Judge Bennett.

April 19, 1872, Cassius M. Clay sold and conveyed in fee, to John S. Wilson, about four acres of land lying in the city of Lexington, Ky.

Digitized by Google

Said Wilson, upon the said purchase, took possession of the said land, and thereafter he sold the same in lots to the appellees, who likewise took adverse possession of the same and have so held it ever since. The said appellees brought this suit in equity against the appellants as children and heirs of Cassius M. Clay for the purpose of having their title to said land quieted. The appellees' cause of fear is, that the appellants were asserting the superior title to said land by reason of the discovery of a writing purporting to be a deed made by Cassius M. Clay, in 1845, and duly recorded, to Brutus J. Clay, sr., to said land, to be held in trust for his, Cassius M. Clay's use for life, with remainder to his children, the appellants.

The appellees claim that said writing and the assertion of title thereunder, is a cloud upon their respective titles, and they ask that same be removed.

They claim, as cause for the removal of the cloud, that Cassius M. Clay, in 1871, brought a suit in equity in the Fayette Circuit Court against his said children, all of whom were adults except one, who was properly before the court by guardian *ad litem*, and properly defended for the purpose of removing a cloud upon his title to said land growing out of this supposed trust deed, which was never in fact executed, but was abandoned; that the court did remove the said cloud in accordance with the prayer of the petition. The appellants deny the sufficiency of the pleadings in the suit referred to, to remove the cloud, and assert title to said property under said deed of trust.

Cassius M. Clay's petition in the suit referred to, states, in substance, that in a deed made by himself, in 1850, to Floyd Warfield, for some land in the city of Lexington, of which the four acres now in controversy was a part, the same was excepted from said sale because it had theretofore been conveyed in trust by the plaintiff. He then alleges that it was his intention to convey to Brutus J. Clay, sr., as trustee, to hold the land in trust for his own life, with remainder to the defendants—his children—but said intention was never carried out, nor any deed or memorandum thereof made or executed; that the purpose of executing such a trust was abandoned by plaintiff; that the mention of such a trust in the Warfield deed "was an error of the draftsman."

The prayer is to remove the cloud, &c. All the defendants to that suit, now appellants in this suit, were adults, except one; the adults, although duly summoned, failed to answer, and the allegations as to them were confessed to be true. The answer of the guardian *ad litem* traversed the allegations of the petition, and upon the final hearing, the court adjudged that there was "no incumbrance of trust" upon said property, and that it "was the plaintiff's property in fee-simple."

That judgment was never appealed, but it stands to-day in full force and effect.

Now it clearly appears from the petition that there had never been any conveyance of said land in trust for the appellants by deed or written memorandum; that the purpose to convey said land in trust for them had been abandoned; that the land belonged to him in fee; that the mention of the trust deed in the Warfield deed was a cloud upon his title. These allegations, if found by the court to be true, were sufficient to authorize the judgment adjudging that there was no encumbrance of trust upon the land, and it belonged in fee-simple to the plaintiff. It is said, however, that the allegations were not true because there was a trust deed to Brutus J. Clay, sr., for the benefit of the appellants. But the question as to the truth of

Digitized by Google

the allegations in reference to said trust was the matter that the appellants were called to admit or deny, and with which the court had to deal, and the adults admitted, by failing to deny them, their truth, and upon which the judgment found that they were true, and by which judgment, as long as it remains in force, they are bound, notwithstanding the allegations were entirely a misconception of the truth; for the judgment, as long as it is in force, is not only conclusive upon the parties as to all facts actually before the court upon the issue, but as to all facts that might have been brought before it, but were not, although unknown to the parties at the time of the judgment.

Also, as to the infant defendant, an issue of fact was made for her by her guardian *ad litem*, which the court found against her, and as long as that judgment stands in full force and effect as to her, she is bound by it; and, as she has never taken such steps as the law allows her to get rid of that judgment, it is binding upon her, and her remedy in reference thereto was barred by time many years ago.

But it is said that the trustee was not made a party to that suit, and for that reason the appellants are not bound. The trustee—or alleged trustee—was not made a party to the suit, but he held only the naked legal title for the benefit of the appellants. They were the beneficial owners of the property, and that interest was before the court; that interest they, the adults, could dispose of by deed or will; only the naked legal title was not before the court; the beneficial interest, in reference to which the adults were competent to speak and defend in court, was adjudged not to exist, which judgment, by error of the trustee not being a party to the suit, was erroneous, not void; but said adults having voluntarily submitted to the same until the time allowed in which to reverse it had expired, it was as binding upon them as regular proper judgment would be. They have let the time expire. Also the infant, after obtaining her majority, having let the time allowed her in which to correct the judgment expire, she is likewise bound by it.

The judgment is affirmed.

INGALLS & CO. V. HART HARDWARE CO., &C.

(*Filed Oct.* 29, 1892.)

Pleading—Injury caused by tornado—Failure to remove debris—The petition alleged that a great tornado which passed over the city of Louisville, blew defendant's five-story brick business house on the adjoining house of plaintiff, and on the stock of goods therein, and that plaintiff was greatly damaged by reason of the fact that the debris of said brick building remained on his house and goods for four days, and that defendants "willfully, wrongfully, carelessly and without right refused and neglected to remove" the debris from plaintiff's property for four days, although he notified them to do so. Plaintiff asks damages for such failure to remove the debris. *Held*—The petition does not present a cause of action, because it does not allege that the defendants were able to remove the debris within the four days, or could have done so by the use of all reasonable diligence within such time after notice to remove it.

Jas. E. Gaither for appellant.

Randolph H. Blain and Blain & Kinkead for appellees.

Digitized by Google

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

March the 27, 1899, a great tornado passed over the city of Louisville, Ky., sweeping away hundreds of large and magnificent houses, killing and bankrupting many persons and depriving them of house and home.

It is alleged that the appellees' large five-story brick business building was blown down and fell on the adjoining lot and business house of the appellant, causing great damage to his house and goods therein, and causing increased damage to the same by reason of the fact that the debris of said brick building remained on said house and goods for four days. It is for the latter injury that the appellant claims damages. The court sustained a demurrer to the petition and amended petition. The appellant has appealed. The petition and amended petition allege, in substance, that the appellee "willfully, wrongfully, carelessly and without right refused and neglected to remove" the debris from off the said property for four days, although he was notified to do so, whereby the appellant sustained damage, in addition to that caused by the fall of the building.

Now, it is to be observed that the strong expressions quoted are not equivalent to the charge that the appellant was able to remove said debris within four days, and could have done so by the use of reasonable diligence. We think that in a great disaster like that one described in the petition, involving all in its path and recking their property, fortune and lives, it ought to clearly and distinctly appear before one should be held responsible in damages for not removing the debris (if not removing it be actionable at all), that he was able to remove it and could have removed it by the use of reasonable diligence, after notice to remove it. This does not appear in the petition.

The judgment is affirmed.

JONES V. TYE.

(*Filed Oct.* 29, 1892.)

Memorandum of contract of sale of land—Statute of Frauds—A vendor by verbal contract sold a tract of land, and upon last payment by vendee gave him the following receipt, viz:

"Received of T $18, remainder of the payment of the purchase money on the land bought of J, adjoining the McKebly land. July 2, 1884."

The vendee in this action for specific execution of the contract of sale claims that he purchased one tract, and the defendants claim it was a different tract. *Held*—That the receipt is not a sufficient memorandum of the sale to authorize a specific enforcement of the contract, since it requires verbal evidence to identify the land sold.

K. D. Perkins for appellant.

Hill & Denham for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Bennett.

Digitized by Google

The appellee's action is to enforce the specific performance of a verbal purchase of a tract of land from the appellant. The court, it is supposed, decreed the specific performance upon the ground that the following receipt was a sufficient memorandum to comply with the statute of frauds and perjuries relative to the sale of land:

"Received of John S. Tye $18, remainder of the payment of the purchase money on the land bought of Madison Jones, adjoining the McKebly land. July the 2d, 1884.

MADISON JONES."

There is no identification of the land mentioned in this receipt save the testimony of the appellee, corroborated in part by Mr. Bowlin, that the land in controversy is the land referred to in the receipt. On the other hand, the appellant swears that the land referred to in the receipt is another and different tract from the land in controversy, which he sold to the appellee. At the same time it is alleged that he sold him the land in controversy, and that he never sold him the latter piece of land.

The statement in the receipt that the land sold "adjoins the McKebly land," does not serve to identify the land in controversy, because the land that the appellant admits that he sold to the appellee adjoins the McKebly land as well as the land in controversy adjoins it; so the statement that the land sold adjoins the McKebly land may refer to either parcel; thererfore, in order to determine which piece the expression refers to, verbal testimony must be resorted to, which is clearly not permissible in this State. For it is, as said in Harrison and Owens v. Lane and Taylor, 4 Bibb., 466, the evils arising from the admissibility of verbal testimany in such case, "it was the great object of the statute to prevent." In Overstreet v. Rice, 4 Bush, 1, and in Tyler v. Onzts, &c., *ante* 321, the same rule is announced.

The receipt quoted in the 4 Bibb., 466, *supra*, said that the money was received as "part pay of a lot bought of me in the town of Versailles."

That receipt mentioned the town in which the lot was lying, whereas the receipt in this case does not mention where the land lay; but the court held in that case that the receipt was not a sufficient memorandum, on account of its uncertainty, to take the sale out of the statute of frauds, &c., and so in 4 Bush, 1, case, *supra*, the written memorandum was that the parties had "swapped farms;" but not saying where the land lay. The court held in that case that the memorandum, not identifying the land, was not sufficient to take the contract out of the statute of frauds; but the court says that when the parties have thereafter rendered the uncertainty certain by taking "possession and consumating the mutual exchange, it is too late for either party to" repudiate the agreement. By taking possession, which is an admitted physical fact, without which there can not be a perfect title and right to the land, the uncertainty is made certain—the land is thereby identified. According to these cases, and others that might be cited, it is clear that the receipt in this case is not a sufficient memorandum of the sale to comply with the statute of frauds, because it fails to identify, with reasonable certainty, the land sold; and to allow the controversy as to the identity of the land to be settled by the mere weight of verbal testimony would, as it seems to us, defeat the very object of the statute of frauds.

The receipt in the Tyler case, *supra*, recited that the cash payment "was on lot No. 4, blocks 9 N. E., in Middlesborough, Ky." It will be seen that the receipt identified the lot sold, which, set forth in a bond for a title, would be sufficient. And the court

Digitized by Google

held in that case that, although the description of the land and the terms of sale were set forth in a receipt, if sufficient to identify the land as the property sold, it was such a memorandum as complied with the statute of frauds relative to the sale of land.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

CRUMP V. COMMONWEALTH.

(*Filed Oct.* 29, 1892.)

1. *Evidence concerning the reputation of the defendant for morality and virtue* was admissible against her on her trial for the murder of her husband after she had testified in her own behalf. Having voluntarily assumed the attitude of a witness in the case, her credibility was subject to the same tests as may be applied to any other witness.

2. *Evidence—Dying declaration*—The deceased, shortly after being shot by his wife, stated that he was going to die, and continued to say, up to the time of his death the next day, that he was going to die from the wounds received. He never expressed a doubt about dying or a hope of recovery, and his declarations concerning the shooting were properly admitted as his dying declarations.

The affidavit made by deceased before his death, wherein he charged that his wife willfully shot and wounded him with the intent to kill, without any known cause, was incompetent as a dying declaration, but the defendant can not complain that it was read to the jury, it having been introduced in evidence in her behalf.

T. H. Paynter for appellant.

Wm. J. Hendrick for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Lewis.

According to the dying declarations of her husband, for the murder of whom appellant was indicted and tried, he went to his home about 9 or 10 o'clock at night, and being let in by his son, sat down by the fire, taking off his shoes for the purpose of going to bed; that she commenced to quarrel with him, and without any violence or demonstration or threats of violence on his part, she got out the bed, where she had gone before his return home, and fired a pistol at him four or five times, the first shot, which was the fatal one, striking his back, going nearly through him. He received besides two other slight wounds. He immediately left the house, which he tried to escape from as soon as fired at, and started bare-footed in the snow to his father's house about 300 yards off, but was met about half way by his brother, to whom he said, "I am shot three or four times; I am going to die." He died the next day about 5 P. M., but said to several persons, at different times during the interval, substantially that he was going to die from the wounds received. In fact, he never to any one expressed a doubt about dying or hope of recovery, but, according to the statement of each witness who professed to have heard, he said, without qualification or hesitation, he was going to die.

It seems to us his statements, made under the circumstances proved, are clearly competent as dying declarations.

Digitized by Google

It appears he also made an affidavit, read in evidence, in which it was simply stated that upon the night of the 15th of March, 1892, his wife did willfully shoot and wound him with intent to kill without any known cause; but that affidavit would not be competent as a dying declaration even if it was more than a mere statement of a conclusion of the person making it, because it does not appear that it was made by him in belief of impending death. It certainly did not have the effect to render incompetent his dying declarations otherwise proved; nor can appellant complain of its introduction, because it was read to the jury on her motion. She and her son both testified, and according to both of their statements she shot her husband in self-defense, but evidently the jury did not believe them, or she would have been acquitted. Hence, counsel make the objection that the court permitted evidence that her reputation for morality and virtue is bad to go to the jury. Having assumed the attitude of a witness, appellant was, as has been expressly held by this court, properly subjected to the same tests as any other one testifying, and evidence as to her reputation for morality and virtue was, therefore, competent.

Judgment affirmed.

TAYLOR V. WATTS.

(*Filed Oct.* 29, 1892—*Not to be reported.*)

1. *Evidence of partnership—Partnership and individual creditors—Mortgages*—W. and T., who were partners, agreed upon terms of dissolution of the firm, whereby W. transferred to T. all the firm property and assets, and T. assumed payment of all firm debts and agreed to pay W. a certain sum as the amount due him by the firm. All the firm property was mortgaged to W. by T. to secure the performance of his undertaking. T. failed to pay the firm liabilities and W. was compelled to pay them. In this action by W. against T. and T.'s brother, wherein W. seeks judgment against the brother on the ground that he was a silent partner of the firm of W. & T., *Held*—

First—The verdict of the jury finding that T.'s brother was a member of the firm of W. & T. is palpably against the weight of the evidence; is not sustained by any evidence and must be set aside.

Second—Since the brother was employed by the firm, and after its dissolution appropriated to his own use to pay a debt due him by T. some of the property that had been mortgaged to W. to secure him, the brother is liable to W. for the value of the property so appropriated, and must account to him for it.

C. W. Lester for appellant.

David N. Cull for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Lewis.

Previous to December, 1886, appellee, S. J. Watts, was owner of a store, selling goods at Corbin, Whitley county; a steam saw-mill at Emanuel, about eleven miles distant, and had made a contract with certain persons to furnish timber for tunnel and bridges on twelve miles of the Cumberland Valley extension of the Louisville & Nashville railroad, then being constructed, T. J. Taylor having a contract at the same time for grading and masonry of two miles of that

Digitized by Google

road. A partnership between them was formed, Watts selling to Taylor a half interest in his stock of goods and lumber contract, and taking a half interest in Taylor's contract.

That partnership continued until April 5, 1887, when Watts, retiring from the firm, transferred to Taylor all the partnership property, including goods of the store, tools, animals, lumber and houses, in consideration of which Taylor agreed to assume and pay all the firm debts, and the sum of $231.25 found due to Watts on settlement; and, in order to secure performance of his undertaking, Taylor, on the same day, executed to Watts a mortgage on all the firm property thus transferred to him, including estimates for work done and materials furnished on said road by the firm, the entire property being stated in the mortgage to be of the value of $13,000, and the firm's debts so stated to be about $6,000.

This action was brought by Watts against T. J. Taylor and appellant, J. W. Taylor, jointly, to recover amount of the firm debts, all of which, it is alleged in the petition, the plaintiff has been compelled to pay by reason of the total failure of T. J. Taylor to comply with his contract to pay them, the sum of $231.15 mentioned, damages on account of sacrifice of his property sold to pay said debts, and also the amount of an account for work and labor done for and goods and materials furnished to defendants subsequent to April 5, 1887.

It is alleged in the petition, as cause for suing appellant, J. W. Taylor, that he was a real though silent partner of the original firm of Watts & Taylor, and also a partner of T. J. Taylor in the property and business of Watts & Taylor after the transfer of April 5, 1887, and as such partner he received the benefit of the contracts referred to, and together with T. J. Taylor clandestinely carried off to the State of Tennessee all the property mortgaged to plaintiff to secure payment of the firm debts of Watts & Taylor and the individual debt of $231.15.

At the November term, 1890, of court, a verdict was rendered in favor of plaintiff against J. W. & T. J. Taylor for $5,781.19, though upon grounds filed by him a new trial was granted as to J. W. Taylor; but at the re-trial, had at the May term, 1891, a verdict was again found against him, the amount being $4,500, and from the judgment rendered thereon he has appealed. But T. J. Taylor did not ask a new trial, nor has he appealed, consequently judgment for amount of the first verdict stands against him, which does not, however, avail the plaintiff, because he is insolvent.

It seems to us the evidence does now show J. W. Taylor was a member of the original firm of Watts & Taylor. On the contrary, the testimony of the plaintiff himself shows very clearly he was not, for he stated, as a witness, that December 24, 1886, when the partnership between him and T. J. Taylor was formed, he wanted J. W. Taylor to go into the firm but he would not do it, saying he knew nothing about railroads; was afraid of it and would put no money in it. Moreover, at dissolution of the firm of Watts & Taylor, April 5, 1887, T. J. Taylor alone assumed payment of the firm debts, and of the individual debt of $231 15; to him alone was transferred Watts' share of partnership property, and he alone executed the mortgage thereon to secure payment of the debts. In fact Watts does not testify to a single promise, oral or in writing, direct or indirect, made by J. W. Taylor, to become a member of the firm of Watts & Taylor, or to assume payment of any of its liabilities. As, therefore, the verdict of the jury was, to a great extent, if not altogether, based upon the asssumption J. W. Taylor was a partner

Digitized by Google

that being the main issue made by the pleadings, it is bound to be treated as palpably against the evidence.

The evidence shows, however, that J. W. Taylor, who was a resident of Tennessee, staid at Corbin and Emanual nearly the whole time after the partnership was formed, until the mortgaged property was taken out of this State, and was often at the store and about the mill, and after April 5, 1887, he and T. J. Taylor purchased and operated a mill at Emanual distinct from the one owned by Watts, and previously operated by Watts & Taylor.

His purpose in going to Corbin in December, 1886, was, as he testifies, to look after collection of $1,200 loaned by him to T. J. Taylor, and that, after going there, he was employed by Watts & Taylor to superintend the Watts mill. He admits he continued at Corbin to some time in June for the purpose of collecting or saving the money T. J. Taylor owed him, though, in the meantime, he and his brother jointly purchased and operated a mill.

Whether J. W. Taylor became, after April 5, 1887, interested as a partner of T. J. Taylor in the property and business of the defunct firm of Watts & Taylor, does not fully appear; but it seems to us this record fully authorizes the belief that he appropriated to his own use at least enough of the mortgaged property to satisfy what was due him from T. J. Taylor, who was insolvent, and not otherwise able to pay him. That he collected some of the estimates made on the railroad contracts and going to T. J. Taylor is testified by appellee and not denied by him.

While, therefore, there is such signal failure of proof of J. W. Taylor being a member of the firm of Watts & Taylor as to require the verdict set aside, it is not so clear that he did not, after April 5, 1887, as partner with T. J. Taylor or otherwise, appropriate a considerable amount of the mortgaged property. And to the extent he did so appropriate to his own use any of such property or estimates for work, which were likewise mortgaged, he is liable to appellee Watts, who shows he has paid firm debts for which the property was mortgaged to him. He is also entitled to recover on his account to the extent the alleged services were rendered or goods were furnished to J. W. Taylor, as a member of the firm of Taylor Brothers, if there was such firm, or to him individually.

Wherefore, the judgment is reversed, and cause remanded for the verdict to be set aside and a new trial granted, and further proceedings consistent with this opinion.

HOUCHIN, &C. V. HOUCHIN, &C.

(*Filed Nov.* 3, 1892—*Not to be reported.*)

Ownership of land—Adverse possession—Evidence—A father in 1863 executed a deed of conveyance of land to his son, the consideration for which was therein stated to be the conveyance by the son to the father of the land involved in this action. No conveyance of such land was made by the son to the father, but the latter took possession of it in 1863 and held possession of it and used it for more than fifteen years and until his death. The son claims the father occupied this land under a verbal agreement by which it was, on his death, to revert to the son. The father's widow and devisee claims he held adverse possession, claiming in his own right. *Held*—The evidence sustains the finding of the chancellor that the father held the land, claiming it as his own, and such adverse possession by him for fifteen

Digitized by Google

years gave him a perfect title, although there is no written evidence of the purchase by him.

J. S. Lay & Brother for appellant.

T. B. McIntire for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, John M. Houchin, brought this action to recover damages of appellee, Sarah T. Houchin, and her tenant, Byers, for forcible entry and trespass to a tract of land, and for injunction restraining commission by them of further trespass.

It appears there was, about 1847, a deed made by a State agent to appellant for the tract of land, and during the same year he obtained a patent therefor. So there is no dispute in this case he was at one time the owner. But in 1863 John F. Houchin, father of appellant, conveyed to him certain parcels of land, described as lying in the strawberry value, reserving to the grantor right of way and use of spring on one of the tracts, and use and enjoyment by the grantor during his life of the other.

The consideration for that conveyance is thus recited in the deed: "That the said John F. Houchin has this day for and in consideration of John M. Houchin, having conveyed to me a tract of land on the north side of Green river, in Edmonson county, adjoining the lands of said John F. Huchin and the land of R. M. Davis and the land on which Thomas S. Sanders now lives, supposed to contain —— acres, and for and in consideration of the natural love and affection of the said John F. Houchin for the said John M. Houchin as the son of the said John F. Houchin."

There was a further stipulation in the deed to the effect that the conveyance was "to be in full satisfaction of all claim the said John M. Houchin is to have as one of the heirs of said John F. Houchin, unless the said John F. Houchin should see proper to leave to said John M. other property by will."

There is very little room for dispute of the tract of land mentioned in the deed as having been conveyed by John M. to John F. Houchin being, less 60 acres subsequently sold, the same land now in controversy. But there had not, in fact, been at that time any such conveyance, nor did John M. thereafter convey it to his father, John F. Houchin. Nevertheless the latter did, about date of the deed, take possession of, cultivate and pay taxes on it up to time of his death, about 1886.

Appellant, John M. Houchin, however, contends that it was so held and used by his father under a verbal agreement between them; that at death of the latter the former was to resume possession and enjoyment of it.

On the other side it is contended that John F. Houchin did, at date of the deed of 1863, take possession and continue to hold and use it, claiming it as his own until his death, and consequently it is part of the land intended to be and actually devised to his wife, Sarah T. Houchin, for life. If the land was so held and claimed by John F. Houchin he acquired a perfect title, although there be no written evidence of a sale to him, and, as a consequence, the right of entry by John M. Houchin must be postponed until death of Sarah T. Houchin, when he will be entitled to possession under his father's will.

Digitized by Google

There being, then, no question of John F. Houchin having possession more than fifteen years before his death, the material and decisive question is as to character of such possession, whether under a claim of absolute ownership or as tenant of John M. The evidence on that issue is conflicting, but it seems to us the weight of it, as decided by the lower court, is in favor of a continuous claim by John F. Houchin of a purchase and ownership of the land. It is true appellant, John M., testifies he permitted his father to use and enjoy the land for his life simply as tenant, and he is supported by other witnesses. But a number of apparently disinterested witnesses testify to acts of ownership exercised by John F. Houchin from 1863 continuously to his death not at all consistent with the theory of appellant. They likewise proved repeated statements and acts of John M., showing he did not claim the land, but recognized the right of his father to it. In fact 60 acres of the original tract was, in 1867, sold by John F. and the purchase money paid to him without objection on the part of John M., who, when called on by his father, made a deed to the purchaser.

The question in this case being one of fact, we do not, in view of the evidence, think this court is authorized to disturb the finding of the chancellor, and the judgment must be affirmed.

KENTUCKY CENTRAL RAILWAY CO. v. SMITH, BY, &C.

(*Filed Oct.* 29, 1892.)

1. *Negligence—Operation of railroad in streets of city*—It is the duty of a railroad company to use extraordinary care and diligence in running its trains on the tracks at the intersection of two streets in the center of a densely populated city. In such case the character of the streets, and the usual travel upon them, determine the degree of care that must be exercised by the railroad.

2. *Same—Making of running switch in street of city*—It is an improper use of the streets of a city for a railroad to so use its tracks and trains thereon as to prevent the use of the streets by the public for ordinary business purposes; and it is negligence *per se* on the part of a railroad company to make a "running switch" in the streets of a populous city.

3. *Same—Contributory neglect—Infants*—One about to cross the tracks of a railway located on a street of a city must exercise ordinary care to avoid coming in contact with trains thereon; and where a boy thirteen years of age is crossing such track he must exercise such ordinary care and caution for his own safety as could reasonably be expected of one of such age.

4. *Same*—The railroad's tracks are located at the intersection of two streets near the center of a city of thirty thousand inhabitants. Two belong to appellant, and one track to another company. One of appellant's engines was backing northwardly towards the intersection, pushing before it two gondola cars, and pulling after it four box cars. No one was on the lookout of either of the gondola cars, and no flagman was at the crossing. The train was preparing to make a running switch at a switch about one hundred feet beyond said crossing, and the bell was rung. A boy thirteen years of age had just crossed one track in the street and was probably picking up pebbles therefrom. A train on said track had just passed south, and just as the switch-train on appellant's road detached itself from the box cars to make the running switch, and increased its speed somewhat, some one gave a cry of danger, and the boy, alarmed by the cry, stepped upon appellant's track and was run over by the gondola car. Both feet were crushed, and his legs had to be amputated above the knees. The em-

Digitized by Google

ployes on the moving train, after discovering the danger, used every appliance to avoid injury to the boy, *Held*—

First. The company was guilty of the highest degree of neglect at the time of the accident, first, in making a flying switch in the street; second, in not having some one on the lookout on the front gondola car; third, in not having a switchman at the crossing.

Second. The boy was not guilty of such contributory neglect as will prevent his recovery in this case.

5. *Evidence*—Evidence offered by appellant, that at the time of the amputation of the legs of appellee his uncle had stated that he had often warned appellee to quit playing on the railway tracks at the place where the accident happened, was incompetent.

6. *Motion for new trial—Filing additional grounds after overruling of motion*—After a motion and grounds for a new trial have been filed within three days after the verdict and the motion has been overruled, the court should not, at a subsequent day, even in the same term, set aside the order overruling the motion and allow additional grounds for a new trial to be filed unless the filing of such grounds was unavoidably prevented or the case falls within sub-section 7 of section 340 Civil Code

7. *Practice—View by jury of place of accident*—The court did not abuse its discretion in refusing to send the jury to view the place of the accident at one period of the trial, and in sending it there at another period.

O'Hara & Bryan for appellee.

Hallam & Myers and G. C. Lockhart for appellant.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

At the September term, 1890, of the Kenton Circuit Court, the appellee recovered a judgment based on a verdict of $15,000 for damages on account of personal injuries sustained by him, and caused, as is alleged, by the negligence of the appellant, the Kentucky Central Railway Co.

The appellee, on the 7th of August, 1889, at the instance of Wm. Spotts, who lived at Eighth and Washington streets, in the city of Covington, had gone to procure bread at the grocery of one Linn, located at the south-west corner of Ninth and Washington streets. Where Ninth street intersects Washington street there are three separate railway tracks laid on the last named street. One of the tracts belonged to the Cheapeake & Ohio road, and the two remaining tracks to the appellant, lying west of the Chesapeake & Ohio track. The appellant had a switch on its tracks, the south end of it being, as the proof shows, about one hundred feet from Ninth street.

At the time of the injury the appellee (a boy) was about thirteen years of age, and was temporarily residing with his uncle, Dr. Kearns, and after he had purchased the bread in order to reach his uncle's house, or that of Wm. Spotts, who had sent him on the errand, he had to cross Washington street.

The C. & O track was west of the tracks of the appellant, and after he had crossed the C. & O. track, while standing between that track and the tracks of the appellant, he was struck by the cars of the appellant, knocked down and both leges mashed to a pulp from his feet beyond each knee. Surgeons were at once sent for and both legs amputated above the knee.

It is shown by the testimony, and in no wise contradicted, that the place where the injury occurred in these two streets is in the central

Digitized by Google

part of the city, with regard to population, and was used and passed over by its citizens as much as any of the other streets. Both the appellee and the appellant had the right to the use of the street, with the duty on the part of the appellee to exercise such ordinary care and caution, as pertains to one of his age, to avoid coming in contact with the cars, and on the part of the railway company to use the highest degree of care in order to prevent injuring those who were using the street in passing either on foot or in vehicles. Such a high degree of care must necessarily attach to every railway company when operating its cars on the streets of a densely populated city, and where the travel otherwise than on the cars of the company is as constant as is usual on such streets.

The character of the highway and the travel upon it often determines the degree of care to be exercised by both the company and the party injured. A greater degree of care must be exercised by the company when running its cars on a public street than is required to be exerciesd at the ordinary crossings in the country, and where there are three railroad tracks on a principal street constantly used, as is shown in this case, extraordinary care must be shown on the part of the railroad company before it can be exempted from liability for injuring those who have the same right to use the streets that the company has. It it true the party injured may be guilty of such contributory neglect as to prevent a recovery, and his failure to exercise such care as an ordinarily prudent man would exercise under the circumstances may often be interposed as a defense.

Whether any such defense existed in this case will be first considered. The train of the appellant was made up of the engine and six cars. The train, or engine, was running backwards, and was pushing in advance of it two gondola cars and pulling four box cars. The train was going north, and the purpose was to make a running switch—that is, they were to place the four box cars on another track without stopping the engine or train. While the train was, in fact, going north, the head of the engine, or the front part, was south. There was on the train at the time of the accident five employes. The engineer and fireman were in the cab of the engine. O'Donnell, the foreman, was on the front part of the engine—that is, between the engine and the box cars that the engine was pulling, and was there for the purpose of separating the box cars from the engine when the signal was given; one of the brakemen was on top of the box cars and another brakeman setting the switch or preparing to do so. There was no one on either of the gondola cars that were being pushed north to give warning to those on the street or those crossing it of the train's approach, and no watchman stationed at the crossing for that purpose. We shall assume that the bell was ringing to give notice to the passengers of the train's approach. The employes on the train so state, and there is no reason for discrediting them.

When the time arrived for detaching the box cars the signal was given and the engine, as the testimony conduces to show, increasing its speed to get out of the way of the detached cars, and the boy being alarmed by the cry of someone as to his danger, stepped back near the track of the appellant, was struck by the car in front that was being pushed north and mangled as already stated. He had crossed the C. & O. track on his way with his bread, and while standing at or near the place of the injury a train passed south on the track he had the moment before crossed, so there was a train going south that he had managed to escape, and one backing north at the same time but on a different track that inflicted the injury, and it seems to us it

Digitized by Google

would be difficult for one more prudent and careful, by reason of his advanced years, to have heard the ringing of a bell with these trains under headway, or to have discovered that the engine fronting the south was really going north and pushing the gondolas before it. It is said that the little follow was picking up pebbles from the street and examining them, and perhaps he was, but that his life was in peril from the time he undertook to cross the track of these roads is manifest, and one of mature years would probably have met with the same fate, but whether so or not, if there had been a watchman at the crossing, or even a brakeman on the end of the gondola that was at least sixty feet from the engine, this accident would have been avoided.

It is true the employes, when they discovered the danger, used every effort within their power to avoid the injury, even to the sacrifice of their own lives, and it may be said that the company, by reason of its neglect in not having watchmen at these crossings, or in making running or flying switches in the streets of a densely populated city, is the cause of this injury, and not those who, perhaps, exercised all the caution they could exercise with the employes assigned to this train.

It is an improper use of the streets of a city to so use them by railroad tracks and trains as to prevent the use of the streets for ordinary business purposes, or to use the streets for the purpose of making wild switching that must necessarily endanger the lives of those who are compelled to cross or use them. The elementary books establish the doctrine that it is negligence *per se* on the part of a railroad company to use a running switch in a populous town or city. "The construction and use of a running switch on a highway in the midst of a populous town or village is of itself an act of gross negligence on the part of the company." Sherman & Redfield on Negligence, 3 Ed., sec. 446; Ky. Bridge Co. v. Kreiger, *ante*, 151.

In the case of the Illinois Central Railroad Company v. Rachael Adams, reported in 35 Ill., page 379, it was held that where a running or flying switch was used in a populous part of a city of ten or twelve thousand inhabitants, at a crossing or along an alley used by the public, and the cars thrown upon the side-track having a momentum of five miles an hour, from which an injury occurred, the company was guilty of a high degree of negligence, and the fact that signals of alarm were given from the engine employed in the switching, intended for those crossing the track, afforded no excuse. In this case the engine, with cars attached, caused the injury, and the decided weight of the testimony is that it resulted in the effort to avoid the detached cars and to make the switching successful. The momentum of the engine, as shown by the plaintiff's testimony, was, after it was detached, eight or ten miles an hour, and from that of the defendant five or six miles an hour, the witnesses for the latter stating that the speed slightly increased when the signal was given. Here there was the highest degree of neglect on the part of the company, and ordinary neglect on the part of the injured boy—the one scarcely in a condition to judge of his danger, and the other not even exercising ordinary care, when, from the facts, the highest degree of care was required. If railroad companies are permitted to use the streets of a town or city, others who have the right to use them can require that the utmost care shall be used to secure the safety of their persons. This degree of care is rendered necessary by reason of the danger to which persons are exposed who are compelled to use the streets in common with the railroad companies. This rule does not dispense with the duty on the part of

Digitized by Google

one crossing or using the street to use ordinary care and prudence for his own safety, and if he fail to do this, and is guilty of gross neglect, as well as the party injuring him, and but for which the accident would not have happened, he can not recover. (Ferguson v. Wisconsin Central Road, 63 Wis., 145.) We have been referred to no authority by counsel in which a recovery has been denied upon such a state of case as this, or in cases where the facts conduce to show such gross neglect on the part of the company. The neglect consists, 1st, in the company making flying switches in the street; 2d, in not having a brakeman or some other employe on the front gondola, and, lastly, in not having a watchman at a crossing, to use the language of a witness, used us much by the people in passing *as any other part of the city* with a population of thirty thousand.

It is contended by counsel for the appellee that the instructions form no part of the record. After the verdict a motion for a new trial was made within the three days, as provided by section 342 of the Code; that motion was heard and overruled by the court. The appellant moved to set aside the order overruling the motion, to enable it to file other grounds, and that motion prevailed over the objections of counsel for the appellee. Section 343 of the Code provides that the motion must be by written grounds filed at the time of making the motion, and section 342 provides that it must be done within three days after the verdict unless unavoidably prevented, making as an exception the cause mentioned in sub-section 7 of section 340. By an amendment, where there is *a special verdict* the grounds must be filed within three days after the judgment on the special finding. The object of requiring the motion to be made within the three days is to enable the court to render a judgment without delay, and when the facts and questions of law are fresh in the minds of court and counsel, and it is the evident meaning and purpose of the Code to close the doors to any other motion for a new trial upon any other grounds than the exceptions made, unless unavoidably prevented. Such, too, is a safe construction of this provision of the Code, for if motions are permitted to be renewed from day to day during the term, the time of the court would be consumed in hearing motions for new trials, for amendments would likely be allowed whenever the minds of counsel suggested some additional reason for another hearing. This court, in Houston v. Kidwell, reported in 83 Ky., 301, adjudged that additional grounds might be filed after the three days, but was careful to say that some additional grounds must be filed *before the motion for a new trial was disposed of*, and this construction was given with some doubt. It is true the court may, as a general rule, set aside orders made during the same term at which they were entered, and under this well recognized rule of practice may set aside the order refusing a new trial and grant one; but to permit counsel, after the motion has been overruled, to file other grounds is in violation of the spirit and meaning of the Code. Counsel realized, doubtless, that the instructions given by the court were more favorable to the appellant than the law authorized, as the employes were confined to the exercise of ordinary care, and required only to give warning of the train's approach by bell or whistle when needed, if shown to have been given would have exempted the company from responsibility. The court also, in effect, said to the jury that if the appellee was guilty of negligence he could not recover if, but for the negligence, the injury would not have been sustained, unless the appellant became aware of the danger, and by the exercise of ordinary care could have avoided the injury. This boy was only required to exercise that degree of care that an ordinarily prudent

Digitized by Google

child of his age would have exercised, and if he exposed himself to danger in such a manner as that the injury could not be avoided by the defendant by the exercise of the proper care to prevent it, no recovery should be had; but if the child was on the street or crossing, where it had the right to be, and was injured by reason of the gross neglect of the defendant, although guilty himself of ordinary neglect looking to one of his age, and is injured, a recovery must necessarily follow. So the instructions could not be complained of if in the record.

There were some objections made to the action of the court during the progress of the trial that will not be considered, as there was no abuse of discretion, and no harm resulting from such action. The appellant offered to prove by a witness that, at the time the legs of the appellee were amputated, Dr. Kearns, the uncle of the plaintiff, said: "He had often warned plaintiff to quit playing on the railway tracks at the place where the accident happened." This offer was refused for two reasons: Dr. Kearns could himself have testified, and besides it was incompetent. The boy was then under the influence of morphine, and, if not, it was incompetent, as it could not have affected the result, and in no wise lessened the care to be exercised by the appellant, or increased that to be exercised by the appellee.

A witness was asked on cross-examination, by defendant's counsel, if he did not then have a controversy with the defendant, or was hostile to it, and when re-examined by the plaintiff's counsel was asked if he had not received a judgment for $12,500. The question was objected to, and the court refused to allow the witness to answer, and thereupon counsel for the defense moved to set aside the swearing of the jury, and the motion was overruled. The court, it seems to us, fully protected the rights of the defense in requiring the witness not to answer.

There was an objection and an exception taken to the action of the court in refusing to send the jury to view the premises at a particular time during the trial and before the testimony closed. The court refused to do this, but at the close of the testimony sent the jury to view the premises. The place of the injury had been fully described by the witnesses. No misconduct is alleged to have taken place on the part of the jury. Facts constituting the neglect have been clearly established, and we perceive no reason for reversing the cause on that ground. Some affidavits were filed showing the importance of other testimony discovered after the trial had closed, and it appearing that three witnesses had been previously summoned, except one who was an employe of the company, the court refused to open the case. There was no error in this regard.

The judgment is affirmed.

MUNDY'S LANDING & HARRODSBURG TURNPIKE COMPANY V. HARDIN, &C.

(*Filed Nov.* 1, 1892—*Not to be reported.*)

Granting of relief not prayed for—Injunction—Where an abutting land-owner in his action made no prayer for general relief, but only asked that the defendant turnpike company might be enjoined from opening an old culvert that had been closed for many years, it was error for the lower court, after granting such injunction, to order the defendant to dig a ditch along its road in order that water might escape through another culvert.

Digitized by Google

P. B. Thompson, sr., for appellant.

Gaither & Vanarsdall and O. S. Poston for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

The purpose of this action was to enjoin the appellant from opening a culvert that had been closed for over fifteen years, the plaintiff alleging that the overflow of water on his premises would greatly injure them. We think the facts authorize the relief sought, but the court seems to have gone beyond the prayer and required the appellant to dig a ditch along its road in order that the water might escape through another culvert Such relief as this was not asked for in the petition; all that the appellee wanted was to prevent the opening of the old culvert. No general relief was prayed for, and the court ought not to have gone to the extent of requiring the ditch to be dug when it does not appear that the necessity for making the ditch originated from the attempt to open the sewer.

Judgment reversed, with directions to strike out so much of the judgment as does more than prevent the appellant from opening the culvert.

THE KENTUCKY MUTUAL SECURITY FUND COMPANY, &C. V. TURNER, &C.

(*Filed Nov.* 1, 1892.)

Mutual insurance fund—Distribution of security fund—The Kentucky Mutual Security Fund Company, by its charter and by-laws, provides three funds for the benefit of its policy-holders, to-wit, a mortuary fund, a security fund and an expense fund. The charter provides that if the company shall, after a certain time, fail to pay the maximum indemnity due by the terms of its policy, then the trustees shall at once convert the security fund into money, and "distribute the same * * * among the holders of certificates then in force, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force." In an action to distribute such security fund, *Held*—That said fund must be prorated among the living holders of certificates and the representatives of those that are dead, in proportion to the amount of their respective certificates.

Marc. Mundy for appellant.

W. O. Harris, J. P. Hobson, E. S. Watts, L. N. Dembitz, F. W. Morancy, Simrall & Bodley, Wilkins & DuBose and W. T. Cox for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The representatives of —— Turner and Logan's representatives having obtained judgments on life policies issued to said deceased, by the appellant, the Kentucky Mutual Fund Company, and the same not having been paid in full by said company, the said appellees, as their beneficiaries, instituted this action to subject a fund, known as the security fund, belonging to the said appellant to the payment of said claims. The provisions of the appellant's charter and by-

Digitized by Google

laws provide for funds for the benefit of its policy-holders as follows: A mortuary fund, a security fund, and an expense fund. The mortuary fund is intended to pay the policies of such deceased members as may be entitled to the same. That fund is created by certain assessments for the payment of the policies of the deceased members, but the power to assess for such purpose is limited to a certain number of assessments upon the surviving members of the class to which the deceased belonged; and if such assessments were not sufficient to pay the same in full, it could not be paid out of any other fund. The security fund was intended to be created by separate contributions from the members upon joining the appellant and other sources.

The provision germain to the question at issue is as follows: Said company further agrees that if, at any time after said fund shall have amounted to $250,000, or after five years after February 4, 1884, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity by the terms of the certificate issued, and such certificate shall be presented for payment to said trustees by the legal holders thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it, within the time herein stipulated for the limitation of action, then it shall be the duty of said trustees to at once convert said security fund into money and distribute the same, less the reasonable charges for the management and control of the said funds, among the holders of certificates then in force, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force.

The evidence of such indebtedness, its correctness, demand and refusal to pay, shall be "a copy of a final judgment obtained thereon, and the refusal to pay the same." Final judgment was obtained on the policies mentioned and presented to the appellant for payment and refused. Thereupon, the five years having elapsed, this action was instituted against the appellants, The Kentucky Mutual Fund Company and the Fidelity Safety Vault Company, the latter being trustee of said fund, to subject it to the payment of said policies. All of the policy-holders were made parties. The contention on behalf of the representatives of the policies whose principals are dead is that their policies should be first satisfied out of the security fund, because the living members of said company constituted a partnership for the benefit of the representatives of those members that were dead, and, as the representatives of the dead members, were creditors of the firm, they were, upon the well known principles of partnership, entitled to priority out of the partnership fund, and the members were not entitled to any of it until their claims were satisfied in full. On the other hand, the company and the living members contend that said fund is exclusively for the benefit of the living members in good standing; but it seems to us that either contention does violence to the language quoted, for it is plainly expressed that upon the failure of the company "to pay the maximum" indemnity due on the policies of the dead members, said fund shall be prorated among the living members, and the representatives of such as are dead, in proportion to the amount of their respective certificates. This language places all upon equal terms in the distribution of said funds in proportion to their respective certificates. None are entitled to a preference over the other, and said provision is not modified by any other provision of appellant's charter or by-laws.

The judgment is affirmed.

Digitized by Google

WATTS V. WILSON, &C.

(*Filed Nov.* 17, 1892.)

1. *A guadian appointed by the court of another State, in which his infant ward resides*, has no authority to maintain an action for the sale of the ward's land which is located in this State, unless he has been authorized to act as guardian in this State under section 16, article 2, of the General Statutes. Subsection 4, of section 35, Civil Code, does not repeal this provision of the General Statutes, nor is it in conflict with it.

2. *Same—Judicial sales*—Where non-resident joint owners of indivisible land located in this State bring an action for a sale for division, and one of them is an infant, who sues by a guardian appointed by the court of another State, but who is not authorized to act as such by any court of this State, and a sale thereof is ordered, the purchaser's exceptions to the report of sale should be sustained, because the action by such guardian did not transfer the title of the infant to such laud.

Miller & Owsley for appellant.

J. W. Alcorn for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Holt.

The widow and heirs of W. B. Wilson, who died a resident of Kansas, brought this action under the 490th section of the Civil Code, to obtain a sale of a lot in Lincoln county, upon the ground that the share of each owner was worth less than $100. This fact being shown, a judgment was rendered under which the property was sold and purchased by the appellant, T. C. Watts.

Exceptions were filed by him to the report of the sale, and he appeals from the order of confirmation. One of the heirs is an infant, residing in Kansas. He is a petitioner by his guardian, who was appointed by a Kansas court. This appointment gave him no power, however, to act as guardian in this State.

Section 16, article 2, chapter 48 of the General Statutes provides: "Upon application by petition in a summary way the county court of the county having jurisdiction to appoint a guardian may authorize such foreign guardian to sue for, recover, and so remove (to the minor's residence) any personal estate of such minor, or otherwise to act as a guardian appointed in this Commonwealth."

So far as appears no application was ever made by this foreign guardian to any county court of this State to act as guardian in this State. The power has never been obtained.

It is true sub-section 4, section 35 of our Civil Code says: "The action of an infant, or of a person of unsound mind, who resides in a foreign country, and who has a guardian, curator or committee residing therein, may be brought by such guardian, curator or committee, or by his 'next friend,'" but this provision is not to be regarded as repealing the statute, and the two are to be considered together, and as providing that the foreign guardian, when authorized as provided by the statute, may act for the infant by way of suing for him or otherwise, as if he had been appointed in this State. They are not repugnant, but harmonious and consistent. They constitute but one law.

This view is sustained by section 37 of the Civil Code, which provides: "No person shall sue as next friend unless he reside in this State, and be free from disability."

Digitized by Google

The power of a guardian is territorial; it is confined to the State in which he is appointed; he has no power over property in another State or country controlled by different laws. This rule applies to all fiduciaries as executors, &c. It can not well be supposed that our law-makers intended to permit a foreign guardian to procure a sale of the ward's real estate situated here; get possession of the proceeds, and exercise all the powers of a guardian appointed here, in the absence of all authority from our own courts. It results that the judgment must be reversed, and cause remanded with directions to vacate the sale, cancel the appellant's sale-bond, and for all further proper proceedings.

All of which is ordered.

NEWPORT LIGHT CO. V. CITY OF NEWPORT.

(*Filed Nov.* 3, 1892—*Not to be reported.*)

1. *Taxation of corporations—Public service*—A gas company which has acquired the right, by contract, to supply a city and its inhabitants with gas for compensation, does not render such public service, by complying with its contract, as will exempt its real and personal property, located within the city, from the municipal taxation that is imposed upon the property of all other corporations and of all natural persons of such city.

2. *Same—Exemption from ad valorem taxation by payment of a license tax*—A provision in a municipal charter, that merchants and others paying a license or specific tax on their business, shall be exempt from an *ad valorem* tax thereon; and the imposition, by the council of the town, of a license or specific tax on the business of a gas company, which business is the manufacture of gas and the furnishing of it to consumers, do not entitle such gas company to an exemption from *ad valorem* taxation of its real and personal property used by it in conducting such business.

Nelson & Desha for appellant.

Crawford & Irwin for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Lewis.

By the judgment appealed from appellant was made liable for and directed to pay to appellee municipal taxes for the years 1885-6 and 7, and for one-half the year 1884, that it had hitherto refused to pay. No brief is filed for appellant, but we will consider the two grounds of defense set up in the answer.

1. Appellant is a corporation, having acquired, by contract with appellee, the right to furnish to that city and the inhabitants thereof lights by gas, and to carry out its contract has necessarily to own and use both real and personal property; but compliance with that contract is in not rendering such public service as will exempt appellant's property from the same taxation imposed upon property of other corporations and natural persons in Newport, for it charges and receives compensation for all gas furnished by it.

2. The charter of the city of Newport, it seems, contains a provision that merchants, and others paying a license or specfic tax on their business, shall be exempt from an *ad valorem* tax thereon, and it may be that power is thereby conferred on the general council to impose a license or specific tax on the business of appellant, which

Digitized by Google

is to manufacture and furnish gas to its customers. And it is alleged in the answer, and not denied, that the general council has, in fact, during the years mentioned, imposed upon and collected from appellant such license or specific tax, the precise amount of which is not, however, stated, but it does not seem to us that it was intended by the charter to exempt from *ad valorem* taxation the property of appellant used in the manufacture and distribution of its commodity or stock in trade, which is gas, for the business of manufacturing and selling gas is entirely distinct from the property owned and used for the purpose.

In our opinion the judgment of the lower court was proper, and is affirmed with damages.

CLARK V. RENAKER.

(*Filed Nov.* 17, 1892—*Not to be reported.*)

A parol agreement by a purchaser of land at a judicial sale to extend the time for its redemption by the defendant beyond the statutory period of one year, may be a valid and binding contract; but such agreement will not be specifically enforced unless clearly and satisfactorily proven.

In this case the evidence fails to show clearly, or at all, that the purchaser agreed with the owner to extend the period of redemption and the chancellor properly refused to enforce the alleged parol agreement to that effect.

C. C. Cram and M. D. Gray for appellant.

A. G. DeJarnette for appellee.

Appeal from Grant Court of Common Pleas.

Opinion of the court by Judge Lewis.

In pursuance of a judgment in favor of appellee, Renaker, 288 acres of land owned by appellant, James Clark, was in August, 1886, sold and purchased by the former at $4,000, which satisfied the mortgage debt and costs of suit, but the price being less than two-thirds of appraised value of the land appellant had one year within which to redeem it. He, however, did not do so, and consequently a deed was, by order of court, made to appellant, who got possession of the land about February 1, 1888, and has since held and used it as his own, except the dwelling-house, yard, garden and orchard of the home place, which he on that day leased to appellant for one year at the price of $5 per month.

This action was instituted January 26, 1889, by appellant, James Clark, his two sons, William and George A. Clark, uniting as plaintiffs, to recover all the land except 111 acres sold by appellee in February, 1888, and to that end they ask judgment cancelling the commissioner's deed made to appellee, and that they be allowed to redeem the same by paying back to him the amount of his bid and interest, less the sum for which the 111 acres sold.

It is not alleged appellee agreed, in writing, to extend the time for redemption beyond the statutory period of one year from August, 1886, the date of sale, nor, as often held by this court, is it necessary such agreement should be in writing in order to be valid and binding. The question for us to decide, therefore, is one of fact—

Digitized by Google

that is, whether appellee did agree with appellant, James Clark, or with any one acting for him and by his authority, to prolong the time for redeeming the land.

A great deal of testimony was taken upon that issue, some of which is contradictory; but it does not appear to us satisfactorily shown that appellee ever did make the alleged agreement either before or after August, 1887. It does appear that he did, on several occasions prior to that time, say he would rather have his money than the land, but no statement amounting to an agreement to extend the time is proved to have been made by him; nor has any speech or act of his been proved from which it could have been fairly or reasonably inferred he would permit appellant, or any one for him, to redeem the land after expiration of one year from date of sale in August, 1886. On the contrary, the conduct of both parties tend very strongly to show they considered the right to redeem at an end when the time given by law expired. In the fall of 1887 permission was given by appellant to appellee to sow rye on a part of the land, and they then entered into a written contract by which the dwelling-house, yard, garden and orchard of the home place was, as before stated, leased for one year from February 1, 1888, and no longer; and in that contract was an agreement by appellant to pay for grazing of stock on the land, to abstain from cutting any green timber, and to generally do all those things a tenant usually binds himself to perform; and in February, 1888, one hundred and eleven acres of the land was sold by, and the price thereof paid by the purchaser to appellee, without consent of or consultation with appellant. On the other hand, appellant made no effort to raise the money with which to redeem the land; nor, according to his testimony, did he expect to do so; his version of the alleged agreement being that he was to be at no expense or trouble, but appellee would control and manage the land until the proceeds therefrom amounted to enough to discharge the debt, and then reconvey it to him. One of appellant's sons testifies that in the fall of 1888 he offered to redeem the land but appellee refused to receive it. That son does not state that he had any other means of discharging the debt except by borrowing the money and securing payment by mortgage on the land. But as that scheme, if ever feasible, might just as well have been carried out before expiration of the time for redemption allowed by law as afterward, we do not see how the alleged agreement of appellee misled or prejudiced appellant.

While a right of redemption may be founded on a parol agreement, it seems to us it should never be enforced unless clearly and satisfactorily proved. It has not, in our opinion, been so proved in this case, and consequently the finding of the chancellor was proper.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY V. MORRIS, ADM'X.

1. *Appeals—Questions raised by grounds for new trial*—The question of the correctness of an instruction concerning compensatory damages may be considered on appeal where one of the grounds for a new trial, filed in the trial court, is for error of the court in its instruction as to what constitutes compensatory damages, although another ground, filed at the same time, enumerates certain instructions as erroneous and does not mention the one relating to compensatory damages.

Digitized by Google

2. *Railroads—Negligence in streets of city—Instructions*—Where all the evidence shows that the place at the intersection of two streets of a city, where the defendant railway company ran over and killed plaintiff's intestate, was a thoroughfare of the city, frequented at the hour of the accident by many people, it was not error for the court to assume in the instructions that such place, where the accident occurred, was "more or less thronged with people."

3. *Same*—Those in charge of a railroad train must exercise extraordinary care and prudence in the operation of the train in a much-frequented intersection of two streets of a city so as to avoid injury to those lawfully using such streets.

An instruction requiring the railroad at such place to "exercise ordinary care and caution and give timely warning by bell or whistle and signal light, or other reasonable notice of the approach of the locomotive and tender," is not prejudicial to the rights of the railroad, since it requires only ordinary care on its part. Even if the instruction requires warning to be given by bell or whistle *and* signal light this is not greater care than is required by the above rule.

4. *Same—Instructions—Damages*—An instruction defining compensatory damages as a fair equivalent to the estate of the deceased in money for the power of the deceased to earn money lost by his death, not exceeding the sum claimed in the petition, was not prejudicial to appellant. The living expenses of the decedent need not be deducted from his earning capacity in order to arrive at the true compensatory damages.

(*Filed Nov.* 19, 1892—*Not to be reported.*)

James C. Wright and George Washington for appellant.

Root & Root for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Holt.

On the night of May 15, 1888, Samuel J. Morris, when crossing a street at its intersection with another street in the city of Newport, was struck by a tender attached to a locomotive of the appellant, which was backing along the street, and so badly injured that he died in a few hours.

His administratrix brought this action for damages for the killing, alleging that it resulted from the gross and willful neglect of appellant's agents in charge of the locomotive.

As the deceased left no wife or child the lower court, upon the idea that the case was controlled by the 3d section of chapter 57 of the General Statutes, which authorizes the recovery of punitive damages for loss of life through willful neglect if the decedent leaves a wife or child, dismissed the action upon demurrer. This court upon appeal held, however, that the petition was sufficient under section 1 of that statute, which authorizes an action where the killing results from negligence, whether ordinary or gross, if the person killed be not then in the employment of the railroad company.

Upon the return of the case a trial resulted in a verdict of $5,000, and the railroad company now appeals.

Counsel do not claim that a reversal should be had upon the ground that the verdict is flagrantly against the evidence.

It is shown that the killing occurred at the intersection of two thoroughfares in a large city, and at an hour when it was reasonably to be expected many persons would be passing along. This appears from the number of houses where the accident occurred, and the number of persons who were near at the time.

Digitized by Google

The testimony is conflicting whether there was any light upon the front of the tender as it was being backed, and whether any bell was being rung or whistle blown. Some witnesses say that it was moving very slowly, while others testify that its speed was from fifteen to twenty-five miles an hour. In short, the evidence is of such character that, in the absence of material legal error, the judgment must be sustained.

Complaint is especially made as to instructions one, six and eight. The latter defines compensatory damages, to which any recovery under the first section of the statute is limited. It is said no inquiry can be made as to it in this court, inasmuch as one of the grounds for a new trial enumerates certain instructions as objectionable but omits this one. One of the grounds, however, is that the court erred in its instructions; and another, that it erred in its instruction as to what constitutes compensatory damages. This instruction is plainly, therefore, in question.

It is urged that the first instruction is erroneous in assuming that the place where the accident occurred was "more or less thronged with people;" and in telling the jury that it was the duty of those in charge of the locomotive and tender "to exercise ordinary care and caution, and give timely warning by bell or whistle and signal light at the time and place in the proof described, or other reasonable notice of the approach of the locomotive and tender." It is an indisputable fact, from the evidence, that the place where the accident occurred was one which was "more or less thronged with people." The evidence shows that it was a public street in a large city; that it was at the crossing of two streets; that many persons lived in that immediate locality, the houses being numerous there, and that, at the hour when the accident occurred, it was a place frequented by the public. There is no evidence counter to all this, and the instruction is not, therefore, objectionable on account of the way in which it characterizes the place of the accident.

The degree of care required by it falls short of that laid down by this court in the recent case of the Ky. Central Railway v. Smith, *ante* 455, where it is held that those in charge of a train being operated at such a place must exercise extraordinary care. It is said that the instruction required the company, as a matter of law, to give two kinds of signal, and that if this were not done negligence was *per se* fastened upon it, although one character of signal might have given ample notice of the movement of the locomotive. To require, however, that a train moving through a large city in the night, and at an hour when people may be expected to be passing in all directions, should both ring its bell or blow the whistle, and also indicate its movement and approach by a proper light in the proper place, is but indicating that degree of care that this court has required, and which public safety and policy requires, should be exercised. Anything short of it would not be an exercise of extraordinary care. Moreover, the instruction told the jury that it was required of those in charge to give "timely warning, by bell or whistle and signal light, at the time and place in the proof described, or other reasonable notice of the approach of the locomotive and tender."

It was proper to define willful negligence to the jury inasmuch as they had been told there could be no recovery if it was a case of that character, as the action was not one within the third section of the statute; and in any event this could not have been prejudicial to the appellant. The jury were told that the measure of damages was a fair equivalent to the estate of the deceased in money for the power

Digitized by Google

of the deceased to earn money lost by his death, not exceeding the sum claimed in the petition. It is said this authorized them to find more than compensatory damages; in other words, that such damages are limited to what the party entitled to them has been injured by the death, and that this means what the decedent would have accumulated, or would have been left after deducting his living expenses. A court could not well enter into such an inquiry. It would at least involve an investigation of the condition in life of the decedent, and it seems to us embark the court upon a sea of speculation almost without limit.

The instruction conforms to the rule laid down by this court in the L., C. & L. R. R. Co. v. Case's administrator, 9 Bush, 736, and numerous other cases, and the judgment below is affirmed.

KENTUCKY SUPERIOR COURT.

CINCINNATI COOPERAGE CO V. BATE.

(*Filed June* 1, 1892.)

1. *A corporation has no power to change its name except in the mode prescribed by law*; and if, without having complied with the requirements of the law, the stockholders assume a new corporate name, they surrender the rights and franchises of the old company and stand in the same attitude as if, without authority, they had begun business in the new name.

A corporation, organized under the laws of Indiana, can not change its name except by an order of a circuit court of that State, made after publication of notice as required by the statute.

2. *Where a company acts as a corporation without having been legally incorporated* the members are individually liable for all the debts of the company. The creditors of the concern are not estoped to deny its corporate existence for the purpose of holding the members individually liable.

Fairleigh & Straus for appellant.

James S. Pirtle for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Presiding Judge Yost.

The appellant brought this suit against the appellee, E. R. Bate, on a bill of exchange, drawn by it on, and accepted by, the Gebhard & Bate Brewing Company, alleging that the appellee and one J. Gebhard were partners doing business under the firm name of the Gebhard & Bate Brewing Company.

The answer denied the partnership. The law and facts were submitted to the court, and this appeal is prosecuted by the plaintiff from the judgment dismissing its petition.

Digitized by Google

The questions involved are: Was the Gebhard & Bate Brewing Company a legally organized corporation under the laws of the State of Indiana, where the business of the concern was conducted, and, if not, are the incorporators and stockholders personally liable for its debts?

Accepting as true the court's conclusions of the facts, we find that the New Albany Brewing Company was a corporation duly created and organized under the laws of Indiana for the purpose of manufacturing and vending beer. Afterwards, Bate, Gebhard and another acquired the entire stock of this corporation and became its directors. These men then, without taking any of the steps required by law, changed the corporate name to the Gebhard & Bate Brewing Company, and thereafter the business was conducted in that name, and when the bill sued on was drawn and accepted Bate was a stockholder and director of the latter company.

Appellee's counsel contends, first, that the changing of name was not a material change, and in so doing it was not necessary to follow the requirements of the law in order to relieve the stockholders of individual liability for its debts on account of their failure to do so; second, that the appellant, having dealt with the Gebhard & Bate Brewing Company as a corporation, is now estopped to dispute its organization or legal existence, and, third, that this question can not be raised in a collateral proceeding.

Was the statute followed in changing the name, and, if not, was the change a material one?

In sections 1000 and 1002 of the Revised Statutes of Indiana it is provided that, in the event the stockholders of a corporation shall desire to change its name, the circuit courts of the several counties of the State may so order on application by petition. Before the court is authorized to make the change, however, it is further provided that, upon the petition being filed, the applicant shall give notice thereof by three weekly publications in some newspaper of general circulation, printed and published in the county thirty days prior to the first day of the term at which such petition shall be heard. Proof of the publication must be made to the court by filing a copy of the published notice verified by the affidavit of a disinterested person.

As we have shown, Gebhard and Bate assumed the name of the Gebhard & Bate Brewing Company without applying to a court or publishing the notice as required by the statute, and, except as above provided, no change of a corporate name can be effected by a company doing business in the State of Indiana.

The name of a corporation is its very being. It exists and is known, sues and is sued, contracts and is contracted with by its name only.

Both our statutes and those of Indiana provide the manner in which any number of persons my associate themselves together and become incorporated for the purpose of the transaction of any business. In both States the law is, that before commencing any business other than their own organization they shall make, sign and acknowledge their articles of incorporation, which shall contain first the corporate name adopted and then the objects of the formation of the company. These articles must then be recorded in the office of the county clerk of the county where the corporation is situate and also in the office of the secretary of state.

A corporation can no more act without a name than it can transact business without having given the notice of its objects by the records referred to. That it can not change its objects or transact business

Digitized by Google

not therein embraced, without changing its articles of incorporation and recording the change, has been often held. That it can not change its name without going through the formula prescribed by the law is equally clear.

When a general law provides that persons may become a body-politic and corporate upon complying with its provisions, which lay down strict rules for the adoption of a corporate name, and the manner in which, and in which only, that name can be changed, the performance of these acts is a necessary prerequisite to the very existence of the corporation.

When Gebhard and Bate, without color of authority or form of law, abandoned purposely the name of the old corporation and assumed the name of the new they surrendered the rights and franchises of the old company, and stood in the same attitude as if, without authority, they had begun business in the latter name.

A corporation has no right or power of itself to change or alter the name originally selected by it without recourse to such formal proceedings as are prescribed by law. (Beach on Private Corporations, section 375, and cases there cited.)

Authorities relied on by counsel, to show that the identity of a corporation is not affected by a change of name, apply to instances where the change was a misnomer merely or had been made by due process of law. Misnomers are, in these cases, held immaterial because the real corporation was intended.

In Girard v. Philadelphia, 7 Wallace, 1, the change was made by an act of the Legislature, and the court held that that did not defeat the trust. It has never, so far as we can find, been held that the stockholders of a corporation can voluntarily abandon its name and assume another without the requisite notice to the world.

Assuming that the Gebhard & Bate Brewing Company had no corporate existence under the laws of Indiana, is the appellant estopped to raise that question, and can he raise it in this collateral proceeding?

A corporation created by a statute which requires certain acts to be done before it can be considered in being must show such acts to have been done before it can establish its existence. The mere acting as a corporation for any length of time is not sufficient, and if a corporation is illegally formed the stockholders are not relieved from individual liability by the good faith of the corporators or the actual transaction of business by the corporation.

While it has been held that a person doing business with a corporation is estopped from questioning its corporate capacity, the better rule, it seems to us, is that a corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation and proceed against the supposed stockholders as partners by proving that the prescribed method of becoming incorporated was not complied with by the company in question. The fact that he contracted with them under a corporate name is immaterial, as at common law partners may carry on business under any name they choose. This is the rule as given by Cook, in his work on Stocks and Stockholders, section 233, and has been followed by the courts of Illinois, Biglow v. Gregory, 73 Ill., 197; New Hampshire, Union Insurance Company v. Crain, 43 N. H., 641; California, Munkelumna Mining Company v. Woodbury, 14 Cal., 425; New York, Fuller v. Rowe, 57 N. Y., 26; Indiana, Coleman v. Coleman, 78 Ind, 344, and Kentucky, Robinson & Co. v. Harris, &c., 5 Ky. Law Rep., 978, and cases there cited.

In Coleman v. Coleman, 78 Ind., 344, the court says: "Waiving all

Digitized by Google

consideration of the doctrine of estoppel contended for, and conceding that there was no corporate body for which the appellees were authorized to act, * * * still, if the company was not a corporate body then it was a partnership composed not merely of the directors, but of all the subscribers to the articles of incorporation."

The Kentucky case, Robinson & Co. v. Harris, &c., 5 KY. LAW REP., 978, seems to have been overlooked by counsel. It bears directly upon the questions at issue here. The 56th chapter of the General Statutes provides that, before persons desiring to form a corporation shall begin business they shall have published, for at least four weeks in a newspaper of the county, a notice specifying the name of the corporators and corporation, the nature of its business, etc., etc.

Harris and others attempted to incorporate themselves for the purpose of engaging in the retail mercantile business. Robinson & Co. dealt with them in their corporate capacity, giving the credit and billing and charging the goods sold to the corporation. The action was, in fact, first instituted against the corporation, but an amended petition was filed making all of the stockholders parties, in which, after pointing out certain defects in the organization of the company, mainly, that no notice had ever been published, as required, a personal judgment was sought against the members.

The answer alleged that the plaintiff had dealt with the corporation and given credit to it, and was, thereby, estopped to deny its corporate existence. In that case, as in this, it was contended that, under the 17th section of the 56th chapter, which provides that no franchise of a corporation shall be declared null or forfeited except in a regular proceeding brought for the purpose, the legality of the corporation could not be questioned collaterally. The court said: "It being admitted that appellants sold the goods to the association as a corporation, with notice of the articles of association and organization of its members, and gave credit to appellees as such corporation and not to them individually, the question is whether the failure to publish the notice required by section 5 is sufficient to make them personally liable to appellants. The corporate existence of associations provided for in chapter 56th, General Statutes, depends upon and begins only after the terms and conditions of the law have been substantially complied with. The notice required by section 5 never having been published, the association had no right to commence business as a corporation, nor, in fact, did it then exist as a corporation; and the members of the association having participated in the profits and gotten the benefits of the goods sold to the association, must be held as not exempt but liable as individuals therefor."

A strict measure of compliance with all material statutory requirements in the formation and conduct of the business of a corporation should be exacted when its individual members seek to avoid personal liability for its debts. Beach on Private Corporations, section 162, says that exemptions from personal liability being one of the chief characteristics of corporations, distinguishing them from partnerships, it follows that where there has been no legal incorporation the members are individually liable as partners for all the debts of the organization.

The rule that the regularity of an incorporation is not to be questioned collaterally in suits between private parties does not apply where persons assuming to act as a corporation under authority of a

Digitized by Google

general law, failed to comply with its requirements in any material point.

The Gebhard & Bates Brewing Company had no right to do business as a corporation until the members had complied with the law. Until they did so no corporation existed. The stockholders were merely doing business as partners, and, as such, are individually liable for the debts.

The judgment is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Presiding Judge Yost delivered the following response to a petition for a rehearing:

The opinion in this case is not in conflict with the law as laid down in Walters, &c. v. Riley, &c., 85 Ky., 415. Under the provisions of the 56th chapter of the General Statutes corporators, before commencing any business except that of their own organization, must adopt articles of incorporation, which shall be signed and acknowledged and recorded in a book kept for that purpose in the office of the clerk of the county court of the county where the principal place of business is to be. A notice shall *then* be published for at least four weeks in some newspaper, giving the name, objects, etc., of the corporation. The corporation may at once begin business as soon as the articles are filed for record as above required.

In Walters' case, the articles had been filed for record, and the court held that the provisions of the statutes recognize indisputably the existence of the corporation from the time of the filing of the articles. Here we held, and now emphasize the holding, that the Gebhard & Bate Brewing Company never had an existence, nor did the members take a single step required by the law for such a purpose.

The statutes of Indiana authorize the circuit courts of the several counties of the State to order the change of the name of a corporation only on the filing of a petition, notice of which shall have already been given by publication in newspapers of the State. Though the publication does not follow the change as named in statutes it does the organization, but is an absolute condition precedent to the jurisdiction of the court. Bate assumed the name of the Gebhard & Bate Brewing Company without any articles of incorporation. If it was a mere change of name, as he now contends, no notice was ever given. No court was ever asked nor was it ever ordered that such change should be made. Under this state of facts, the stockholders were merely doing business as partners, and, as such, are undoubtedly liable for the debts.

The petition for a rehearing is overruled.

I have examined the petition for a rehearing.

J. BARBOUR.

MEYERFIELD, BLOOM & CO. V. ROBERTS.

(*Filed Dec.* 14, 1892.)

1. *Mortgage—Provision for sale by mortgagee*—The stipulation in a mortgage of personal property that upon default in payment of any one of the installments of the mortgage debt "the grantees may enter and take possession without demand or notice, and may sell the same at public or private sale, and apply the same to the payment of their debt," is valid, and the

Digitized by Google

mortgagee having, upon default in payment, taken possession and sold the property under such a provision, is not liable to an action for trespass.

2. *Appeals—Amount in controversy*—Upon appeal by a defendant whose counter-claim has been dismissed, the amount in controversy is the sum of his counter-claim, and the amount of plaintiff's claim for which judgment has been rendered against him.

Walter T. Ritchie for appellants.

Tisdale & Gray for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Presiding Judge Yost.

Is a contract, by the terms of which the mortgagor agrees that on default of payment the mortgagee may enter, take possession of the property mortgaged, sell it and apply the proceeds to the payment of the debt, enforcible between the parties?

On the 29th of September, 1890, the appellants, Meyerfield, Bloom & Co., sold to the appellee, Roberts, a lot of furniture and other household goods for the consideration of $111, payable in monthly installments. In order the better to secure them in their payments Roberts thereupon executed and delivered to them a mortgage on the property, which contained the following stipulations: "Provided further, That upon default in payment of any one of said installments as aforesaid, * * * then the grantees may enter and take possession of said personal property without demand or notice, and may sell the same at public or private sale and apply the same to the payment of their said debt, or may proceed to foreclose this mortgage by decree of court."

Roberts failed to make the payments and the appellants entered his house, took from it all of the property embraced in the mortgage, sold it and credited Roberts by the proceeds, who thereupon brought this suit against them for damages for the alleged unlawful taking of the goods, charging that they, without his knowledge or consent, broke into his dwelling and without right carried away his property.

In their answer the appellants denied that they broke into Roberts' dwelling, or forcibly entered it, and after setting up in detail the conditions of the mortgage and Roberts' failure to meet or make the payments, or any of them, they alleged that, under the terms of the contract, they entered in a quiet and peaceable manner, without force and without breaking, and took possession of the mortgaged property, and no other, for the purpose of selling it as provided in the contract and for no other purpose, which they afterward did, crediting Roberts by the proceeds. They further pleaded a counter-claim against Roberts for $85, the alleged balance due upon their debt. To this answer a demurrer was sustained, and upon the appellants' refusal to plead further a jury, empanelled to assess the damages, found a verdict against them for $70, and they now prosecute this appeal from the judgment rendered thereon. This court has jurisdiction of the appeal as the amount involved is the sum of the appellants' counter-claim dismissed and the judgment against them.

Did the answer set up a good defense to the action? In Huburn v. Koebler, 42 Wis., 319; Warner v. Berryman, 28 Kan., 60; Roy v. Goings, 69 Ia., 361; Hugens v. Fryer, 1 Lous., 276, it was held that a clause in a chattel mortgage, providing that if the mortgagee

Digitized by Google

should at any time deem himself insecure he might take possession and sell the property, gave to him an absolute discretion so to do.

We see no reason why a clause in such a mortgage, providing that the mortgagee shall, on default, enter, take possession and sell the mortgaged property, is not equally enforcible between the parties. At common law, where the mortgagor of personal property makes default in the payment of the debt at maturity, the mortgagee has the right to take immediate possession of the property.

Has this common law right been abridged by any statutory provision in this State? We think not. In Swigert and Shreve v. Thomas, 7 Dana, 226, the court held that on a mortgage of personal property, after conditions broken, the mortgagee may take possession of the property, if he can peaceably get it, as authorized by the common law, "which right," said the court, "has never been repealed by any statute."

In Brown v. Phillips, 3 Bush, 657, Phillips mortgaged a mare to Brown, who, before the maturity of the debt, peaceably, but without Phillips' consent, took possession of her. The court, after citing and approving the case cited *supra*, say that as Brown took from Phillips the possession of the mare *before forfeiture of conditions*, the latter had a technical right of action therefor, not that the common law right of possession of the mortgagee in the mortgaged property after forfeiture of conditions remains now unmodified by statutory provisions.

By the terms of the contract in Barney & Smith Manufacturing Co. v. Hart, receiver, 8 KY. LAW REP., 223, it was agreed that in a failure of Berthand, the purchaser, to pay the deferred installments the company should have the right to resume possession of the property and sell it for the payment of the debt. The Court of Appeals holding that this contract, unrecorded as it was, was not enforcible against Hart, an intervening creditor says, that "it was a lien for the purchase price or a part of the purchase money that could be enforced between the parties, but did not affect the right of creditors unless recorded or lodged for record as provided by the statute. All the appellants could have done under the contract was to regain the possession and sell the property to satisfy the claim. The vendee had agreed that the vendor should sell instead of the chancellor, and but for that provision of the contract a court of equity would have been called on to enforce the lien."

Jones, in his work on Mortgages, section 675, says that a mortgagor can not maintain an action for trespass against the mortgagee after entry for conditions broken. The gist of the action is unlawful entry, but the entry of the mortgagee in such case is lawful.

If the mortgagee has this right under the common law, how much more has he the right when it is directly and specifically given him by the terms of the mortgage.

The court erred in sustaining the demurrer. The answer as amended set up a good defense to the action. The appellants, under the contract, had the right peaceably and without force, but not otherwise, to take possession of the mortgaged property.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

Newport News & Mississippi Valley Co. v. Howard, &c.

Filed December 7, 1892. Appeal from McCracken Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Railroads—Contributory negligence of traveler at crossing*—A railroad company running its trains in a proper and usual manner along or across a street of a city is not liable for damages caused by a horse of a traveler taking fright at the noise or appearance of the train, or at the necessary blowing off of steam from one of its locomotives.

2. *Same*—When a traveler, knowing that he is approaching a railroad crossing and hearing and seeing a crossing train, still advances to the track, his reckless conduct constitutes such negligence on his part as will defeat a recovery for any injuries thus inflicted upon him unless the engineer in charge of the train saw, or by the use of ordinary care could have seen, his perilous position in time to avoid the danger.

In this case the plaintiff, having advanced to a railroad crossing knowing that an engine was approaching, was guilty of such contributory negligence in forcing his horse across the track immediately in front of the engine that he can not recover for the injuries resulting from the horse becoming frightened at the noise of the engine and running away.

3. *Same*—The law does not require the speed of trains to be slackened on approaching the crossing of a public highway when a team is seen approaching. The engineer in charge of the train has the right to assume that the traveler will avoid danger, and is only called on to act when the traveler is so close to the track as to necessarily warn the engineer of his danger.

Holmes Cummins, Quigley & Quigley and P. H. Darby for appellant.
Husbands & Husbands for appellee.

Gray v. City of Paducah.

Filed December 7, 1892. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

A city may change the grade of a street without rendering itself liable to adjacent property owners for injuries resulting to their property by reason of the fact that the surface water, which had theretofore flowed from their lots into the street, is left standing upon their premises.

Gilbert and Kahn for appellant; Reeves and Wheeler for appellee.

Commonwealth v. Betz, sheriff.

Filed December 7, 1892. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Commissions of sheriff*—Where the sheriff reports to the county clerk a list of property which has been omitted by the assessors, he is entitled to a commission of twenty-five per cent. on the taxes realized on the assessment. The fact that he may have received from the auditor's agent his information as to the omitted list does not deprive him of the right to the commission.

The auditor's agent of Campbell county instituted proceedings to compel the city of Newport to list its water works for taxation for the years 1872 to 1881, inclusive, and the liability of the property to taxation having been determined in that proceeding, the agent arranged with the city for a settlement of the taxes claimed by the State, including the years 1886 to 1890, the assessment for those years to be made by the sheriff, as the pro-

Digitized by Google

ceeding referred to did not include them. The sheriff then reported these lists to the county court, assessed the property and collected the taxes. *Held*—That he is entitled to a commission of twenty five per cent.

2. *Fees of auditor's agent*—The auditor's agent act makes no provision for the payment of any fees to that official except where he has instituted proceedings for the collection of demands due the State, unless the owner of property not listed shall, when notified, list his property, and pay the taxes due with interest to the agent.

W. J. Hendrick and R. Reid Rogers for appellant; C. J. Helm for appellee.

KENTUCKY AND INDIANA BRIDGE CO. v. CECIL.

Filed December 7, 1892. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. *Peremptory instruction*—Even if the court erred in overruling defendant's motion for a peremptory instruction made at the conclusion of plaintiff's evidence in chief, still if the defendant chose not to stand upon his motion, but introduced evidence which supplied the deficiency in plaintiff's evidence, this court will not reverse for that error.

2. *Evidence not in record*—Where the distance from one point to another is material upon the question of negligence, and a witness has indicated that distance by comparing it with the distance from the witness stand to some point known by the judge and jury, but not known to this court, a material part of the evidence is absent from the record, and this court can not say that the finding of the jury that there was negligence is not sustained by the evidence.

3. *Instructions to jury—Prejudicial error*—Where the instructions conflict and the jury are left without any means of harmonizing them the verdict should not be allowed to stand. But where, taking all the instructions together, it is plain that the jury could not have been misled by an error in one of the instructions, an Appellate Court should not reverse for such an error.

4. *An instruction defining ordinary care* in accordance with the definition laid down in L. & N. Railroad Co. v. McCoy, 81 Ky., 409, was proper.

5. *Railroads—Negligence at crossing*—An instruction denying plaintiff the right to recover if he saw the engine coming when he attempted to cross the track, "unless the train was so far distant as to make it highly improbable that the train could not reach plaintiff before he could safely cross," was properly refused, as it required extraordinary care upon the part of plaintiff in using the public thoroughfares of the city.

6. *Same*—In a place thickly populated and where many persons are known to be constantly passing about and across a railroad, as in a city like Louisville, those in charge of trains must be on the lookout for persons crossing the tracks, and must, by customary signals, warn them of approaching danger.

7. *Misconduct of counsel in argument*—The action of counsel for plaintiff in his argument to the jury, in reading from a slip of paper a quotation from an opinion of the Court of Appeals as to the value to be attached to the evidence of confessions, was not proper, but could not have prejudiced defendant.

E. F. Trabue for appellant; Matt O'Doherty for appellee.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. MONTGOMERY.

Filed December 7, 1892. Appeal from Carroll Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Railroads—Care required as to employe accustomed to use track in going to work*—The plaintiff, an employe of defendant railroad company, who was accustomed to walk on defendant's track in going to and from his work, is not to be regarded as a trespasser so far as concerns the duty owed him by

Digitized by Google

servants of the company in charge of a truck car, who knew of his custom to use the track, and who had frequently passed him on the way.

2. *Same*—The servants of the railroad company in charge of the truck car were, as to plaintiff, guilty of gross negligence in loading a tool-chest across the car so that the handles extended beyond the track. and also in not stopping the car when they saw plaintiff in front of them, or in not giving him timely warning of the danger he was in, it being necessary for him to step further from the track than it was ordinarily necessary for him to step in order to allow the car to pass in safety, and, as plaintiff, while standing on the abutment of a bridge, upon which he had stepped from the track in order to allow the car to pass, was struck by the handles of the tool-chest and knocked to the ground below, the company is liable to him for the injuries received, it appearing that he would not have been injured if the tool-chest had been loaded on the car lengthwise, as was customary and proper, and as he had the right to assume it was loaded.

3. *Gross negligence*—The court properly refused an instruction defining gross negligence as "intentional wrong, or such reckless disregard of the security and rights of others as to imply bad faith."

Winslow & Winslow for appellant; Gaunt & Downs for appellee.

FAIN, &c. v. TURNER'S ADM'R.

Filed December 7, 1892. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Consideration for contract—Distribution of estate*—Where two of the children of an intestate had each received from their father, by way of advancement, $1,000 less than had been received by each of the other children, and were insisting that they each should be paid that amount, in order to make them equal with the other children, and were about to institute legal proceedings to determine their rights, when the widow agreed with them if they would consent to an equal distribution of the estate she would pay each of them $1,000, in consideration of which they released their claims against their father's estate, and an equal division was made, the promise of the widow was based upon a sufficient consideration and was valid.

2. *Statute of frauds*—Such a contract is not within that section of the statute of frauds which provides that "no action shall be brought upon any agreement which is not to be performed within one year from the making thereof" unless the agreement be in writing. To bring an agreement within that section of the statute it must be a specific agreement not to be performed within a year. If the contract can be performed within a year it it is not within the statute, although the possibility of performance within a year may not in fact have occurred to the parties.

3. *Same*—Even conceding that the claims of the two children which the widow agreed to pay can be regarded as debts against the estate of the decedent, which is questionable, the widow's promise is not "a promise to answer for the debt, default or misdoing of another" within the meaning of the statute of frauds. In order to fall within that section of the statute there must be a debt of another for which that other remains liable. If the original debtor is discharged, the promise is an independent and an original contract, and need not be in writing.

R. P. Jacobs and R. H. Tomlinson for appellants; W. O. Bradley for appellee.

MUIR'S COMMITTEE v. COMMONWEALTH, BY, &c.

Filed December 14, 1892. Appeal from Todd Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Taxation—Proceeding by auditor's agent to list omitted property*—The lists made out and given to the assessor by a tax-payer are *prima facie* correct, and in a proceeding by the auditor's agent to compel the listing of omitted property the burden is upon the agent to show in what particular the list which has been given is an improper one.

Digitized by Google

Settlements made by the committee of a lunatic with the county court were not alone sufficient evidence of the inaccuracy of lists given by the committee to the assessor, the committee being required by law to charge himself in his settlement with the face value of all securities until released by the court, whereas he was only required to fix their true value in giving in a list of his property for taxation. And, besides, he was not required to include in his list bank or other stocks where the bank or other corporation in which it was held was required to pay tax in the same.

2. *Same—Valuation conclusive*—The valuation fixed upon property by the assessor, and afterwards by the board of supervisors, is conclusive not only upon the tax-payer but also upon the Commonwealth. And in a proceeding by the auditor's agent to compel the listing of omitted property the county court has no power to revalue property already listed and valued by the proper authorities, but only to assess and fix the value of property not listed. And this rule applies as to the valuation of securities.

Forgy & Petrie for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

FRANCIS, &c. v. COLLINS.

Filed December 14, 1892. Appeal from Knott Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *New trial*—The court will not grant a new trial upon the ground of newly discovered evidence where the evidence might, by the use of proper diligence, have been discovered before the case was called for trial.

2. *Same*—That the verdict was not supported by the evidence; that the verdict is excessive; irregularity in the proceedings and misconduct of the prevailing party are not grounds for new trial, or vacating a judgment, upon petition.

3. *Same*—Where a motion for a new trial has been made and overruled the party making the motion can not afterward set up by petition any of the grounds relied on in support of the motion.

4. *Same*—In an action against M. and others for the delivery of personal property, the summons was returned "not found" as to M.; but on the same day the order of delivery was executed by the same officer who executed the summons on the other defendants M. was present and signed the bond taken by the officer for the forthcoming of the property, and the officer, in an affidavit filed, swears he returned the sommons "not found" by mistake. When the case was called for trial an attorney employed by the other defendants, one of whom was M.'s partner in the ownership of the property in controversy, filed the joint answer of all the defendants and attended to the case for them. *Held*—That the lower court did not err in refusing to grant a new trial, upon the ground that M. was not before the court and never authorized any attorney to act for him in his defense.

W. L. Hurst and J. J. C. Bach for appellants; James Andrew Scott for appellee.

COOPER v. JACKSON.

Filed December 14, 1892. Appeal from McLean Circuit Court. Opinion of the court by Judge Brent, reversing.

1. *Malicious prosecution—Evidence*—In this action for malicious prosecution the defendant should have been allowed to prove that he had, before swearing out the warrant against plaintiff, stated the facts to the justice who issued it; and that the justice, who was an intelligent and prudent man, in whose knowledge and discretion he had confidence, advised him that the facts related constituted the offense charged, and that it was his duty to prosecute plaintiff, and that but for this advice he would not have instituted the prosecution. These facts tended to show the absence of malice, and were competent in mitigation of damages.

2. *Same—Instructions to jury*—The court erred in submitting to the jury

Digitized by Google

the question of plaintiff's guilt. The only questions for the jury were, whether the defendant acted maliciously and without reasonable cause in procuring the arrest and trial of plaintiff.

3. *Same—Burden of proof*—The answer being merely a denial of the malice and want of probable cause alleged in the petition, the burden was on plaintiff, although he had been discharged on a trial before the examining magistrate.

Tanner & Higdon for appellant; Noe & Taylor for appellee.

OVERSTREET v. MOUSER.

Filed December 14, 1892. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Reformation of contract for mistake*—A simple mistake of a party as to the legal effect of an agreement which he executes is no ground for relief.

2. *Same*—In this action, in which the wife's heirs seek to have an antenuptial contract reformed, upon the ground that the wife was mistaken as to the legal import or effect of the terms used in the contract, the evidence of the mistake is not of that clear, unequivocal and decisive character which will justify a court of equity in reforming it so as to deprive the surviving husband of the marital rights which he has, not only under the writing but under the law, in the absence of any contract.

Rives & Spalding for appellant; L. S. Pence and S. A. Russell for appellee.

PROCTOR & TROUTMAN'S ASS'EE v. WILSON & MUIR.

Filed January 18, 1893. Appeal from Union Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Power to make an assignment of partnership property* may be expressly conferred by one partner on the other, or it may be inferred from the conduct of the partners, their manner of doing business and the circumstances in which they place themselves in reference to the business of the firm, and validity may be given to such an assignment by subsequent ratification as well as by prior authority.

Two partners, knowing that a corporation with which their firm was involved was financially embarrassed, agreed that, in the event of an assignment by the corporation, they would also assign their partnership assets for the benefit of their creditors. The corporation did make an assignment, and thereupon, in pursuance of their agreement, one of the partners, the other being out of the county, made an assignment of the partnership property. *Held* That the assignment is valid.

2. *Assignment for creditors Acceptance by assignee—Attachment*—While the statute provides that no deed of trust shall be valid against creditors until such deed shall be lodged for record: yet the acknowledgment of a deed of assignment by the assignor and its acceptance by the assignee at once vests the assignee with an equity, if it does not vest him with the legal title, and a subsequent attaching creditor acquires only an equity which, being a junior equity, must be treated as subordinate to the assignee's equity. Besides, if the deed is recorded within the time required by statute after acknowledgment, the recording relates back to the time of acknowledgment.

Fairleigh & Straus for appellants: John D. Wickliffe for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. FEBRUARY 1, 1893. No. 15

KENTUCKY COURT OF APPEALS.

FIELDER V. HARBISON, GD'N.

CLEMISHIRE, &C. V. SAME.

(*Filed Nov.* 5, 1892.)

1. *Pleading—Action by ward to surcharge guardian's accounts*—A petition to surcharge a final settlement of the accounts of a guardian and to hold him liable for certain sums he had, without legal authority, permitted his ward to expend in excess of her income, is fatally defective when it contains no specific statement of any improper credit given the guardian, or of the omission of any item of indebtedness by him, and with no averment of fact to enable the chancellor to know whether any alleged excessive expenditure allowed by the guardian was improper.

In this case such defect in the petition was cured by the answer filed.

2. *Action by ward to surcharge guardian's settlement of accounts—Limitation*—An action by a ward to surcharge a guardian's final settlement of accounts is not barred within five years after the order of approval of such settlement by the county court.

3. *Same—Expenditures in excess of ward's income*—The allowance, by a guardian of an expenditure by his ward in excess of the ward's income, which expenditure was greater than the ward's health or future position in society required, is not authorized, although made by the advice of the physician of the ward, or by the direction of those relatives of the ward having immediate charge and control of her.

4. *Same*—A guardian may make expenditures for the ward in excess of her income where the tender years or delicate health of the ward requires it; and while the guardian may be credited in the settlement of his accounts for such expenditures, although not made by direction of the chancellor, still it is a prudent and equitable rule for the guardian always to consult the chancellor before making such expenditures.

5. *Same—Principal and income of estate*—The accumulations of income from the wards' personal estate, remaining after deducting all expenditures, become from year to year a part of the principal of the estate, and the guardian will be charged with it as such. Therefore, the fact that the wards, when young, spend annually less than their income, does not authorize an expenditure in excess of such income during their maturer years.

Digitized by Google

6. *Same—Settlements of accounts—Estoppel*—Any compromise or settlement made by a guardian with his ward, immediately after the ward arrives at age, for the benefit of the guardian and to the prejudice of the ward, and without a full knowledge of all the facts, will be disregarded by the chancellor at the instance of the ward.

7. *Same*—A guardian discharged his duty to his wards in all repects, except that he allowed them to expend a sum in excess of their income, at a time when such expenditures were unauthorized and improper. The extravagant expenditures were made while the wards were in bad health, and by the advice of their relatives and physician. After the wards became of age they were informed of their claim against their guardian on account of the extravagant expenditures, and made a final settlement with him with a full knowledge of all their rights against him. They executed a receipt in full to him, in which they recited that they ratified and approved of such unauthorized expenditures by him. *Held*—That the settlements so made were morally just, and the chancellor will not now permit the wards to surcharge such settlements and to charge the guardian on account of said extravagant expenditures.

Temple Bodley and Helm Bruce for appellant.

Randolph H. Blain and B. F. Buckner for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The appellee, J. J. Harbison, was appointed the statutory guardian of Myra and Bettie Fielder in the year 1864. Myra became of age in June of the year 1876, and in September, 1877, a final settlement of her accounts was made, and approved in March, 1878. On the 9th of May, 1889, Bettie became of age, and shortly after her arrival at age, to-wit, on the 14th of March, 1881, the guardian made a settlement of her accounts. The settlement of Myra's accounts was with the court; that of Bettie was made out of court, and a receipt executed acquitting the appellee of liability except as to the sum found due her on that settlement, to-wit, $12,825.26.

On October 19, 1882, a period of exceeding six years after Myra arrived at age, and two years and five months after Bettie arrived at age, these actions were instituted for the purpose of surcharging these settlements made by the guardian. During the pendency of the action Almyra married her co-appellant, Clemishire. It appears from the testimony as well as the pleadings that the assets or estate of the wards in the hands of their guardian, as found by the two settlements, was not paid over to them, but retained by the appellee, who controlled and managed it as the agent of the two sisters. There is no claim, however, that the appellee violated his trust as agent in any way, or has failed to account for the estate in his hands as such, the sole object of the petition being to have a settlement of the accounts, the main error in the settlement, as appears from the amended pleadings, being that the guardian had sanctioned the extravagance of the two wards by permitting them to make much larger expenditures out of their income than their wants or station in life required. The original petition contained no specific statement as to any improper credit that had been given or the omission of any item of indebtedness by the guardian in either settlement; nor is there any averment of fact as to the excess of expenditure for the support of the wards that would enable the chancellor to know whether the expenditure was or not improper. The petitions were for that reason fatally defective. No demurrer, however, was filed, but the case referred to the commissioner to take proof after an answer had been

Digitized by Google

filed controverting the statements of the petition and, to some extent, assigning reasons for the expenditures made, without stating the amount, and, in our opinion, such an issue was formed as would have authorized the chancellor to have granted relief under the general averments of the petition if the facts authorized it.

The appellants, however, made each petition more specific by amendments that were permitted to be filed, and the error, if any, made by the court below, consisted in setting aside the order of reference after nearly all the proof had been taken under the issue made with the appellants, and requiring them to make their pleadings more specific.

The appellee had invited the surcharge of all his accounts by his answer, and, in fact, attempted to plead affirmative matter justifying his expenditures, and, therefore, no question arises as to the statute of limitation; and, besides, this action was instituted within five years from the time the settlement of Almyra was made final by the approval of the county court.

The principal cause of complaint in each case is "that the guardian allowed his wards to expend too much money, and that for several years their expenditures exceeded the income of the estate. It does, in fact, appear that the appellants were extravagant in their expenditures, and but for such extravagance would have had two or three thousand dollars each in addition to the amount found due them by the appellee on final settlement. It is not pretended that the appellee appropriated their money to his own use, or that they had not received and expended all the money charged to them in the settlements, and the sole question is, should the guardian be now charged with what was expended by them, exceeding in amount the sum necessary to board and clothe them, and to provide them with such comforts, in the way of travel, dress, etc., as prudent fathers would furnish their daughters in the same station in life. The young ladies seem to have been under the control of an elder sister, who dictated to the guardian as to their wants and the amount of money necessary to meet their yearly expenditures. He seems to have protested now and then against what he regarded as extravagant, but was met with the fact that both of his wards were in delicate health and would probably not live until they were old enough to settle with him. They were advised by their family physician it was necessary to travel for their health, and the proof, in fact, shows that Almyra was in a dangerous condition, and that, no doubt, prompted an expenditure by the guardian, at the direction of their elder sister, of sums of money for some of the years that exceeded the income, and that seems to us from the testimony to have been extravagant, looking to their future, their station in life, as well as to the necessity for increasing the expenditures for the preservation of their health. An expenditure of a greater sum by the guardian than their wants required, although under the advice of their physician or by the direction of those having the immediate charge and control of the children, will afford no defense in an action for a settlement of the guardian's accounts.

A guardian may exceed the income of the ward's estate when the ward is of such infirm health or of such tender years as requires the expenditure. This is a provision of the statute, but when authorized to make such an expenditure it is only so much of the income as is required on account of the condition of his ward. In Chandlin v. Moore, 7 Mon., 150, and in Withers v. Hickman, 6 B. M., 292, it was adjudged that a court of equity will not permit an encroachment upon the capital of the ward's estate for the purpose even of maintaining a

Digitized by Google

child in health and infancy. This rule has been, to some extent, modified by the statute referred to, and in Withers v. Hickman, already cited, it was held that if the expenditure by the guardian would have been allowed by the chancellor, if called on, then the guardian should be credited by it, and while this rule is equitable it, is best always to consult the chancellor before making extraordinary expenditures.

In this case, for three or four years prior to Bettie's arriving at age, she spent, in the aggregate, a sum exceeding her income by $2,500. It is true that she then required a larger sum annually than when of tender years, and so in the case of her sister, but neither seems to have been permitted to make extravagant expenditures merely because their income justified it. It may be doubtful, however, from this record, whether, when looking to the expenditures during the whole period of the fiducial relation between the appellants and the appellee, the appellee permitted his wards to expend more than was proper. We are inclined to think he did, but it is reasonable to assume that, in the exercise of a prudent judgment on the part of the elder sister and her female relatives with whom these wards lived, or under whose control they were, this supposed economy on the part of the guardian, when these children were quite young, justified a much larger expenditure when advancing in years they were required to assume the social position their fortune and family entitled them to. The record conduces to show that the principal of the estate was about $10,000 to each child, and that he paid over to them each a sum exceeding $12,000, so that the fund had increased instead of diminished in the hands of the guardian; and, while the accumulations of the personal estate must necessarily become a part of the principal, after deducting expenditures from year to year, still we find the estate increased in the hands of the guardian, and this brings us to the consideration of another question that must be decisive of this case:

Have or not both appellants, after arriving at full age, with a full and fair understanding of their claims against their guardian by reason of these expenditures, settled with the appellee and ratified his acts in the premises?

It is well settled by the repeated adjudications of this court that any compromise or settlement made by the guardian with his ward, immediately after his ward arrives at age, for the benefit of the guardian and to the prejudice of the ward, without a full knowledge of all the facts will be disregarded by the chancellor. (Brewer v. Vanarsdale, 6 Dana, 204; Clay v. Clay, 3 Met., 548; Buchannon v. Linney, 7 B. M., 571.) So in this case, when Bettie Fielder made this settlement with her guardian, about ten months after she had arrived at age, if she had been ignorant of her rights as his ward, or been misled by counsel or by her guardian, or had not been advised as to her claim against the guardian on account of these unnecessary expenditures, there might be great reason for holding the guardian responsible, although the money was expended under the advice and direction of those in whom both the guardian and his wards had the right to confide.

Counsel for these appellants, and for the guardian while acting as such, states that he advised a settlement out of court of Bettie's estate because of the bungling manner the other settlements had been made in court, and to save the costs attending it; that both Almyra and Bettie were present and preferred settling in that way; that the guardian was not present when the settlement was made. The books and accounts were exhibited to them. He fully explained

Digitized by Google

to Bettie her rights in the matter, and called her attention to what the witness considered excessive expenditures on her part; that every item and voucher was taken up, and that Bettie and her sister examined each one and discussed some of them but took no exceptions whatever. *They fully understood every item.* This witness says he was paid his fees out of the girl's money; that in the other settlements where he found a mistake against the girls he had it corrected, and so of the guardian, and evidently was advising both parties as to their rights in the matter. There was no conflict between the wards and the guardian, and his advice to the guardian was to keep within the line of his duty. Bettie, when the settlement was completed, made this statement in writing:

"I have examined the statement above of my former guardian, J. J. Harbison, and the detailed account from which the above account is taken, and the vouchers *seriatim*, and I find that statement, vouchers, account and balance all correct and satisfactory. My expenditures necessarily exceeded my income, and I hereby ratify and approve what my guardian has done in that respect. For the sake of economy I hereby waive a settlement before the county court, and the filing of the vouchers, and ask that this account and statement shall be recorded as a full settlement of my guardian's accounts with me, and agree that the balance therein stated of $12,825.26 is correct, which remained in his hands as my agent.

"Signed: BETTIE FIELDER.

"Witnesses:
"PAT JOYCE.
"MYRA FIELDER."

It is evident that she had been fully advised by Joyce, and, independent of his statement, the writing she signed indicates clearly that she was aware of his liability for having sanctioned these unnecessary expenditures. The two appellants had been committed to the care of their sister; they moved in the best circle of society. The health of each had been much impaired when small children, and, under the belief of their sister, their aunt, and the girls themselves, that this expenditure of money was necessary to restore them to health and vigor, they applied to the guardian for the money and he furnished it. Under such a state of fact it was right and proper that the girls should each have ratified what the guardian had done, and, having done so, the relief sought was properly denied.

The girls were not misled. There was no deception by the guardian. Myra had been of age fifteen months before her settlement was made, and six years before this action was instituted. She approved the accounts, and was to sign a statement that had been prepared similar to the one signed by her sister but omitted to do so. She acquiesced in what had been done from that time until this action was brought in the year 1882, nearly five years after the settlement was made. She aided her sister, who was younger, in making her settlement, and witnessed the writing that evidenced her full knowledge of all her rights in the premises. The parol proof and circumstances attending the settlement by Almyra in her own behalf makes as strong a case against her as that of her sister. The settlement in each case was wise and eminently just, and this court, while not disposed to relax the vigor of the rule as to settlements between guardian and ward, where the latter has been wronged, will not enforce it where the ward, after full age, has sanctioned expenditures that every rule of moral right required the ward to do, al-

Digitized by Google

though the chancellor, if applied to during the existence of the fiducial relation, would not have authorized.

The judgment is affirmed on the original and cross-appeal. (Hardin v. Taylor, 78 Ky., ; Chinn v. Corydon, 74 Mich.)

JAMES, ADM'R, V. MCMINIMY, &C.

(*Filed Nov.* 5, 1892.)

1. *Blasting with gunpowder in a city or town*, or near enough to the property of others to injure it, is *per se* the commission of a nuisance, unless proper precautions are taken to prevent damage to such property and injury to persons ignorantly coming near the place of such blasting.

2. *Liability of employer for acts of contractor*—An employer who engages one as an independent contractor to perform work lawful in itself is not liable for injuries done to the property or persons of others, through the wrongful, unlawful or negligent execution of such work by the contractor; and if such work seemed lawful when the contract for its performance was made, but turns out during its progress to require the commission of acts that are a nuisance, then the employer is not liable to third persons suffering damage by reason of such nuisance before he has notice of the existance of such nuisance; but after notice thereof it is his duty to promptly suppress it.

But where the employer, as a man of ordinary prudence, must know that the work to be performed will create a nuisance, he is liable for injuries suffered by others by reason of the doing of such work by his independent contractor.

Bell & Bell for appellant.

Poston & Jacobs for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, Ellen and Thomas McMinimy, employed Isaac Wechershone, a competent and skillful person in that line, to build them a house on their lot lying in the town of Harrodsburg, Ky. Said employment included the building of a cellar of certain dimensions under the house and the excavation of the earth for that purpose.

The bill of exceptions says the evidence adduced before the jury conduced to show that it was necessary, in order to do the excavation in the ordinary mode of doing that kind of work, to blast with gunpowder.

The proof also shows that the appellant's intestate, a citizen not engaged in helping to do the blasting, was hurt by one of the blasts.

This action seeks to recover damages from the appellees, McMinimys and Wechershone, caused by the said injury. The right to recover damages from the McMinimys was resisted upon the grounds—

1st. That Wechershone was an independent contractor, and the work that he was to perform did not necessarily create a nuisance, consequently they were not liable in damages for the injury.

2d. That the injury to the appellant's intestate was the result of his contributory negligence.

Digitized by Google

It is well settled that blasting with gunpower in a city or town, or near enough to the property of others to do injury, is a nuisance, unless proper precautions are taken to prevent injury to the property of others within its reach or to the person of others ignorantly coming within its reach.

The contract clearly shows that Wechershone was an independent contractor, and not the servant of the McMinimys. Now it is well settled that where the independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages to such persons for the injury. On the other hand, where the contractee employes the contractor to do work for his benefit, which, in the ordinary mode of doing it, he, as a prudent man, has reason to belive is a nuisance, he is liable for any injuries that may result from it to third persons. The reason of the contractee's liability is, that the contractee is liable for injuries resulting from his own unlawful act, and he can not protect himself from such liability by employing others under the name of independent contractors to do the unlawful act. But where he, as a prudent man, has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the contractee is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence. But, in such case, upon necessary notice, it would be his duty to take such reasonably prompt and efficient means as are in his power to suppress the nuisance, else he will be responsible for injuries to third persons resulting from the nuisance after notice. (See Wood, Master and Servant, pages 598 to 612; Robinson v. Wall, 11 Bush 480.)

The case should have been submitted to the jury in accordance with the foregoing principles. Also the question of contributory negligence should have been submitted to the jury.

The judgment is reversed and case remanded, etc.

CITY OF COVINGTON V. CHESAPEAKE & OHIO RY. CO.

(*Filed Nov.* 17, 1892—*Not to be reported.*)

1. *Appeal—Absence of material evidence from record*—Whether the ground in controversy has ever been dedicated as a public street depends largely upon facts disclosed by a certain map, which was before the lower court. In the absence of such map from the record, on appeal it will be presumed that the map sustained the finding of the lower court with reference to the dedication.

2. *Actions—Nuisance—Ejectment*—When it appears from the pleadings that the defendant is in possession of a strip of ground, claiming it as its own, which plaintiff claims is one of its public streets, the plaintiff must resort to ejectment to recover such strip of ground, and can not maintain an action to compel defendant to remove a nuisance therefrom erected by it, the nuisance consisting of certain piles driven in said street.

Plaintiff's petition sought to prevent a railroad company from erecting piles in an alleged street of the city. Defendant, by answer, traversed the allegations of the petition and alleged that the alleged street was its property, and that it was in the possession of it. The reply denied that defendant owned said ground, but admitted its possession of it. Thereupon, the

Digitized by Google

court held that ejectment was the proper remedy for plaintiff, and gave it leave to amend the prayer of its petition. Defendant did not so amend, but offered to file an amended reply changing the action to one of ejectment. *Held* –That the trial court did not abuse its discretion in refusing to permit such amended reply to be filed.

W. A. Byrne for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

The appellant sued the appellee for erecting a nuisance in one of its streets by driving piles therein. It asks that the appellee be compelled to remove the nuisance erected in the street, and it be enjoined from erecting other nuisances therein of the same kind. The appellee answered, traversing appellant's allegations in reference to the alleged nuisance, and averring that the strip of ground was not a street, and alleging that the said strip belonged to it in fee and it was in the possession of it. The reply denied that the appellee owned the strip of land, but it did not deny the appellee was in the possession of it, and, upon the admission that the appellee was in possession of the strip, the court held that an action of ejectment was the proper action and not an action for a nuisance, and gave the appellant leave to amend the prayer of its petition to that effect; but, instead, it offered an amended reply, attempting to deny that the appellee was in the possession of the strip of land, but changing the action; but the court refused to allow the amended reply to be filed, and we can not say that the court, under the circumstances, abused its discretion in rejecting the amendment. So, as the pleadings stand, the appellant is seeking to have the piles removed, etc., notwithstanding the appellee is in the possession of the land. It seems to us, in this condition of the record, the proper remedy was by an action of ejectment. But as to whether or not the strip of ground is a public street by dedication (there is no proof that it was ever condemned for that purpose) depends upon the calls in some plats and deeds.

The deed from the Baptist Institute to Walker calls for R. H. Hickey's plat, made in 1842, for more particular description of the land sold. The lower court says that that plat was made before the land described by it was in the city, and that it was not a dedication of the strip of ground in controversy as a street, and if the Baptist Institute had sold a lot calling for the map the vendee might have claimed that all the streets laid down on that map were dedicated as public ways, but such was not the case. The said map is not a part of the record in this case, but it was evidently before the lower court and considered by it as evidence. Now, it is well settled that we must presume, in the absence of the map, that it sustains the court's judgment in reference to the dedication.

The testimony of the two witnesses for the appellant does not prove that the strip of ground is a public street. It is shown by them that said strip was never improved except by the railroad company; that it was never used by vehicles except by the vehicles of the railroad company; that it was simply a common as other commons in that part of the city. (See pages 46 and 47.)

The judgment dissolving the injunction and dismissing the petition is affirmed.

Digitized by Google

PFINGST, &C. V. DOLFINGER, TRUSTEE, &C.

(*Filed Nov.* 19, 1892—*Not to be reported.*)

Construction of will—Life estate—Trusts—A testator devised a certain portion of his estate to a trustee for the benefit of his daughter, "to be held in trust by him during the natural life of the said Josephine (the daughter), and at her death the same is to go to her child or children, free of any trust." The trustee was clothed with power to "invest, sell and re-invest in any way that he thinks best, and in any securities that he may wish, without regard to the rate of interest, and the net income * * * he shall * * * pay to my said daughter * * * during her natural life. He may, if he thinks best, invest in a home for my said daughter, and, if he thinks proper to do so, he may use as much of the principal as he thinks right for her benefit, or pay the same to her." *Held*—That the trustee had a right to use as much of the estate as he deemed right to make provision for the daughter during her life or to confide the same to her; yet it was error for the chancellor to permit the trustee to surrender the whole estate to the daughter as her absolute estate, thus altogether defeating the interest in remainder. The authority to invest in a home for the daughter meant only a home for her life, with remainder to her children.

Gibson, Marshall & Lochre for appellant.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

The ninth clause of John H. Detchen's will is as follows: "I will and direct that the portion of my estate given to Otto Dolfinger in trust for Mrs. Josephine Pfingst, be held in trust by him during the natural life of the said Josephine Pfingst, and at her death the same is to go to her child, or children, free of any trust. The said Dolfinger shall have full power to invest, to sell, and reinvest in any way that he thinks best, and in any securities that he may wish, without regard to the rate of interest, and the net income arising therefrom he shall, from time to time, pay to my said daughter, Josephine Pfingst, during her natural life. He may, if he thinks best, invest in a home for my said daughter, and, if he thinks proper to do so, he may use as much of the principal as he thinks right for her benefit, or pay the same to her."

The lower court, at the instance of the trustee, relieved him of the trust, and permitted him to surrender the entire estate to her, as her absolute estate, defeating, in toto, the remainder interest to her children. This, we think, is error, for it clearly appears from the will that the testator meant to make ample provision for his daughter during her life, if it took all of the estate for that purpose, and to authorize the trustee to use as much of the estate for that purpose as he deemed right, or to confide the use and management of the same to her for that purpose, and, at her death, if there was any of the estate unexpended in accomplishing said purpose, it was to go to her children as a vested remainder. The authority to invest in a home for her certainly meant a home for her during life, remainder to her children, etc.

The judgment is reversed, with directions to proceed according to this opinion.

Digitized by Google

WATKINS' EX'ORS V. SNADON, &C.

(*Filed Nov.* 22, 1892.)

Construction of will—Right of life tenants of personal property to possession of the corpus of the estate—It is a general rule of construction that where there is a bequest of money or stocks or bonds to one for life, remainder to another, the life tenant is not entitled to the possession of such money or bonds or stocks; but this rule must be disregarded where the testator plainly expresses his intention that the life tenant should have possession and control of such estate.

In this case, where a testator devised a large amount of personalty to his grandchildren for life, remainder to their children, it appears from the will that the testator intended that the grandchildren should take possession of the estate given them for life; therefor, the chancellor properly ordered the executor to deliver the property bequeathed to such grandchildren.

Petrie & Forgy and Wm. Lindsay for appellants.

Bowden & Bowden, W. F. Browder, Ben T. Perkins, jr., and —— Stites for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Chief Justice Holt.

Williams Watkins died testate in May, 1890, his will having been executed in October, 1883. He left no widow, but two children and six grand-children, the latter being the children of his two daughters, that survived him. He left a large estate, consisting of various kinds of property. A son-in-law, a grandson, and one of the daughters were nominated by the will as his personal representatives, and they are the appellants.

They brought this action for its construction. It gives to his two daughters, for their separate use for life, certain real estate and county bonds, with remainder to their children; and the power is given the daughters, or, in the event of their death, the grandchildren, to dispose of the property if sufficient cause arises, the proceeds to be reinvested by them in real estate.

After making one other specific bequest he gave the entire remainder of his estate for life to the six grandchildren, share and share alike, for their separate use, with the remainder to their children, respectively.

It is evident the paramount purpose of the testator was to provide for his two daughters and his grandchildren. The will expressly so states. It further provides, if any one of the grandchildren should die without issue, his or her portion shall go to the survivors; also, as money may be collected on notes or bonds for its reinvestment in certain ways, and gives the power, if it becomes necessary, to sell any of the real estate and invest the proceeds in like property, but does not expressly say by whom this is to be done.

It expressly declares that the profits arising from the estate given to his daughters for life shall be subject to their absolute disposal and control, and that this shall be the case as to the grandchildren as to the estate given them for life, after paying the expenses of their education, and when they become of age.

Three of the grandchildren are married women and three are infants. Mention is not made in the will of any one as trustee. In the portion of it relative to the devise to the grandchildren, and just after speaking of them, it says: "Such is the difficulty of loaning

Digitized by Google

money safely that I hereby authorize *the parties*, if they, in their wisdom, think it would be best and safest to invest the notes above named, and also the bonds as above, in good real estate." It also provides: "I request and require that my hereinafter named executor, or executors and executrix, make no charge for distributing the legacies herein made to my daughters and grandchildren, because of the little labor attending it. I hope to make the distribution myself."

The principal contention, and the only one we think it necessary to consider, is, are the grandchildren not only entitled to the profits of the estate given them for life, but also to the possession and control of it, those not of age being represented by guardian? The lower court held they were, and denied the right of the executors to hold and control it during the lives of the life tenants. In this view we concur. It is urged, however, that the estate devised to them for life is a large one; that it is largely composed of money and notes; that by giving the control of one-sixth of it to each of the life tenants it will likely be lost to the remaindermen, and that the testator can not be supposed to have intended such a risk; that the conduct of the estate in this way will place the rights of the remaindermen in continual peril, and that such management with safety to the rights of all the interested parties is impracticable.

It is true that generally where there is a bequest of money or stocks or bonds the life tenant is not entitled to the possession. The executor retains it, the life tenant getting the income; but this, and all other rules of construction, must be disregarded if the testator's intention plainly appears from the entire will. If it shows that he intended the life tenant to have the possession; that he was willing to trust him with it, then this intention must, of course, control. It determines the rights of the parties, and rules of construction are to be resorted to only when the testator has not made known his purpose. It is to be gathered from the entire will. The language employed in a single sentence is not to control as against an evident purpose shown by the whole instrument. Effect is to be given to the general intent, and this, we think, is shown throughout this will.

In the first place, it is clear he intended the daughters to have the control and possession of the property given to them for life, and a portion of it consisted of bonds. It is true it was a specific bequest, but yet it shows he was willing to risk the life tenants. The support of his daughters and his grandchildren was his chief concern. His great grandchildren were not; and it is evident he expected and intended a speedy distribution of his estate. This would be impossible if the executors are to hold it for the remaindermen. A half a century would likely elapse before the duty would end, and this would certainly be, in the face of the fact that the testator declared "I hope to make the distribution myself." The will, in the first place, gives the property to the grandchildren for life. It seems to speak of them as "the parties" who are to make investments of the proceeds of the notes and bonds in real estate. It can not be doubted that if the personal representatives are to hold the property during the lives of the grandchildren, and, as one may die, deliver his or her portion to his or her children, that the care and control of the estate would involve much care, responsibility and labor; and yet the testator has declared that they shall "make no charge for distributing the legacies herein made to my daughters and grandchildren, because of the little labor attending it."

It seems to us that it is plain, when the entire will is consid-

Digitized by Google

ered, that he was willing and intended to risk the life takers with the possession of the property. If it be said that this is improbable, because their interest is antagonistic to that of the remaindermen, yet the interest of the former was his chief concern, and he doubtless knew that in case of bad faith upon their part, or that of the guardians of the infant devisees in the control and conduct of the property, the courts would, upon proper application, interfere for the protection of the remaindermen.

He was willing to make the life tenants, for whose benefit the devise was mainly intended, in effect trustees for the remaindermen without the giving of security. He undoubtedly would not have required it if he had, as he hoped to do, made the distribution himself.

Judgment affirmed.

MESSER V. COMMONWEALTH.

(*Filed Nov.* 22, 1892—*Not to be reported.*)

1. *Criminal law—Evidence*—On the trial of appellant for murder, where the only question at issue was whether or not appellant committed the homicide in self-defense, it was error to permit the Commonwealth to prove that after the killing the appellant and the wife of the deceased were on friendly terms, or that the wife had gone to live on appellant's land, there having been no evidence introduced to show that appellant, by any conduct whatever towards the wife of deceased, had caused the latter to be jealous of him.

2. *Same—Instructions as to right of self-defense*—After the admission of such incompetent evidence it was prejudicial to appellant's rights for the court to qualify its instruction concerning his right of self-defense by saying that if the defendant, by his own wrongful acts, made the harm or danger to himself necessary or excusable on the part of the deceased, then "such a defense would not protect him; but whether such facts existed was for the jury to determine." There was no evidence to authorize such a limitation of appellant's right of self-defense.

Knott & Edelin for appellant.

W. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted for the murder of one Rufus Cooke, and convicted of manslaughter. The killing took place at the house of one Henry Ramsey, the parties all living in the same neighborhood, but neither of them living with Ramsey. The house of Ramsey has two rooms, the one directly back of the other. Cooke, the deceased, with a Winchester rifle, was in the back room near a window with his gun. It was about an hour after dark when the trouble originated, and why the deceased was seated on a box near the window, with a gun by his side, is unexplained except on the theory that he was anticipating the arrival of the accused. The latter had been rabbit hunting on that evening, and from the uncontradicted testimony stopped in at Ramsey's, on his way home, for the purpose of getting the latter to sharpen his saw the next day. When the defendant entered the house, from the testimony of an eye-witness, he said to the deceased he wanted to see him, and with this utter-

Digitized by Google

ance raised his gun and shot the deceased without any warning whatever.

The defense shows that as soon as the deceased saw the accused he raised his gun, and the accused exclaimed "don't do that," when a gun fired and the deceased fell. From the testimony on both sides it was simply a question as which one of the parties to the shooting acted in self-defense. If the testimony of the accused is to be believed it was excusable homicide, and the complaint here made is, that the verdict of guilty was returned into court by reason of an erroneous instruction based on incompetent testimony. The State was permitted to prove that after the killing the accused and the wife of the deceased were on friendly terms, and that she had gone to live on defendant's premises. There had been no evidence introduced that prior to the killing the defendant and the wife of the deceased had been too fond of each other, or that the defendant, by any conduct of his, had caused the deceased to be jealous of him, but on the contrary it is shown that the appellant had no idea of any hostile feeling on the part of the deceased towards him until the day the shooting took place, and an entire failure of proof to show that the accused knew that the deceased was at Ramsey's when he entered the house.

The court in instructing the jury qualified the instructions as to self-defense by saying, in substance, that if the defendant, by his own wrongful acts made the harm or danger to himself necessary or excusable on the part of the deceased, then such a defense would not protect him, but whether such facts existed was for the jury to determine. That qualification would be sustained if any facts existed upon which to base it, but it seems to us there is no testimony authorizing it, but its effect was to leave the jury to speculate upon the real or imaginary wrongs of the deceased by the accused that led, or might have led, to the meeting at Ramsey's resulting in the death of the deceased.

Intimate relations between the wife of the deceased and the accused prior to the killing, if any existed, might have gone to the jury to show the motive on the part of the accused for taking the life of the deceased, but none was shown, and the testimony of what took place after that time between the wife of the deceased and the accused was clearly incompetent, and particularly with a qualification to the instruction as to self-defense, that if the accused, by his own wrongful acts brought about the necessity for his taking the life of the deceased, the law of self-defense will not avail him.

The only issue, it seems to us from the testimony is, did the accused act in self-defense when he shot the deceased? The instruction on that subject is entirely correct except the qualification annexed. This should have been omitted.

The judgment of conviction is reversed, and the cause remanded with directions to award a new trial, and for proceedings consistent with this opinion.

PHILLUPS, &C. V. PHILLUPS' ADM'R, &C.

(*Filed Nov.* 22, 1892.)

Descent and distribution—Partial intestacy—A father made conveyances of land to all of his sons except two, and in each conveyance stated that the land conveyed was all he intended the grantee to have out of his estate. By his will he bequeathed a certain sum to each of his daughters, which he

Digitized by Google

said in the will was all he intended his daughters to have out of his estate. As to a large part of his estate he died intestate. *Held*—That the estate not disposed of by will can not be considered as impliedly devised to the two sons for whom no provision was made by deed or will. Under our statute such undevised estate must be divided among the decedent's heirs-at-law, the children provided for being charged with the property received by them as advancements.

Auxier & York for appellants.

N. T. Burns for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

The appellants and appellees are the children and heirs-at-law of Thompson Phillups, who died partially testate, and leaving a large estate undisposed of by gift or devise. The part of the estate undisposed of is that part in controversy. The facts are: That Thompson Phillups devised to his five daughters two hundred dollars each, which sum, he says, is "all I intend for my five daughters to have of my estate." To all of his sons except the appellees, F. M. and George Phillups, to whom he made no gift or devise, he gave by deed small portions of land, saying in each deed that the land given was all he intended the donee "to have out of his estate." The appellees contend that the portion of the estate not directly disposed of by the will or deeds was impliedly devised to them, hence appellants have no interest in the same. On the other hand, the appellants contend that Thompson Phillups died intestate as to that estate, and they take under the statute of descent and distribution as coinheritors with the appellees, being chargeable with what they received by the will and deeds as advancements.

There is no doubt that there is no implied devise to the appellees, and that Thompson Phillups died intestate as to all that property not directly willed or conveyed by deed, so the question is, do the appellants take under the statute of descent and distribution as coinheritors of the undevised estate, or do the will and deeds exclude them as coinheritors of the undevised estate?

In the case of Clarkson v. Clarkson, 8 Bush, 658, it is held, that in case of partial testacy mere words of exclusion are not sufficient to deprive the beneficiary of the right to inherit his portion of the estate undisposed of by the will, because, as to that estate, the law casts the descent upon him, not the testator, and he can only be deprived of his inheritance by the testator's disposing of his entire estate. It is true, under the circumstances of the Clarkson case, the court held that the whole estate was impliedly devised, but those circumstances do not appear in this case, on the contrary, Thompson Phillups certainly died intestate as to a portion of his estate. He having advanced a portion of his estate by deed and will, and died intestate as to a portion, the question is, did he, by the words of exclusion *supra*, deprive the beneficiaries of their right to inherit with the appellees the undivided estate? Upon that subject section 17, chapter 31, of the General Statutes provides that "any real or personal estate or money given or devised by a parent or grandparent to a descendant shall be charged to such descendant" in the "division or distribution of the undevised estate," so as to equalize all, etc. This court, in the case of Bowles v. Winchester, &c., 13 Bush, page 1, decided that the provision of the statute *supra* could not be

Digitized by Google

controlled or varied by any expression of intention by the parent; in other words, if the parent should say, in giving or devising his child one thousand dollars, "this is not to be charged to you in the distribution of my undevised estate," or "it is to be in full of your portion of my undevised estate," such an expression of intention, though found in the written conveyance or will, would not have the effect of suspending the operation of the statute *supra*, the object of which was to equalize, as far as possible, all the children in the distribution of the undevised estate of their parent, and to that end to prevent the parent from discriminating in favor of or against any of his descendants, unless he does so by disposing of his whole estate; but where he leaves a part of it undisposed of it is the object of the law to cast the descent so as to equalize all his descendants, his intention to the contrary notwithstanding.

The judgment is reversed, and cause remanded, etc.

BLAIR V. COMMONWEALTH.

(*Filed Nov.* 17, 1892.)

Criminal law—Return of verdict by jury—Rights of court to make formal changes therein—The trial judge may, in the presence of the jury, make formal corrections in the verdict as returned, in order to make it conform to the real and manifest intention of the jury. Only formal changes, however, may be so made, and if the meaning of the finding of the jury is not plain, the jury must make it so.

A defendant was indicted for uttering a forged writing. The jury returned a verdict finding him "guilty of forgery as per indictment," &c. The trial judge, in the presence of the jury, ordered the words "of forgery as per indictment" erased from the verdict, which, so altered, was read to the jury and assented to by it. *Held*—That the alteration was a mere formal correction, and made plain the manifest finding of the jury, for which defendant can not complain.

J. B. O'Neal for appellant.

W. J. Hendrick for appellee.

Appeal from Kenton Criminal Court.

Opinion of the court by Chief Justice Holt.

The indictment is for uttering a forged writing. The jury returned this verdict:

"We, the jury, find S. F. Blair guilty of forgery as per indictment, and fix punishment at three years in the penitentiary.

"HENRY KENTRUP,
"Foreman."

Upon its being read, the trial judge, in the presence of the jury, altered it by erasing the words "of forgery as per indictment," making it read:

"We, the jury, find S. F. Blair guilty, and fix the punishment at three years in the penitentiary."

Upon its being read to the jury they said it was their verdict, and it was so received. Objection was made and exception taken to the change being made by the court. It is now urged that the jury should have been directed to return to their jury-room to re-consider the case.

Digitized by Google

It is true the verdict as returned found the accused guilty of forgery, when he was indicted for uttering a forged writing; but it also recited that the jury found him guilty as charged in the indictment. It is plain the alteration made the verdict conform to the intention of the jury, and the real meaning of the finding. They said so when it was read to them after the correction. It has always been the practice for the trial judge, in the presence of the jury, to make formal corrections of the verdict, and he should undoubtedly have this power. If the meaning of the finding it not plain, then the jury must make it so. Their province must not be invaded by the judge. He may alter the verdict in form but not in substance. Only this was done in this instance.

There was evidence to support the finding, and it is a well settled rule that when this is so there can be no no reversal in a criminal case, although the weight of the evidence may be against the verdict.

Judgment affirmed.

LOVELL V. COMMONWEALTH.

(*Filed Nov.* 22, 1892.)

Jailer—Forfeiture of office—The failure of a jailer to require a prisoner, committed to his care under a judgment and sentence which directs that said prisoner be worked at hard labor on such public works as are mentioned in General Statutes, chapter 29, page 464, to compel such prisoner to labor on such public works or to work for the number of hours each day on such works that the law directs, is not such misfeasance in the discharge of his duties as will authorize a forfeiture of his office. For a violation of his duty in this respect the Commonwealth must punish the jailer by proceeding by warrant to recover the penalty imposed by said statute of a fine of not less than $5 nor more than $15.

Wm. Lindsay and E. Parker for appellant.

Wm. J. Hendrick for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, being the jailer of Laurel county and while acting as such, took into his custody, under a capias properly issued, the body of I. W. Goff, the latter having been sentenced to confinement in the county jail until he satisfied certain fines imposed upon him for violating the penal laws of the State. The jailer was to see that he worked at hard labor upon such public works as provided by the statute, viz: County roads, streets or alleys, &c., or on some public building, until his labor discharged the fine, if not otherwise paid. (General Statutes, chapter 29, page 464.) For a failure to discharge any of the duties imposed upon him by the act referred to, the jailer is made liable to pay a fine of not less than $5 nor more than $15.

It seems, from the testimony, that the jailer was a little too lenient towards the prisoner and placed him occasionally at work not authorized by the statute. He permitted or required him, when out of jail, to carry water to those on the inside of the jail, and occasionally to the house in which the jailer resided for the use of his family. He was also required to clean up the court-house, but

Digitized by Google

for much of the time was at work on a fence around the public square and repairing a well, that was of a public nature.

The Commonwealth, instead of proceeding under the statute imposing a slight penalty, to be recovered by warrant, indicted the appellant for misfeasance in office. He was tried under the indictment; found guilty, and his fine assessed at $50, for which a judgment was rendered, and his office declared forfeited by reason of section 36 of article 4 of the Constitution of 1850.

This indictment is found under chapter 61 of the General Statutes, relating to jailers and prescribing their duties. The jailer received the prisoner into his custody; discharged him when the term expired, and there is nothing showing that he violated any of his duties as jailer as prescribed by section 4 of article 1 of chapter 61.

The extent of this jailer's offending is, that he did not require Goff to work at all times for the benefit of the county, and perhaps failed to make him labor as long on each day as the statute required; but this was not such a misfeasance in his office as should cause its forfeiture, but was a violation of the statute of April 10, 1878, imposing this slight penalty for a dereliction of duty; and the court below, instead of telling the jury that sweeping out the court-house and carrying water for the jailer was not the work required by the statute, should have dismissed the indictment and remanded the Commonwealth to its proceeding by warrant.

We do not mean to say that a willful refusal to receive a prisoner, or to discharge him after he is in custoday as the law requires, is not an indictable offense, although the prisoner is confined under the first statute referred to; but what we do mean is, that the proof warrants no forfeiture of office for a violation of any of the duties imposed by chapter 29 of the General Statutes; and the lesser penalty was intended to apply where there might be a slight departure from a line of duty that did not amount to a willful neglect or misfeasance or a malfeasance in office.

The offense for which the accused was tried, if found guilty, lost him the office as jailer; and the fact that the jailer required the prisoner to clean up the court-room, or carry water to his family on one or two occasions (particularly where it was a mere inadvertance on his part), instead of working him on the street all the while, is not such a grave offense as would subject the accused to a heavy fine and at the same time deprive him of the right to longer hold the office. Such was never contemplated by the framers of the Constitution, and no such penalty should be enforced in this case.

The judgment is reversed and remanded, with directions to set aside the judgment forfeiting appellant's office, as well as the fine imposed, and to dismiss the indictment.

DAVEZAC V. SEILER.

(*Filed Oct.* 22, 1892.)

1. *Weight of chancellor's finding on issue of fact*—On an issue of fact as to whether or not there was any consideration for an agreement by one surety to indemnify his co-surety against loss, by reason of their joint suretyship, where each party to the controversy sustains his contention by his own testimony and that of corroborating witnesses, the chancellor's finding will not be disturbed, since it can not be considered as clearly against the weight of evidence.

Digitized by Google

2. *Consideration—Evidence*—Where a surety agreed to indemnify his co-surety against loss, in consideration of the co-surety's promise to become the surety on the sale bonds of the purchaser of certain property at a judicial sale, the failure of the co-surety to sign such sale bonds, or to offer to do so, releases the said surety of his obligation to indemnify the co-surety.

O'Hara & Bryan and Hallam & Myers for appellant.

Jas. P. Tarvin and B. F. Graziana for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

The appellant and appellee and others were the joint sureties of Louis Geisbauer to the Northern Bank of Kentucky for a large sum of money; said bank also held a mortgage on a brewery, situated in Covington, belonging to Geisbauer, to additionally secure said indebtedness. Geisbauer having failed to pay off all of said indebtedness at maturity, a suit was instituted by the bank against him and his sureties to recover personal judgment for the unpaid balance and to enforce its mortgage lien on said brewery.

The brewery was operated by the appellant and appellee as receivers until it was sold by the order of court to satisfy Geisbauer's indebtedness. At the commissioner's sale John Brenner bought it at the price of $66,096, and executed bonds for the price, with the appellee as his surety, which bonds the commissioner making the sale accepted as a compliance with the condition of the judgment in that regard.

The appellee and Brenner had, previously to the sale, agreed to buy said brewery and run it in co-partnership; and the purchase by Brenner was pursuant to that agreement; and the appellee having gone on Brenner's bond as surety for the price, was to accommodate matters in reference to the suretyship that the judgment required to be taken on the bonds.

It turned out that the brewery did not sell for enough to pay said indebtedness, though it was thought, and so stated by one of the bank officers, that it did; and the bank thereafter recovered judgment against the appellee and another, not the appellant, for the balance.

The appellee, having paid more than his proportion of the judgment, sued the appellant for contribution. The appellant made defense to the action, upon the ground that the appellee had, for a valuable consideration, agreed, as far as the appellant was concerned, to assume the payment of all of said Geisbauer indebtedness and to indemnify the appellant against loss of any kind, by reason of his being a co-surety on said notes. The answer sets up three considerations for the agreement, viz:

1. That appellee was to buy the brewery and the appellant was to assist in procuring the appellee an eligible partner.

2. That the appellant was not to bid on the property at the commissioner's sale.

3. That appellant was to surrender to the appellee certain bank stock that had been assigned to them by Geisbauer as collateral security.

The foregoing was, according to the answer, the only considerations for the agreement. The reply denied *in toto* the allegations of the answer. Upon that issue evidence was taken and heard pro and con, the appellee swearing, and being supported in whole or in part

Digitized by Google

by disinterested witnesses, that no such agreement was ever made or contemplated by him. On the other hand the appellant swore, and was supported by other witnesses, that such was the agreement between the appellee and himself. So, upon the issue as presented by the pleadings, there was clear and positive proof to sustain either side, and the chancellor's judgment therein can not be reversed by us, because the issue being purely a question of fact, the chancellor's judgment thereon can not be disturbed, unless it is clearly against the weight of the evidence. It serves no good purpose to detail the evidence; the chancellor has done that in a full and clear opinion. It is sufficient to say that we can not say that his judgment upon the issue formed by the pleading is against the weight of evidence.

But when the appellant gave his deposition he produced a writing signed by the appellee on the same day but after the bonds were executed for the price of the brewery, and accepted by the commissioner making the sale obligating the appellee, in consideration of the appellant having signed the bonds as the surety of Brenner for the price of the brewery, "and for other good and sufficient considerations," to indemnify the appellant against any loss on account of his being Geisbauer's surety.

The only consideration expressed in said writing for the agreement is, the signing of these bonds as one of the sureties of Brenner. The expression or "other good and sufficient considerations" expresses no consideration; for, the consideration being traversed, the burden, so far as that expression is concerned, would be upon the plaintiff. Then the only expressed consideration in said writing for the agreement is, that the appellant had signed said bonds as the surety of Brenner.

Now this consideration is not that set up in the answer; it is wholly distinct from, and additional to, that set up in the answer; and the agreement set up in the answer, there being no allegation that it was in writing, must be considered as being verbal. But the question as to whether or not the writing can be introduced under the allegations of the answer, because of the variance between the allegations and proof, the answer being upon a verbal agreement and the agreement offered in evidence being in writing, and not the same as the alleged agreement in the answer, may be waived, because that agreement was admitted in evidence and proof was heard pro and con in reference to the consideration mentioned in the agreement, and the court held that there was no consideration.

Now the evidence is conclusive that the appellant never signed the bonds given by Brenner as his surety, and that the writing was signed by the appellee after Brenner had given the bonds to the commissioner, with the appellee as surety, and the commissioner had accepted the same; also the appellee swears that he was induced to sign the writing, the appellant being present, at the request of his lawyer, who told him that it was a mere matter of form, and he would not be bound upon it.

A disinterested witness, who was present, corroborates in full the appellee. It is true the appellant and the attorney referred to contradict these statements; but the chancellor having passed upon the evidence, we must let his judgment stand.

The appellant says, however, that on the occasion of the signing of the bonds to the commissioner, he was there and ready to sign them; but he does not say that he tendered his services to sign them in accordance with the agreement; but he stood by and saw, without offering his services, a different arrangement made which let him out of all liability on account of said matter, and left him, as

Digitized by Google

to his obligation as one of the sureties of Geisbauer, precisely where he was before, and the appellee's condition in no wise bettered by any act or omission of his; so it would seem entirely unconscionable to allow him to profit by the loss of appellee. But, be this as it may, it is a fact that the questions of fact in reference to these matters were decided by the chancellor and his judgment must stand.

The only legal question urged by the appellant that we deem necessary to notice is, that the court could not hear evidence upon the question of no consideration, because the consideration was a promise for a promise; but it seems to us that the agreement, if made, is to the effect that each party should perform certain things; and the failure of either party to perform his part of the agreement would be such failure of consideration as would be available to the other party in an effort to get rid of his obligation; or if one party had not, in fact, agreed, &c., the plea of no consideration would lie.

The judgment is affirmed.

GIBBS, &C. V. DAVIS.

(*Filed Nov.* 1, 1892.)

1. *A coercive sale under writ of fieri facias of only a life estate interest of the debtor defendant* in land, in which he owns at least a defeasible fee, is absolutely void and passes no title to the purchaser.

2. *Same—Judicial sales—Res adjudicata*—But where only a life estate of a husband in land, to which he owns the title in fee, is sold under judgments rendered in an action against him by his wife for divorce and alimony, the sale of such life estate, rather than the fee-simple estate, does not render the proceedings void, but only erroneous; and where the husband filed exceptions to the commissioner's report of sale, on account of such error, which were overruled, and failed to appeal from such adverse order and judgment, the proceedings are conclusive upon him.

One who claims the right to the possession of such land, under a purchase of the fee-simple title thereto under a judgment and order of sale thereof rendered subsequent to the sale aforesaid, is not entitled to the possession of said land until after the expiration of such life estate, it appearing that such purchaser had notice of the previous sale of such life estate and was a party to the suit in which it was sold.

Smith & Robbins for appellants.

D. G. Park and W. P. Lee for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Lewis.

This action was brought by appellee, F. G. Davis, against appellants, Q. V. Dyer and her husband, Geo. Dyer, and tenant, Boaz Gibbs, to recover possession of a tract of land. The plaintiff claims and traces his title as follows: In 1887 I. F. Davis conveyed to his three nephews, F. G. Davis, V. P. Davis and J. W. Davis, a tract of land, and by deeds of partition the parcel in controversy was conveyed by the other two joint owners to J. W. Davis.

In 1886, upon a judgment in favor of Bamberger, Bloom & Co. against J. W. Davis and F. G. Davis, execution was issued and levied on the land in dispute, and at the sale it was purchased by F. G. Davis, to whom, in 1889, the sheriff made a deed therefor.

Digitized by Google

The defendant on the other side claims title thus: In September, 1884, the defendant, Q. V. Dyer, who was then wife of J. W. Davis, brought an action against him for divorce and alimony, an attachment being issued and levied on personal property alleged to belong to him and also upon *his life estate* in the tract of land in dispute; and by the judgment of divorce rendered in her favor *his life estate* in the land so levied on was directed sold to pay amount of alimony and costs allowed, she becoming purchaser and subsequently receiving a commissioner's deed, by which such estate of J. W. Davis was in terms conveyed to her.

A jury having been waived, and law and facts of this case submitted to the court, judgment was rendered in favor of plaintiff for recovery of the land. To authorize that judgment it must be assumed that J. W. Davis acquired, under the deed from I. F. Davis, followed by the deed of partition, a fee-simple title to the land, and that, because only his life estate was levied on under the attachment and sold, the commissioner's deed to Q. V. Davis, now Dyer, was ineffectual for any purpose.

We are satisfied J. W. Davis did, when the land was levied on and sold, have, if not an absolute title, certainly a defeasible fee, which was, of course, an interest in the land greater in quantity than estate for life; and we are inclined to the opinion that if such levy and coerced sale of his life estate merely had been made by the sheriff in pursuance of a writ of *fieri facias*, the proceeding would have been void and no title have passed by his deed; but the sale as well as deed to Q V. Davis was made by a commissioner in pursuance of judgments rendered in an action to which J. W. Davis appeared as party defendant; and the report of sale was formally excepted to by him, one of the grounds of exception being that his life estate in the land, instead of the entire estate owned by him, had been levied on under the attachment and sold by the commissioner.

The judgments can not be, therefore, treated as void, although we think they were erroneous, and an appeal might have resulted in setting aside the sale; but as no appeal has been, nor could now be, prosecuted, they must be treated as valid, and the title acquired by V. G. Davis to the life estate of J. W. Davis, as to him at least, effectual. For if he might have himself conveyed and passed the title to his life estate, or any quantity of interest in the land less than the fee, to one person, and remainder in trust to another, or even retaining the reversion, we do not see why the judgments that he elected to abide by should not be held effectual for the same purpose.

It is, however, contended for appellee, F. G. Davis, that he is not bound by the judgment rendered in that action, and that his subsequent purchase, under execution and sheriff's deed, operated to give him an absolute title to the land and right to immediate possession, notwithstanding the previous purchase by, and conveyance to, Q. V. Davis of the life estate. But it seems to us that position is not tenable, because the levy under execution having been made subsequent to levy under the attachment, and, as stated in the officer's return, also subject to that levy whatever right or interest appellee may have acquired by his purchase under the execution, being *lis pendens*, must be subordinate to the lien to the extent it was adjudged to exist and be enforcible in favor of the attaching creditor against J. W. Davis. Besides, appellee was a party to the action of Q. V. Davis against J. W. Davis, and although the only contest made between him and the plaintiff was in reference to attached

Digitized by Google

personal property claimed by him, there is enough in the record to show he had actual notice of the sale to appellant and of exceptions filed to that sale, and, consequently, is bound by the judgment for the sale as well as that confirming report of such sale and directing a deed made to her for the life estate of J. W. Davis.

In our opinion, therefore, Q. V. Davis, now Dyer, acquired a perfect title to such life estate, and appellee, F. G. Davis, can not, while J. W. Davis lives, maintain an action for recovery of the land from her.

The judgment is reversed and cause remanded for dismissal of the action.

GRAHAM V. HITE.

(*Filed Nov.* 5, 1892.)

1. *Conveyances—Covenants running with land*—A covenant in a deed of conveyance of a city lot, to the effect that "the building or buildings that shall be erected on said lot shall be of brick, and set back the same distance from Third street as the house now erected on the southwest corner of Third and Oak streets, and shall be suitable dwellings for the neighborhood," was evidently for the benefit of the corner lot alone, which was owned by the grantor; and, therefore, one owner of a subdivision of the property conveyed, who claims through the grantee, can not enforce said restricting clause against the owner of another subdivision of said property, there being no restriction concerning the erection of houses in either of the deeds under which said parties claim.

2. *Same—Construction*—Such restriction was intended to require that the front walls of the buildings thereafter erected should conform to the front wall of the corner house, and does not prohibit the erection of dwellings on said property with a porch, stoop or platform nearer said street than said corner house.

3. *Practice—Injunctions*—Where a motion for a preliminary injunction to prevent the erection of a costly dwelling-house, at a certain place, was overruled, and the defendant permitted to proceed for many months with the erection of his house, at a cost of several thousand dollars, and thereafter the court, on final decree, issued a perpetual injunction against defendant on the same evidence heard on the motion for the preliminary injunction, and ordered him to tear away a considerable portion of his house, whereby it will be greatly disfigured, this court is disposed to regard such final judgment as oppressive, and to reverse it unless it is clearly upheld and required by law.

Humphrey & Davie for appellant.

Geo. B. Eastin, Geo. H. Alexander, Chas. A. Wilson and Hargis & Eastin for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

In December, 1886, T. L. Barrét sold and conveyed to J. L. Matthews a parcel of land in Louisville, described thus: "Commencing at a point on the west side of Third street, 31 feet south of the southwest corner of Third and Oak streets; running thence along the west line of Third street southwardly 108 feet; thence westwardly 126 feet to a ten-foot alley; thence northwardly along the east line of said alley 108 feet; thence eastwardly 126 feet to the point of beginning."

Digitized by Google

The deed then executed contains the following condition: "It is further agreed that the building or buildings that shall be erected on the said lot shall be of brick and set the same distance back from Third street as the house now erected on the southwest corner of said Third and Oak streets, and shall be suitable dwellings for the neighborhood."

September 5, 1887, Matthews conveyed 36½ feet off the south end of said parcel of land to Joyes, who conveyed same to J. C. Hale and he to appellant, Graham.

September 7, 1887, Matthews conveyed 36½ feet adjoining and north of Joyes' lot to J. C. Hale, who conveyed same to appellee, Hite.

It does not appear whether Matthews has conveyed the remaining 35 feet at the north end of the parcel, and, consequently, we assume he yet owns it.

Hite having previously erected, and then occupying a dwelling-house on the lot purchased by him, instituted this action August 19, 1890, for judgment enjoining Graham erecting a dwelling-house on his own lot unless set back — feet from the line of Third street, it being stated in the petition he was then proceeding to erect such building more than ten feet nearer Third street than is the house referred to at corner of Third and Oak streets.

September 2, 1890, plaintiff made a motion in open court for a preliminary injunction according to prayer of his petition, which, being heard upon affidavits agreed to be read as evidence, and, upon exhibits filed, was overruled; and there being no judicial restraint upon him defendant continued construction of his house, according to the original plan, and had, at cost of several thousand dollars, nearly completed it, when, July 15, 1891, without any additional evidence in behalf of plaintiff, the same court rendered the judgment appealed from, requiring defendant to tear away a considerable portion of the structure, whereby it will be disfigured and greatly lessened in value and utility.

It seems to us at the outset that the judgment is, under the circumstances, oppressive, and should not stand unless clearly upheld and required by law, especially as appellee has dealt with appellant very unfairly from the beginning.

The evidence shows appellant was ignorant of the restriction contained in the Barret deed, and so remained until this action was commenced, while appellee was aware of it, and that, although the foundation of appellant's house was completed by the last of May, 1890, whereby the general plan was developed, and appellee, in going into and out of his own dwelling-house, passed a very short distance from where the work was going on—not over 25 or 30 feet—he gave no notice or intimation to appellant of objection to the location of his building, but waited until nearly three months' work had been done and a large sum of money had been expended and then commenced this action. His conduct does not, however, quite amount to a legal estoppel, as contended by counsel, and we will, therefore, consider the other two grounds for reversal.

It seems to us too plain for dispute that the parties to the deed from Barret to Matthews intended simply for the front wall of each building thereafter erected on said parcel of land to conform with the front wall of the house then standing at the corner of Third and Oak streets in respect to distance form Third street, and not to either inhibit erection or prescribe shape or dimension of any porch, stoop or platform the respective owners might choose to build. And such has been the interpretation of the

Digitized by Google

deed by each person who has erected a dwelling-house on that parcel of land, including appellee, for there projects from the house on the lot retained by Matthews next to the corner lot, a covered platform and steps six feet, and from the house of appellee steps five feet, in addition to which is a bay window extending from the second-story near to the roof, and projecting about three feet from the front of his house, while from the corner house there is a platform and steps projecting only four feet four inches.

It is manifest that Barret, the original grantor, expected there would be erected costly and showy dwelling-houses on the land sold to Matthews, varying in designs to suit convenience, taste or fancy of the respective owners, and, consequently, did not intend to restrict them in regard to size or shape of porches, stoops or platform. Therefore, unless the porch of appellant that appellee complains of projects an unreasonable distance beyond the front wall of his house, compared with like structures attached to houses of appellee and Matthews, or unreasonably obstructs light and air, there is no cause of action against him, even if bound by the condition in the Barret deed.

The front wall of his house is on a line of the front wall of the corner house. The porch in question was, as stated by the architect, designed to be covered, but open, and it is not satisfactorily shown in what manner, if at all, light or air will be unreasonably obstructed by it. The only cause of complaint there can be is, that it extends six and seven-tenths feet nearer his property line than the main body of the house, which certainly does not authorize the judgment for such width of porch, attached to a house set back from the sidewalk, would not, ordinarially, nor, compared with projections for similar purposes from the houses of appellee and Matthews, should be regarded as unreasonable. We do not intend, however, to decide that there might not be such projections from one house as would seriously impair the value and usefulness of other houses on the same street, but simply that looking to the condition as set forth in the Barret deed, and the practical interpretation given to it by appellee himself, there is not enough in the record before us to justify interference of the chancellor.

But it is not necessary to consider this branch of the case further, because we are of opinion appellee has no right to enforce the restriction in that deed against appellant, for Barret did not intend to subject any one of the lots into which the parcel conveyed to Matthews might be subsequently divided to a restriction in its use for benefit of another or others of such lots, nor does the language used authorize such meaning or operation of that condition. Assuming, as may be done, the condition is, in effect, an easement, it was evidently created for the benefit of the corner lot mentioned, and probably such other lots in the neighborhood as were then owned by Barret, and the parcel conveyed to Matthews, as well as lots into which it might be divided, was intended to be made subject to the restriction, not each for use of others of such lots, but all for use alone of the corner lot. There was no such restriction in any deed made by Matthews for the two lots now owned by appellee and appellant, nor in any such deed made by Hale, through whom both likewise claim; consequently, Matthews, still owning one of the lots, could not, for the use of it, enforce any restriction on the lot of either appellee or appellant, nor could Hale, if he was still the owner of the lot belonging to appellee, enforce the restriction on appellant; and if neither of them could maintain an action like this against appellant we do not see how appellee, deriving title from them, can do so. There might

Digitized by Google

be covenants in deeds executed by a common grantor to different purchasers, made mutually and reciprocally binding upon each, but no such condition exists in this case. The essential relation of estates, dominant and servient, does not exist between the lots owned by appellee and appellant, and, consequently, there is not an easement on either for use of the other.

The only case cited by counsel that authorizes this action by appellee is Winfield v. Henning, 21 N. J. Equity Reports, 188. And even in that case it was conceded an action at law would not lie, and upon supposed equitable grounds alone the owner of one lot was held for benefit of another owner to observance of a covenant to the common grantor. But the judgment of the chancellor in that case was, in Dana v. Wentworth, 111 Mass., 291, held to be inconsistent with the decisions of courts of Massachusetts and of England. And, we may add, that judgment can not be supported by principle, because it restricts one lot-owner in the use of his property for the benefit of another, with whom he never contracted and to whom he never became bound, expressly or by implication.

The judgment is reversed and cause remanded, with directions to the chancellor to dismiss the action.

ROBERTSON, &C. V. ROBERTSON.

(*Filed Nov.* 17, 1892—*Not to be reported.*)

1. *Pleadings—Homestead—The burden of proof* is on the defendant to show that he is entitled to a homestead in property sought to be subjected by a creditor, although the plaintiff alleges in his petition that said land is not exempt from execution and is not occupied by the defendant as a homestead, and these allegations are traversed by the defendant in his answer.

2. *Pleadings—Husband and wife—Fraud*—In an action by a debtor to subject certain land alleged to have been paid for by the husband and fraudulently conveyed to the wife at the husband's instance, when the wife sets up a claim to said land as paid for by her, she should clearly and explicitly explain in her answer how she acquired her rights therein, and an evasive and uncertain answer by her will be regarded with suspicion by the court.

3. *Liens—Executions—Actions*—A judgment creditor, who has caused his execution to be levied on land owned by the defendant, but which had not been conveyed to the defendant, and who caused the same to be sold under said execution and then purchases it, may thereafter maintain an action in equity against the said defendant and his wife to subject such land to his debt, when it appears that the debtor, after such execution sale, had the legal title to said land conveyed to his wife. While such execution sale conferred no right on the plaintiff, because the defendant did not then have the legal title to the property, still the levy of the execution on it gave him a lien thereon for his debt, which he has the right to enforce in this action.

J. S. Glenn and J. E. Fogle for appellants.

Guffy & Ringo for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellee, Tol Robertson, having a judgment against the appellant, P. R. Robertson, sued out execution, which was levied on

Digitized by Google

a tract of land that had been purchased of Jacob Tichenor. It was sold under the execution and bid in by the creditor for a small sum. Subsequently, he sued out another execution, which was returned "no property."

At the time of the levy and the sale of the land the debtor did not have the legal title to it. Tichenor conveyed it to the debtor's wife after the creditor had brought suit upon his debt. This is alleged, and the attempted denial is evasive and not sufficient. The creditor now brings this suit, claiming the land, in fact, belonged to his debtor, although he had no deed to it; that by the levy upon it he acquired a lien for his debt, which he now seeks to enforce.

Various defenses are presented. The petition avers that the land was not exempt from execution and was not occupied as a homestead. These averments are denied, and a claim to the land as a homestead is asserted by the appellants. They were but statements of legal conclusions; were surplusage and did not place the burden on the plaintiff of showing that the debtor and his wife were not entitled to a homestead. It rested with them to so show, and there is no evidence to support the claim.

The petition avers that the debtor and not his wife paid for the land; that it was conveyed to her after the institution of the suit at her or her husband's instance, and in fraud of the creditor.

The answer is not of a satisfactory character. It is true it denies that the husband paid for the land, or that the conveyance was fraudulent, or that the wife did not pay any thing for it; but while it was a transaction with a third party, yet the relative rights of the husband and wife are involved, and such a transaction, occurring, as it did, after the creditor's suit was brought, is suspicious in character, and the claim of the wife should be clearly and fully stated. In this instance interrogatories to the appellants were attached to the appellee's petition. It is true no steps were taken to compel responses, but they had the right to respond to them, and if they had done so under oath their statements would have been evidence for or against them. It seems to us the wife should have at least set forth in her answer what and how she paid for the land. It is not sufficiently explicit. It appears to be evasive. So much so that under all the circumstances this court does not feel authorized to disturb the finding against her by the chancellor.

It follows, that while the execution sale conferred no right upon the appellee, inasmuch as the debtor did not have the legal title to the land, yet the levy gave him a lien upon it for his debt, which he has the right to assert in the mode now adopted.

It is said, however, that this is not so, because he had a complete remedy at law. If this statement of fact be true, then the legal statement is correct.

It is said that as the appellee had bought the land at the execution sale, he had the right, under sections 9 and 11, article 12, chapter 38 of the General Statutes, to give the debtor notice, and by motion obtain a judgment for the possession; and if, upon the trial, it appeared the debtor did not have a legal title, then the court could, in the same proceeding, subject the land to the payment of the debt, as in case of a return of "no property found."

The statute provides, however, that in order that the relief last mentioned may be granted, such steps shall be taken or pleadings filed as are necessary in an equitable proceeding. Thus we see that in such a case a perfect remedy can not be had at law. The proceeding must be converted into one like this one. An equitable proceeding must be set on foot, and this being so the statutory pro-

Digitized by Google

visions should not be construed as depriving the creditor of the right to bring this character of an action.

The judgment in this case enforcing the lien also embraces a personal one for the debt, although such a judgment had been entered in the former suit. Upon the return of the cause an order must be entered reciting that the satisfaction of one shall operate as the satisfaction of both.

The judgment is affirmed.

COCANOUGHER, &C. V. GREEN.

(*Filed Nov.* 26, 1892.)

1. *Specific execution of a contract by a court of equity is not a matter of absolute right in either party thereto*, but rests in the sound and reasonable judgment of the court, and will never decree it except it be in all respects equitable.

2. *Same—Laches—Limitation*—Although the right to maintain an action on a contract may not be barred by any statute of limitation, still a court of equity will refuse to specifically enforce such contract where the party seeking it has been guilty of such conduct or laches as to make it inequitable and unjust to grant such relief, or as amounts to a discharge or abandonment of the contract by him, or to an equitable estoppel; and one who is himself in default, and has failed to perform his part of the contract, can not, as a rule, maintain an action for its specific enforcement.

In this action plaintiffs seek the specific enforcement of a contract by which defendant, nearly fifteen years ago, promised to permit them to redeem certain of their land purchased by defendant at a judicial sale. It appears that plaintiffs abandoned said contract almost as soon as it was made, and performed no part of their obligation under it; and it is held that they have been guilty of such conduct and laches as to authorize defendant to regard the contract as abandoned by them; therefore, they are not entitled to the relief they seek.

W. C. McChord for appellants.

John W. Lewis for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Lewis.

February, 1872, C. C. Cocanaugher conveyed to trustees for benefit of creditors all his personal property not exempt from execution and a tract containing about 308 acres of land; there being, however, excepted his homestead and dower right of his wife, Lucinda.

In April his creditors agreed that she should receive, in satisfaction of her dower right, thus relinquished, the excess of what the personal property might sell for above amount it was appraised at, which turned out to be about $782; and there was some sort of agreement whereby he was to receive, in satisfaction of his homestead right, amount of profit that might be realized by resale of certain property purchased at the assignee's sale by persons acting in his interest.

Under judgment in favor of the trustees the tract of land was, October 4, 1872, sold, Sidney Green becoming purchaser, at the price of $9,900, for which he executed two sale bonds of equal amounts, bearing interest from date and payable in one and two years.

Digitized by Google

October 31, 1872, a written contract was made between Green of one, and C. C and Lucinda Cocanaugher of the other part, by which it was agreed that if they, or any one for them, paid the sale bonds executed by him as they respectively fell due, and also balance of the debt due to him from C. C. Cocanaugher, that might be left after deducting therefrom his pro rata share of estate in hands of the trustees, he would reconvey the land to C. C. Cocanaugher, or any person to whom he directed it conveyed.

It was further agreed that toward payment for the land they were to transfer to him whatever money they would be entitled to on account of the relinquishment of their homestead and dower rights; and it was recited in the contract they had that day given orders therefor on persons who had purchased personal property at the assignee's sale.

This action was instituted by C. C. and Lucinda Cocanaugher, April 21, 1889, for specific performance of that contract, to the extent of requiring Green to convey to Lucinda 115 acres of the land, 189 acres thereof having, in October, 1877, been sold and conveyed by him to another person; and judgment is asked also for $2,000, alleged to have been paid by them to, or received by, him in excess of the agreed price of the land.

The first ground made in brief of counsel for reversal of the judgment dismissing the action is, that the lower court improperly overruled the motion of appellants for a continuance.

It seems the principal part of the property, profit on resale of which was relied upon by appellant, C. C. Cocanaugher, to pay off the sale bonds executed by appellee, Green, consisted of horses and mules sent to the southern markets; and one of the questions of fact involved is how much, if any, profit was realized from that venture and paid by those making sale of the stock to appellee. It was also made a question whether he received any part of the sum of $782 payable to Lucinda.

The additional evidence it was the object of the continuance to procure, as disclosed by the affidavit filed, bears directly upon those two issues, and would tend to support the allegations of the petition. But it is needless to consider that ground of reversal until we determine the action could be maintained with such additional evidence before us.

Specific execution of a contract in equity is a matter not of absolute right in either party, but of sound and reasonable discretion in the court, and will never be adjudged except it is strictly equitable to do so. (Story's Equity, 742.) For, although an action for specific execution of a contract in writing is not barred by the statute of limitation before expiration of fifteen years, nevertheless a party may be guilty of such conduct or laches as to make it inequitable and unjust to grant to him relief, or as amounts to a discharge or abandonment of the contract, or to an equitable estoppel; and, as a general rule, he can not maintain such action at any time without showing he has been in no default and has taken all proper steps toward performance on his part.

It does not appear that appellants, at date of the contract, had o relied on any other means to pay off the two sale bonds as they fel due, except said sum of $782, agreed by the creditors to be paid t Lucinda for her dower right, and the amount of expected profits o sale of the horses and mules sent South, not alleged or proved t much exceed $3,000.

It is, however, admitted by C. C. Cocanaugher that, accepting a true the statement or representation of appellee, confirmed by h

Digitized by Google

own agent and attorney, that no profit had been made on the sale of the horses and mules, he abandoned the contract and in 1873 leased the land from appellee, agreeing to pay rent therefor, and so continued in the attitude of tenant instead of purchaser until 1877, when he voluntarily removed from it.

It further appears that the sale in 1877 and receipt by appellee of purchase price of all the land, except the 115 acres now in controversy, was at the time known to and acquiesced in and is not even now complained of by appellants.

It is, however, alleged in the petition, as an excuse for abandoning the contract and long acquiesence in the claim and exercise of ownership of the land by appellee, that he combined with the agent and attorney of appellant C. C. Cocanaugher, to misrepresent and deceive him in respect to profit on sale of the horses and mules, actually made and received by appellee. But as such fraudulent misrepresentation was made, if at all, in 1873, it seems to us it can not now be pleaded as an excuse for the long delay in bringing this action, for section 6, article 3, chapter 71, General Statutes, provides that no action for relief for fraud shall be brought ten years after time of perpetration of the fraud.

We thus have the case of a vendor bringing an action for specific execution of a contract, entered into nearly fifteen years previously, and practically abandoned by him almost the same length of time, without any legal or equitable excuse for such long delay. Moreover, it is not alleged or proved that the plaintiffs are now, or ever have been, ready, able and willing to perform their part of the contract. For, conceding that profit on the horses and mules was actually made and paid to appellee, still the amount thereof, according to the estimate of appellants, even when added to the sum of $782, fell short of paying the sale bonds and amount of C. C. Cocanaugher's indebtedness to appellee, shown to be about $1,300; in fact the resources relied on by them were not sufficient to pay the first of the sale bonds falling due; and it is not alleged that the purchase price of the land had been or could be paid except by charging appellee with rent of the land for more than fourteen years, during which period it was with the knowledge and consent of appellants claimed and used by appellee as his own, and part of the time occupied by them as tenants.

Appellee might, upon failure of appellants to meet and pay off the sale bonds as they contracted to do, have enforced his lien upon the land for satisfaction of the entire purchase price; but he could not have maintained such action at any time after abandonment of the contract by appellants, which this record makes very plain, he consented and agreed to; and if he, after such agreement, could not have enforced collection of the purchase price, certainly appellants ought not to be permitted, after a delay of nearly fifteen years, to enforce execution of the contract, especially when it does not appear they were ever able or offered to perform their part of it, in the manner contemplated.

It seems to us the essential grounds for relief in this case are wanting, and the judgment is, therefore, affirmed.

Digitized by Google

CHEMICAL NATIONAL BANK OF NEW YORK v. WAGNER, ASS'EE.

FIRST NATIONAL BANK OF NEW YORK v. SAME.

(Filed Nov. 29, 1892.)

1. *Bills and notes* An innocent purchaser, for value and without notice, of a negotiable note of a corporation takes it at his peril as to the authority of the officer of the corporation to draw said note for it, by whom it purports on its face to have been drawn. Against such a holder the corporation may plead want of authority in such officer to bind it by executing such note.

In this case it is held that under the by-laws of a certain corporation its treasurer had no authority to draw notes in its name.

2. *Same—Innocent purchasers*—A negotiable note of a corporation, drawn in the name of the corporation by its treasurer and made payable to himself individually and indorsed by him individually and delivered to the president of the corporation, carries on its face sufficient notice of its infirmity to put a purchaser on inquiry, and one purchasing it can not be regarded as an innocent holder for value, and without notice of any infirmity therein.

Wm. Worthington, W. B. Burnett and John S. Ducker for appellants.

C. L. Raison, J. C. Wright and C. J. Helm for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Bennett.

The Swift Iron and Steel Works Company is a corporation created by the Legislature of this State in January, 1871.

At the time of the transactions in controversy in this case, E. L. Harper was president of the company, and J. H. Mathews was its treasurer. There were also a vice-president and board of directors of said company.

The powers of each are set forth in the company's by-laws as follows: "Section 3. All contracts and obligations binding the corporation may be signed by the president or vice-president." "Section 5. The treasurer shall have charge of the finances of the company and shall sign all checks and receive and account for all moneys and property coming into his hands." "Section 8. There shall be a business committee, consisting of the president and vice-president, who shall have full power to transact the business of the company under such restrictions as the board of directors may devise from time to time." This by-law was amended so as to authorize either member of the business committee to act in the absence of the other, and, in the absence of both, "the treasurer shall have power to act as such committee." J. H. Mathews, in April and May, 1887, drew six promissory notes in the name of the Swift Iron and Steel Works for $25,000 each, due respectively in four months, and signed by him as treasurer, and made payable to himself individually, which he then indorsed individually and delivered to E. L. Harper, who was then vice-president of the Fidelity National Bank of Cincinnati. Said Harper, as vice-president of the Fidelity National Bank of Cincinnati, indorsed said notes to the appellants—two to the Chemical National Bank and four to the First National Bank—to collaterally secure loans of money to the Fidelity National Bank.

Not long thereafter the Fidelity National Bank and the Swift Iron and Steel Works becoming insolvent, made an assignment to

Digitized by Google

the equal benefit of creditors. The appellants filed these collaterals in the suit by the assignee of the Swift Iron and Steel Works to have its affairs settled and assets distributed for the purpose of obtaining their pro rata thereon. The lower court rejected their claim upon the ground that J. H. Mathews, as treasurer, had no authority to issue them payable to himself individually, hence they were void at the instance of the company.

The appellants contend that said Mathews did have authority to issue said notes; but if he did not the notes were negotiable paper, and they were purchasers thereof, for value, having no notice of any infirmity in them.

It is conceded for the sake of the argument that the notes dated at Cincinnati, Ohio, indorsed and payable to order at a bank in New York, were, by the laws of Ohio and New York, negotiable paper, and that the appellants, as innocent holders thereof for value, are not prejudiced by any equities existing between the antecedent parties, of which they had no notice, or notice of such facts as should put them upon inquiry as to the existence of the antecedent equities; but the rule protecting innocent purchasers of negotiable paper against antecedent equities does not apply to the authority to make the paper. The holder of the paper purchases it at his peril in reference to the authority to make it. *Caveat emptor* applies to him in full force in reference to the authority to make the paper. For instance, if the person making the paper professes to act as agent for another, the person purchasing it must look out for the agent's authority to make the paper. The purchaser purchases at his peril as to the authority of the agent. The same rule applies to an agent of a corporation issuing paper in the name of the corporation. The purchaser of the paper buys it at his peril as to the agent's authority to issue it. The only exception is, if the agent of the corporation, in issuing the paper, acts within the scope of his authority, but in the particular instance wrongfully, of which the purchaser for value had no notice, nor of such facts as should put him upon inquiry as to the authority in the particular case, then the innocent purchaser would be protected upon the ground that the corporation, whose agent, acting within the scope of his authority and with the consent of the corporation, should suffer by the wrongful act of the agent acting within said scope, rather than an innocent purchaser. So the question is, did Mr. Mathews have authority to issue these notes? We think not, for the following reasons: By the fifth by-law, *supra*, his authority is confined to taking charge of the finances of the company, signing its checks, receiving and accounting for its money coming to his hand, and by an amendment to act as a business committee in the absence of the president and vice-president. Now, by the fifth by-law, he had no authority to issue said notes, and there is no pretense that he issued them as a committee. But suppose he did; had he the authority to do so? We think not. In the first place, because if he could issue them at all, he could do so only in case of discharging the business of the company in the absence of the president and vice-president, and it is not shown that they were absent, which absence is a condition precedent to such authority; and, in the second place, the business committee, including the president, vice-president and treasurer, were confined to transacting the legitimate business of the company subject to the discretion of the board of directors, and it is not shown that they conferred authority upon the committee to issue these notes or any notes of the kind which would be beyond the scope of their authority as a business committee. Nor is it shown that they, or any of them, ever exercised such

Digitized by Google

authority with or without the authority of the board of directors, save the treasurer's action in this instance, which action was an attempt by the treasurer to bind his principal as its agent to pay him, as principal, the sum that the notes called for.

To allow the agent to thus bind his principal, without authority from him to do so, would at once destroy good faith on the part of the agent and become the most glaring fraud; to prevent which, and to protect the principal, the law declares such transactions void at his instance. The principal may give authority to his agent to thus bind him, and an agent in like manner may bind the corporation he represents, if he acts under the "immediate instructions from some other superior agent" authorized to thus act, or from the board of directors. (1 Morawitz on Corporations, section 527.)

It does not appear that the board of directors authorized J. H. Mathews to thus act, and if Mr. Harper authorized him to thus issue said notes, it was an attempt to bind the company for his personal benefit in connection with another corporation not within the scope of his authority, and was a fraud upon his principal. Now the notes bear upon their face the conclusive evidence of the fact that they were issued by Mr. Mathews, as agent, to himself, as principal, which was notice of itself to the appellants that the notes were void at the instance of the company, which destroyed their immunity as innocent purchasers, consequently they could not recover thereon unless they could show that the company, by its superior officer, authorized him so to do, or its board of directors, with like authority, authorized Mr. Mathews to thus issue the notes, because the appellants, being *prima facie*, not innocent purchasers, the notes being void upon their face, they, in order to entitle them to recover from the company, must show that they were issued rightfully and properly by the company's agent, which they have failed to do.

The judgment is affirmed.

There is no brief on file for the appellees.

WILSON V. CAMPBELL, &C.

(*Filed Dec. 3, 1892—Not to be reported.*)

Decedent's estate—Homestead—Trusts—In a controversy between a decedent's widow, who was his second wife, and the heirs-at-law of the decedent's first wife, concerning the widow's right to a homestead in certain land to which decedent had the legal title and which he occupied as a homestead at the time of his death, the widow's homestead right therein can not be defeated except upon the clearest proof by the children that they are entitled to the immediate possession of such property.

Although there is some parol evidence that conduces to show that the land was paid for with the first wife's estate in 1850, under some agreement that she was to have it, yet it appears that the legal title had been in the husband for almost forty years, and the proof is not sufficient to establish a resulting trust in favor of the first wife's heirs, thus defeating the widow's claim.

John W. Lewis for appellant.

J. W. S. Clements for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Holt.

Digitized by Google

This is a controversy between the widow of Josiah Wilson, who was his second wife, and the children of his first wife. Some of the latter are dead, but they are represented in this litigation by their children.

At his death he had the legal title to, and was with her, who is now his widow, living upon the land in contest. She claims it as a homestead. The heirs of the first wife deny she has any right whatever, and say they are the owners and entitled to the immediate possession. It is proven the land is worth less than a thousand dollars; that it was occupied *bona fide* by the husband and wife when the former died as their home, and has ever since been so used by the widow.

There is no doubt she is entitled to what she claims, unless the claimants, as heirs of the first wife, are entitled to the immediate possession of the property. They claim it upon the ground of a resulting and enforceable trust. It is shown that a part of the land was obtained by means of estate that the first wife derived from her father. It was held in the name of her brother, and as long ago as April 24, 1850, was conveyed by him to the husband, Josiah Wilson. She also had some estate coming to her from other relatives and it was traded for certain land, her brother holding the title to it also, and it finally exchanged for the remainder of the land in contest, the deed being made to the husband April 25, 1850. It does not appear why the deeds were made to the husband instead of the wife, unless it was because they bore that relation to each other. There is some evidence that when the wife parted with a portion of what she was entitled to, it was agreed that she was to have the land that was gotten in exchange; but it is shown she knew the deeds were made to her husband. It was done many years before her death, and nearly forty years before the bringing of this suit.

Our present statute, adopted in 1852, provides that where a deed is made to one person, and the consideration paid by another, no trust shall result in favor of the latter; but these conveyances were prior to its enactment, and while it is true if the land really belonged to the first wife the husband had a life estate in it, and the remainder parties could not sue for the possession until his death, yet the testimony as to the alleged trust is not of such a satisfactory character that it should prevail against the widow's claim to a homestead. The heirs could have sued for the correction of the deed and the establishment of the trust at any time after the first wife's death. The legal title was in the husband for nearly forty years, and holding it thus, the wife, who is now his widow, lived upon it with him for ten or fifteen years before his death.

Upon this state of case a trust should not be raised upon parol testimony of an unsatisfactory character to defeat the widow's claim to a homestead right in the land. Such a claim under such circumstances would not be heard as against creditors of the husband.

The judgment is reversed for further proceedings consistent with this opinion.

THOMPSON V. THOMPSON, &C.

(*Filed Oct.* 25, 1892.)

1. *Ejectment—Burden of proof*—In an action of ejectment the burden of proof is on the defendant where the first paragraph of the answer traverses plaintiff's claim of ownership and to right of possession, and the second

Digitized by Google

paragraph thereof alleges that an absolute gift of the land involved had been made by the plaintiff to his son, under whom defendant claimed, and that the son had entered and held possession of said land adversely for more than fifteen years.

2. *Appeal—Weight given verdict*—Although it is by our Code made a cause for a new trial that the verdict is not supported by sufficient evidence, a judgment will not be reversed on appeal, merely because the verdict is not sustained by a preponderance or the weight of the evidence; a reversal will be granted only when the verdict is clearly and palpably contrary to the evidence.

3. *Adverse possession—Evidence*—The evidence herein authorized the jury to find that the plaintiff had made an absolute gift to his son of the land herein involved in 1867, and that the son had held it adversely, claiming it as his own, for more than fifteen years previous to his death and the institution of this action.

4. *Same—Estoppel*—Certain writings executed by the son, after he had been in possession of such land for more than fifteen years, wherein he acknowledges that his father had merely loaned said land to him, and that he had never, at any time, claimed it adversely, do not conclude or estop the heirs of the son to assert that the possession of the son was all the time adverse, or that title had been perfected in him by reason of the gift by the father and the adverse possession by the son for fifteen years before the signing of such papers. The weight of such papers, signed by the son, as evidence is for the jury to determine.

5. *Instructions—Adverse possession*—An instruction that if the father made an absolute and unconditional verbal gift of the land to his son, in pursuance of which the son entered into possession, claiming title according to the gift, and that if such possession continued for a period of fifteen years and was actual, visible and notorious, that then such possession was adverse and the jury must find for defendant, correctly presented the meaning and effect of adverse possession as involved in this action. It was not essential that the instruction should embody the idea that the possession of the son must have been hostile in the commencement and continued uninterruptedly for fifteen years, open and of such a character as to indicate that the son claimed the land as his own.

Breckinridge & Shelby and C. J. Bronston for appellant.

Jno. R. Allen for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lewis.

This is an action brought May, 1, 1888, by appellant, P. H. Thompson, against Margaret Thompson, widow, and Rodes, Charles and C. C. Thompson, children and heirs of Rodes Thompson, son of plaintiff, for recovery of a tract of about 100 acres of land.

While the allegation of the petition that plaintiff is owner and entitled to possession of the land is denied in first paragraph of the answer, in the second defendants state that, for consideration of love and affection, an absolute gift of it was made by plaintiff to his son Rodes, under which he took, and for more than fifteen years before commencement of the action, held possession adversely. It is, therefore, manifest the burden of proof was on defendants to show plaintff had been divested of title, thus confessed to have been once in him, by adverse possession, affirmatively pleaded. The evidence introduced on behalf of defendants uncontradicted, as was the case at conclusion of it, fully supported their claim of title, and, consequently, the motion then made for an instruction to the jury to find for plaintiff was properly overruled. The same motion was made

Digitized by Google

and overruled at conclusion of the entire evidence; but we need not review the ruling then made, because it is subordinate to the question that arose on motion for a new trial, whether the verdict is sustained by sufficient evidence.

Although it is, by subsection 6, section 340, Civil Code, made in terms a cause for new trial that the verdict is not sustained by sufficient evidence, this court will not reverse simply because a verdict is not in our opinion sustained by a preponderance or the weight of evidence, but only where it is clearly and palpably against it.

About the year 1867, plaintiff, P. H. Thompson, placed his son Rodes in possession of about 150 acres, including the 100 acres in dispute, which was part of his home-tract, containing about 1,200 acres. He also placed two other sons and a daughter in possession of a part of his tract, but some years after that date, though before expiration of fifteen years, concluding the quantity he had set apart to Rodes and another son was an undue portion, he became dissatisfied and cut off and repossessed himself of enough of each tract to reduce it to about 100 acres, which was defined and identified, as had been the original parcel of 150 acres. The evidence clearly shows that from 1867 to his death in 1888, Rodes Thompson had continuous possession, use and enjoyment of the 100 acres of land. He erected improvements upon it and obtained policies of insurance in his own name, and when the dwelling was burned collected and appropriated the insurance money. He listed and paid taxes on it. From time to time he leased parts of it to and collected rents from various tenants, including his father. In fact, he had, without any question or interference whatever by his father up to 1884, as full possession, use and control of the land as if he had been the actual owner of an indefeasible title. In addition to all these acts of ownership, of which his father, residing not one mile away, was cognizant and never objected to, several disinterested witnesses testify that on various occasions the plaintiff told them he had given the land to his son and disavowed his once ownership and control of it, and, in 1878, actually executed a receipt which, fairly interpreted, practically amounts to an admission he had given the land to his son, and disclaimer of ownership in himself.

It appears that previous to that time a policy of insurance on the dwelling-house, afterwards destroyed by fire, had been issued to Rodes Thompson, and objection was made by the insurance company to paying amount of insurance on the ground he was not the owner. Thereupon, in addition to receipt of the money given by Rodes himself, P. H. Thompson executed the following writing: "I hereby acknowledge the receipt of my son, Rodes Thompson, of the sum of $800 to him by the Kenton Insurance Company for the loss under this policy, and in consideration of such payment so made I hereby waive and release all my rights, *if any I had or have*, to compensation of said loss." There is evidence on the other hand of plaintiff and others tending to show he did not give the land to Rodes Thompson; and, in addition, there was introduced a paper executed by him at the instance and at the house of his father, in which it is stated substantially the latter had, a number of years previously, loaned to him use of the 100 acres of land, and that he then recognized it to be the land of his father, with the unimpaired right to retake possession and dispose of it at his pleasure; and, furthermore, that he, Rodes, never held said land adversely to his father, but all the time recognized his title as perfect.

In 1884, another paper was prepared by his brother, which he was induced to sign, containing, in the language used, a *solemn* disavowal

Digitized by Google

of any right to the land, and admission of title at that date in his father.

Rodes Thompson married in 1869 against his father's will, and there never was afterwards much intercourse or good feeling between his wife and father's family, nor do Rodes and her appear to have always lived together harmoniously. He was very dissipated, and, as a consequence, generally embarrassed financially; and, at the time the last paper was given, sued his brother, who had required him to make a settlement. The evidence is such that it might have been reasonably inferred by the jury that not only was Rodes Thompson, on account of his dependence upon his father, without disposition or will to resist any demand made on him, but that the papers proved too much, for they were evidently prepared in pursuance of advice of a lawyer, and with a view to defeat his title, probably already acquired by more than fifteen years' possession, under what he might be able to show was an unconditional gift. Therefore, as evidence, the papers can not be necessarily treated as conclusive on the issue of fact in favor of the plaintiff, nor do they amount to an estoppel, for at these dates, more than fifteen years after 1867, Rodes Thompson had or had not acquired a perfect title to the land. If he had, then H. P. Thompson could not have then, by any legal proceeding, divested him of title or possession of the land; and, consequently, neither the position nor rights of plaintiff were altered or in any way affected by what was stated or admitted in the papers. If he did not then have title it was because there had, in fact, never been any verbal gift of the land nor adverse possession under it, and, consequently, H. P. Thompson's right to recover the land was not impaired by reliance on any such conception or admission, his right to maintain an action, if he had any, being as complete in 1888 as it was in 1884.

It seems to us the statements and admissions contained in those papers do not constitute an estoppel in any sense of the term. What they amounted to as evidence on the issue of fact was for the jury to determine.

It thus results as our opinion that the instruction asked to the effect that if plaintiff, relying on statements and promises contained in those papers, withdrew his demand for possession and consented for Rodes to remain, the jury should find for plaintiff, was properly refused by the court.

The instruction given, and which presents the true issue, is as follows: "If the jury believe, from the evidence, that the plaintiff, Patrick Henry Thompson, made an absolute and unconditional verbal gift of his entire title to the land described in the petition to his son, Rodes Thompson, and in pursuance of such gift he, the said Rodes Thompson, entered into the possession thereof, claiming title thereto according to such gift, and that such possession of said land continued for a period of fifteen years previous to Rodes Thompson's death, and during such period his said possession was actual, visible and notorious, then such possession is adverse and the jury should find for the defendant."

It seems to us the meaning and effect of adverse possession, as applicable to this case, could not be more fully nor accurately defined, and if there is any fault in it, defendants, not plaintiffs, were liable to be prejudiced thereby; but counsel contends it was error to refuse an instruction asked embodying the idea that adverse possession sufficient to defeat the legal title of plaintiff must have been hostile in the commencement and continue uninterruptedly for fifteen years,

Digitized by Google

and open and of such character as to clearly show that Rodes Thompson, the occupant, claimed the land as his own.

A joint tenant may, by adverse possession for fifteen years, defeat any recovery by his co-tenant; so a lessee's adverse possession for the statutory period takes the right of even his landlord's entry; but as the entry is, in each of such cases, amicable, and no presumption of adverse claim exists, adverse possession, in order to bar recovery, should be brought to notice of the joint tenant or landlord and, therefore, proved to have been open and of such character as to clearly show that the occupant claimed the land as his own. But in this case, as in every one like it, where it is shown an absolute gift of land was made by the father to the son, and that the latter took and held under it, adverse possession follows and continues as a legal consequence, and the donor must be presumed to have had notice of such adversary claim, because it was intended and procured by him to be so.

Perceiving no error of law accruing on trial of this case, and the verdict not, in our opinion, being clearly against the evidence, the judgment is affirmed.

CARGILL V. COMMONWEALTH.

(*Filed Dec.* 13, 1892.)

1. *Weight of verdict of jury*—On the trial of a defendant for detaining a woman against her will, with the intention of having carnal knowledge with her, the question whether the woman acted against her own will is for the jury to determine; and if supported by any evidence the verdict will not be reversed in absence of errors of law on the trial.

2. *Criminal law—Instructions*—When the Commonwealth, on the second trial of a defendant, proves his statements on the first trial, which do not, in any sense, amount to a confession, the accused is not entitled to an instruction that the confession of the defendant will not warrant a conviction unless accompanied by other evidence that the offense was committed, &c.

3. *Criminal law—Evidence*—In the absence of any thing indicating an abuse of its discretion in that regard, this court will not hold that the trial judge, without sufficient cause, permitted the Commonwealth to introduce a witness after both sides had closed their evidence.

4. *Specific acts of unchastity on the part of the prosecuting female witness* can not be proved by a defendant charged with detaining such witness against her will, with the intention of having carnal intercourse with her.

5. *Criminal law—Evidence—Practice*—The fact that the jury, on the second trial of accused, were permitted to take with them, when retiring to consider of their verdict, the indictment, which had written on it the verdict of the first jury, finding defendant guilty, is no ground for a reversal, when it appears this defendant did not object thereto at the time. By proper vigilance his objection in this regard might have availed him.

Smith & Robbins for appellant.

W. J. Hendrick for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Holt.

This is the second conviction of the appellant, Frank Cargill, for detaining Lillian Yarbroger against her will, with the intention of having carnal knowledge with her.

Digitized by Google

The punishment awarded on the first trial was three years, and upon the last trial three and a half years in the penitentiary. The case upon the former appeal will be found reported in 12 KY. LAW REP., 149.

The testimony is quite conflicting, whether the conduct of the appellant was against her will. But, under the rule that governs this court in a criminal case, the fact that it is conflicting forbids a reversal, although the weight of the evidence may seem to us to be upon the side of the appellant.

In such case the finding of the jury is conclusive, and in the absence of substantial legal error the verdict must stand. Complaint is not made of the instructions, save it is said the entire law of the case was not given to the jury.

It is urged that this consisted in failing to instruct under section 240 of the Criminal Code, which provides that a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other evidence that such an offense was committed.

A case was not, however, presented for such an instruction. A witness testified to what the accused had sworn upon the former trial. It did not, however, in the least degree, amount to a confession. His then testimony, as proven by this witness, who was then a juror, if true, showed that he did not commit the offense charged, but that the woman was a willing party to all that occurred.

After the close of the evidence upon both sides, the court permitted the State to introduce a witness and prove by her a statement of the accused. The trial court has, in tne interest of justice, a broad discretion in such a matter, and in the absence of a manifest abuse of this discretion its action should not be disturbed, and there is no sufficient reason to do so in this instance.

The accused offered to prove specific acts of unchastity with other men. The evidence was properly rejected. If this were true, it would not have shown that the appellant was not guilty of detaining her for an immoral purpose against her will.

In rape the character of the prosecutrix for chastity may be impeached, but it must be done by evidence of her general reputation and not by proof of particular instances of unchastity. (3 Greenleaf on Evidence, section 214.)

While the language of the State's attorney in the argument of the case was quite emphatic in saying that the testimony of the accused showed him to be an infamous perjured scoundrel, yet it did not pass the proper limit, looking at the evidence from his standpoint. The ground mostly relied on in argument for a reversal is, that the jury, when they retired to make their verdict, took with them to their jury-room the indictment, and that upon the back of it was written the former verdict.

The Criminal Code, section 248, provides that a jury, upon retiring to deliberate as to a finding, may take with them all papers and other things that have been given in evidence.

It has always been customary and is proper for them to take the indictment. That the indorsement of the former verdict was allowed to remain on it was, of course, an oversight, but the appellant made no objection, and it was his business as much as that of the other side to see that the proper papers were taken by the jury, and if not being done to call the court's attention to it. By proper vigilance upon his part his right of objection would have been available to him.

An accused has a right, of which he can not be deprived, to be in

Digitized by Google

court when the case is submitted to the jury. He has a right to see what papers they take to their jury-room, and to make any question he desires relative thereto.

If the jurymen, or any of them, saw the indorsement, it does not appear, however, to have controlled their verdict. They did not find a like one, and the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

CENTRAL PASSENGER RAILWAY CO. V. CHATTEESON.

(*Filed Sept.* 14, 1892.)

The appellee has the right at any time after the appeal is granted to file the transcript with the same effect as if filed by appellant, and may, therefore, upon a transcript thus filed by him, move to affirm as a delay case.

Humphrey & Davie and Kohn, Baird and Speckert for appellant.

Stone & Sudduth, O'Neal, Phelps & Pryor and Davis & O'Doherty for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Barbour.

The appeal in this case was granted by the lower court on the 19th of May, 1892. A supersedeas bond was executed in due time, and, on the 19th of July, the transcript was filed by the appellee in the clerk's office of this court. There are now pending for our consideration two motions—one by the appellant to strike the appeal from the docket, and one by the appellee to affirm the judgment as a delay case. The provisions of the Code bearing upon the questions raised by the motions are:

Section 738. "The appellant shall file the transcript in the clerk's office of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time, as, for cause show, the court may do;" and

Section 741. "The appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by appellant;" and

Section 759. "If an appeal with a supersedeas be taken for delay merely, the appellee may, at any time, move the court to affirm the judgment as a delay case. * * * Whereupon, the court shall examine the record, and, if they find no error in the proceedings, and believe the appeal was prosecuted for delay merely, they shall affirm the judgment."

Digitized by Google

It seems to us that the reason and the letter of the statute so plainly secures to the appellee the right, at any time after the appeal is granted, to file the transcript and urge a speedy trial of the appeal, that we would deem it unnecessary to write an opinion upon the motions were it not for the fact that we have been referred to the rulings of the Court of Appeals in two cases, which, it is insisted, support the appellee's contention. The argument is that the appellant, having executed a supersedeas bond, thereby rendering the judgment safe, and itself liable for both interest and damages, it can not be hastened in the appeal, but has the full time allowed by the Code in which it can keep the appeal in abeyance. We have examined the cases referred to. In one, Dulaney v. Murphy, 12 KY. LAW REP., 688, the judgment appealed from was rendered December 12, 1890, and the appeal was granted at the same time, the supersedeas bond being executed a few days thereafter. The appellee filed the record in the Appellate Court on the 16th of December, and thereupon moved the court to dismiss the appeal, and the court sustained the motion, dismissing the appeal upon the ground that the judgment appealed from was not final, the court in its opinion saying that the appellee's "right to file the record and make the motion is not denied. This question, if there be one, is not made." The other case is that of the Louisville Water Works Co. v. Clark, sheriff. In that case the judgment was rendered October 27, 1890, and an appeal was then granted and the judgment superseded. On December 11th the appellee filed the transcript in the Appellate Court and moved that the judgment be affirmed as a delay case. On December 18th this motion was overruled, no reasons being given so far as the record shows. In February, 1891, the case was passed for oral argument, and on February 23, 1892, the motion to affirm as a delay case was renewed. The appellant objected to the motion, but on March 8, 1892, the motion was sustained and the judgment was affirmed. No opinion was delivered.

It will thus be seen that in the first case the question was not made or decided; and in the second case we have nothing in the record to show the reasons of the court for its rulings. If the objection had been made that the appellee could not file the record, and thereby hasten the action of the court upon the appeal, it seems that the court, in overruling the motion, would (as the appellant asks us to do in this case) have stricken the case from the docket; but, instead of that, the case is, after the overruling of the motion to affirm, passed for oral argument, and is subsequently, upon reconsideration, affirmed as a delay case. The court can only speak by its records, and the record, instead of sustaining the contention of the appellant now made before us, shows nothing further than that, upon the first consideration of the motion, the court did not regard the case as one which should be affirmed as a delay case, but, upon reconsideration, changed its opinion and sustained the motion. All of which assumes the right of the appellee to file the record before the expiration of the time allowed the appellant by section 738.

It does seem to us that the rule contended for by the appellant would absolutely annul the provisions of sections 741 and 759. The swiftest, the plainest judgment, even a judgment on a promissory note by default, could, by the taking of an appeal and the execution of bond, be delayed at the will of the defendant. A party could, by praying an appeal in the lower court, suspend all action until after the expiration of the twenty days preceding the first day of the second term of the Appellate Court from the granting of the appeal, and at the end of that period, although he had lost his right under that

Digitized by Google

appeal, he would still have the right to obtain an appeal from the clerk of the Appellate Court, which would have the same effect, and would still further suspend any action by the appellee or the court until after the expiration of the twenty days before the first day of the second term after the granting of that appeal; and, therefore, the provisions of the Code allowing the appellee to file the record in the Appellate Court with the same effect as if filed by the appellant, and giving him the right, at *any* time, to move the court to affirm the judgment as a delay case, amount to nothing. They secure to the appellee no right whatever. For, if the appellant fails to file the transcript in the time named in section 738, the appellee, by simply filing a copy of the judgment and bond, can have the appeal dismissed with damages. In that case (in event of the failure of the appellant to file the transcript in time) his right to that appeal is gone—the judgment, in legal contemplation, ceases to be superseded, and there is no case for affirmance. But if this view should be considered technical, still the appellant, who has abandoned the appeal granted him by the lower court, may obtain an appeal from the clerk of the Appellate Court, which has the same effect as the original appeal, suspends (if counsels' argument is correct) all action by the appellee until the time allowed him to file the transcript has expired, at which time his right to an appeal is lost entirely, and will, on motion of the appellee, be dismissed with damages. So, in any state of case, the motion to dismiss answers every purpose.

It is no answer to this assertion of the appellee's right to say that the appellant has, by his bond, not only secured the judgment and interest thereon, but damages also, for in many cases the interest and damages will prove an inadequate compensation. Were it not so, why have we a law providing for the summary disposition of delay cases? A party's right to an appeal is not upon the same footing as the right to institute an action. One having a cause of action can not be compelled to assert it in the courts. He can choose his own time to act; but when he does appeal to the courts the spirit of the law requires of him, as well as of his adversary, a diligent prosecution of the cause to its final determination. Either party will always, upon a proper showing, be accorded, both in the lower court and in the Appellate Court, a reasonable time to prepare his case; but neither has the right to wantonly vex his adversary with unnecessary delays. Section 738 of the Code was intended not to enlarge, but to restrict the appellant's right. He may file the transcript, if he can obtain it the same day the appeal is granted him, but he *must* file it within the time named. Section 741 secures to the appellee the same right. The motion to strike the appeal from the docket is overruled.

We have examined the record, and we do not believe that the appeal is prosecuted for delay merely, and, therefore, the motion to affirm the judgment as a delay case is overruled.

FORD LUMBER AND MFG. CO. V. MCQUEEN.

(*Filed Dec.* 14, 1892.)

1. *Navigable streams*—A creek susceptible at certain periods of the year of valuable use for the purpose of floating logs to market, and which has been continuously so used for more than twenty years, must be considered to that extent a navigable and floatable stream, subject to the use of the public.

Digitized by Google

2. *Same—Damage from lodgment of one's logs on land of another*—Where the owner of logs has been negligent in placing or leaving them on the banks of a navigable stream, and, by reason of that negligence, the logs have lodged on another's land, the owner is liable for the damage whether he undertakes to reclaim the logs or not. If, however, the logs were thrown upon the land by inevitable casualty, the owner, unless he should reclaim them, is not liable for the damage done by the lodgment, or by the remaining of the logs on the land. If he does reclaim them he is liable only for the damages sustained by reason of the logs being allowed to remain on the land an unreasonable length of time and the damage done to the land by their removal. He is not liable for the damage done by the lodgment of the logs. (Ingalls v. Hart Hardware Co., *ante* 447.) And if he was not able to remove the logs in a reasonable time, because of the fault of the owner of the land or because of his unreasonable demands, he should not be held liable for the delay.

3. *Same—Counterclaim*—In this action to recover the possession of logs which had lodged on defendant's land, in which plaintiff sued out an order of delivery and took the logs off the land, the damages which defendant is entitled to recover are the subject of a counterclaim.

Riddle & Riddle and Beckner & Jouett for appellant.

J. B. White for appellee.

Appeal from Estill Court of Common Pleas.

Opinion of the court by Judge Barbour.

Appellee is the owner of a tract of land lying on Station Camp creek, a tributary of the Kentucky river. This creek is susceptible, at certain periods of the year, of valuable use for the purpose of floating logs to market, and had been continuously so used for more than twenty years, and must be considered, to that extent, a navigable or floatable stream, subject to the use of the public. (Carter v. Thurston, 58 N. H., 104; 42 Am. Rep., 584; Lawson's Rights and Remedies, sections 2927 and 2928.)

Appellant owned a number of saw logs which it had placed in and along the banks of the creek, above the appellee's land, for the purpose of being floated down to the Kentucky river, and thence to their mill. In August, 1891, there was an unusually high tide, and appellant's logs were carried out of the channel of the creek onto appellee's land, where about 300 of them lodged, covering several acres which were in corn.

In October, and again in April, 1892, appellant undertook to remove them, but appellee refused to allow them to be removed until the damages which he had sustained, by reason of the logs lodging on his land, had been paid. In May, 1892, appellant instituted this action for the recovery of the logs, and sued out an order of delivery and took them off the land. In hauling off the logs roads were made on the land and gullies were cut into it.

In his answer appellee charges that appellant was negligent, and that but for such negligence the logs would not have lodged on his land, and claims damages by reason of the lodging and the remaining of the logs on his land, as well as the damage done in their removal. The appellee having, upon his counterclaim, obtained a verdict and judgment for $150, the appellant prosecutes this appeal.

The first objection urged is, that the damages claimed were not the subject of a counterclaim; but in the view we take of the case we think differently. (Tinsley v. Tinsley, 15 B. M., 454.)

Although Station Camp creek was a navigable stream, if appel-

Digitized by Google

lant was negligent, and by reason of that negligence the logs were allowed to lodge on appellee's land, it is liable for the damages, whether it undertake to reclaim them or not. If, however, the logs were thrown upon appellee's land by inevitable casualty, appellant (unless it should reclaim them) is not liable for the damage done by the lodgment, or the remaining of the logs on the land. Appellant could, if it chose to do so, abandon them.

Upon these propositions all the cases agree. Both the common law and the civil law hold that where the owner of property, carried away by inevitable accident, sees fit to abandon it, he can not be held liable for any injuries which it may have done to the property of others.

If, however, he seeks to reclaim it, the civil law requires him to make good the damage which it has caused to the property of others. "He who desires to have back the materials of his building that is fallen down, or that which a flood hath carried away from his land and thrown upon another man's ground, is obliged, on his part, not only to indemnify the proprietor of the said ground as to what damage shall happen to be done by his taking away the things which have been thrown upon it, but he is, moreover, bound to repair all the damage which has been already done to the ground by the things since they were cast upon it; but if he chooses rather not to take away any thing he will owe nothing; for if he abandons to the proprietor of that ground all that has been cast upon it, he is not bound to make good a damage that has happened by the bare effect of that accident, and it is enough that he loses what the accident has carried away from him."

Such is the civil law and the weight of authority. The majority of the adjudications of the other States hold that the rule of the common law on this point is the same as that of the civil law. (Foster v. Juniata Bridge Co., Penn. State, 393; 55 Am. Reps. and Notes, 506; Gould on Waters, section 102; Sheldon v. Sherman, 42 N. Y., 484; 1 Am. Rep., 569.) The case of Sheldon v. Shannan cites Reeder v. Anderson, 4 Dana, 193, as sustaining this doctrine.

In New Hampshire, however, the court holds that one has the right to use a public stream in a proper and reasonable manner to float his logs, and if they strand on the land of a *riparian* owner he is not liable for an injury thereby to the land, unless negligent, and may enter upon such land to reclaim the logs, but is liable for any improper use of the stream or unnecessary injury to the land. (Carter v. Thuston, 58 N. H., 104; 42 Am. Rep., 584.)

In the recent case of Ingalls v. Hart Hardware Co., *ante*, 447, our Court of Appeals seems to hold to the New Hampshire doctrine. In that case in the great tornado of March, 1890, the hardware company's building was blown down and fell on Ingall's lot. Though notified by Ingalls to remove the debris, the hardware company allowed it to remain four days, and for allowing it to so remain, Ingalls sued, claiming damages for the injury. The court held that a demurrer to the petition was properly sustained, because it was not averred that the hardware company was able to remove the debris within four days. The effect of the opinion is, that if the hardware company removed the debris as soon as it reasonably could, it was not liable for any damage, but if it allowed it to remain an unreasonable time it would have been liable for the injury sustained by Ingalls in consequence of such unreasonable delay.

In the Ingalls case there was no claim that the property would have been or was injured by the act of removing the debris; but in this case it can not be denied that the land was materially injured

Digitized by Google

by the removal of the logs. To that extent, whether the injury was unavoidable or not, it was an injury which the appellant, in the act of reclaiming its property, inflicted upon the appellee, and, we think, upon both principle and authority, it should be required to respond in damages for that injury.

Upon the trial of the case there seemed to have been no well defined idea of what the issues were, either in the evidence or the instructions to the jury. Though negligence was charged in the appellee's pleadings, he made no effort to establish it by his evidence, nor did he ask or the court give any instructions upon that point.

The only instruction given by the court assumed the appellant's liability and required the jury to find for the appellee whatever damages he sustained by reason of the plaintiff's logs lodging, remaining upon and being hauled over his premises.

If the appellant was negligent in the placing and running of the logs it is liable for the damages inflicted upon the appellee. If it was not negligent, upon the authority of the "Ingalls" case which we feel bound by, it is only liable for the damages he sustained by reason of the logs being allowed to remain on the land an unreasonable length of time, and the damage done to the land by their removal. If the appellant was not able to remove the logs in a reasonable time, because of the appellee's fault, or because of his unreasonable demands, it should not be held liable for the delay.

Some question is made in argument here as to the appellee's title to the land. The question, however, was not made by the pleadings and need not be noticed further.

The judgment is reversed and the cause is remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

Raine v. Newberger, &c.

Filed December 14, 1892. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Damages for breach of contract of employment*--One unlawfully discharged from employment can not, without an effort to get other employment, remain idle and compel his former employer to pay him a salary, just as if he had performed the labor. If he could have made as advantageous a contract with other parties, he is entitled to only nominal damages.

2. *Instructions—Prejudicial error*—Althongh the instructions given did not place a proper construction upon the contract between the parties, the appellant was not prejudiced thereby as the verdict against him, under the pleadings and evidence, was much smaller than it should have been.

S. H. Bush and H. T. Kendall for appellant; J. H. Vanmeter for appellees.

Digitized by Google

MACAULEY v. ELROD.

Filed December 14, 1892. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, reversing.

1. *Slander and libel*—Plaintiff having been in defendant's employment, words used by defendant, charging that he had discharged plaintiff "for stealing," were slanderous, and in themselves actionable.

2. *Same*—Defendant being the owner and manager of a theatre, procured the publication of a newspaper article stating that for several years he had placed implicit confidence in the integrity of his assistant in the management of the theatre, and that to him he had left the financial management of his business, but, becoming suspicious, he had put an expert to work on his books, and that he had found discrepancies amounting to $17,000; and that, as bills came pouring in on him his books showed had been paid several years ago, he determined, for the protection of himself and creditors, to have a trustee appointed. The petition alleges that plaintiff was the only assistant defendant had, and that he is the assistant referred to in that article. *Held*—That the statements in the article amount to an imputation against plaintiff of dishonesty and the making of false and fradulent entries on defendant's books, and, while not amounting, if spoken, to slander, without further colloquium, they are, without any further colloquium or any innuendo, libelous.

3. *Same*—Words spoken by defendant charging that plaintiff had "robbed" the person to whom they were addressed of $1,000 could not have been understood as charging plaintiff with what is known to the law as robbery, as they were preceeded by words charging that plaintiff had "beat" the person to whom they were addressed "out of $1,000;" which implied merely trickery or cheating, and not an indictable offense, all the words evidently referring to the same transaction. If there were any extrinsic facts by reason of which the words conveyed the idea of an indictable offense, they should have been averred.

4. *Same—Reversible error*—As the court erred in failing to sustain a demurrer to one of several paragraphs of the petition, and it can not be determined upon which paragraph the verdict was based, the judgment must be reversed.

5. *Same—Pleading*—It was error to strike from the answer the allegation of facts explaining the meaning of the words charged in the petition, which facts were alleged to be understood by the hearers of the alleged slanderous words. The fact that the special matter may be given in evidence under the general issue is not always sufficient ground for rejecting the plea.

6. *Same*—When words otherwise slanderous are explained at the time of speaking them with a statement of such facts as show no crime was committed, they are not actionable without allegation of special damage.

7. *Same—Evidence*—If any part of a record in a chancery cause between the same parties was competent evidence, all was competent, and it was error to exclude all except the pleadings and judgment. The facts developed in that record may tend to mitigate the damages.

E. F. Trabue and C. B. Seymour for appellant; Kohn, Baird & Speckert and O'Neal, Phelps & Pryor for appellee.

AULT v. GILL, &c.

Filed January 11, 1893. Appeal from Bath Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

Abandonment of appeal—A landlord, by instituting an action to recover rent, abandoned his right to prosecute an appeal which had been granted him from an order discharging an attachment for the same rent, and, therefore, the court properly refused to permit the papers in the attachment proceedings to be read to the jury in support of the defendant's plea that another suit for the same cause of action was pending on appeal.

R. Gudgell & Son for appellant; C. W. Goodpaster for appellees.

Digitized by Google

N. N. & M. V. R. R. Co. v. Simcoe.

Filed January 11, 1893 Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, affirming.

Railroads—Killing of stock—Evidence of pedigree—In this action against a railroad company to recover damages for the negligent killing of a mare by one of defendant's trains, the plaintiff alleging in his petition that she was an animal "of fine pedigree," and worth on that account $5,000, the court erred in permitting witnesses to testify as to what they had heard was the pedigree of the mare's dam, and to read to the jury a paper prepared by one of them, purporting to be her pedigree. Hearsay concerning pedigree is admissible only when the pedigree is the question in issue, and not in cases like this, where it is only relevant to the issue. But the error in admitting such testimony in this case was not prejudicial, as the verdict shows that the jury, in arriving at the value of the mare, did not consider and were not influenced by the admission of the testimony.

P. H. Darby and Bullitt & Shield for appellant; Ben. F. Gardner and Barnett, Miller & Barnett for appellee.

Louisville, &c, Railroad Company v. Hennen, &c.

Filed January 11, 1893. Appeal from Hancock Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Railroads—Injury to abutting property—Discontinuance of highway*—By the discontinuance of a public highway a lot-owner, whose boundary extended only to the edge of the highway, acquired no right to the land over which the highway ran, and she is not entitled, therefore, to recover the value of the land from a railroad company which has constructed its road over the highway; but as she derived her title from the persons who were the owners of the highway, and the boundary of the lot was fixed by the conveyance to the edge of the public road, and the road had been used as such by her and the owners before her under similar conveyances for more than thirty years, and there was no other possible way of ingress and egress, she was vested with an easement which she could not be deprived of by the owners of the fee in the highway, or by condemnation proceedings against them. The railroad company had the right, however, to build its road in the highway, and is answerable to the plaintiff, the abutting lot-owner, for such damages only as she sustained by the unreasonable obstruction of her ingress and egress over the highway, the throwing or blowing of smoke, sparks or cinders upon or into her house, and the injury done to the walls of her house from the jarring or shaking caused by passing trains and the injury from standing water caused by the railroad embankment.

2. *Same—Measure of damages*—It was error to instruct the jury that plaintiff was entitled to recover "if, by reason of said embankment, her residence has become less comfortable, or its value injured," as this left the jury, under the evidence in the case, to their own fancy as to the damages which plaintiff should recover.

3. *Instructions to jury—Questions of law*—As there can be no question that plaintiff was entitled to an easement in the highway, the instructions should have so told the jury, instead of leaving it to them as a fact to be found from the evidence.

4. *Same—Measure of damages*—It was error to instruct the jury that they must estimate the damage upon the basis of the value of the property to plaintiff for the purposes for which she used it, which was in effect telling them they must fix the damages as estimated by plaintiff. The rule as to damages, laid down in J., M. & I. R. R. Co. v. Esterlee, 13 Bush, 667, is the law of this case.

5. *Evidence*—It was error to admit testimony tending to show that, by reason of the romantic situation, pleasing view, etc., the property was valuable

Digitized by Google

to plaintiff even beyond its market value. These are ideal and not tangible elements of damage.

6. *Same*—It was competent for plaintiff to testify as to her expenditures in making improvements on the property existing at the time of the acts complained of. While the value of the property is not to be fixed by the amount of the expenditures, this testimony was competent as a means of arriving at its value just before it became generally known that the road was to be located in front of it.

Helm & Bruce for appellant; Sweeney, Ellis & Sweeney and W. S. Morrison for appellees.

Trimble v. Lewis.

Filed January 11, 1893. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Weight given finding of lower court*—As the only witnesses in the case were the plaintiff and defendant, and each by his testimony sustained his contention, this court will not disturb the finding of the lower court upon the question of fact.

2. *Wrong reason given for judgment*—Although the contract sued on was clearly not within the statute of frauds, the fact that the court gave as one of its reasons for dismissing plaintiff's petition that the contract was within the statute of frauds will not authorize a reversal, when the court also bases its judgment upon the finding of the facts against plaintiff.

3. *Cross-appeal*—In the absence of a cross-appeal granted by this court there can be no reversal for an error to appellee's prejudice. The fact that an appeal was granted him by the lower court will not avail.

O. H. Waddle for appellant; Curd & Smith and James Denton for appellee.

Cummings v. Bradford's adm'r.

Filed January 11, 1893. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Brent, affirming.

1. *Cross petition*—There is no such pleading known to our system as a cross petition by a defendant against a plaintiff.

2. *Final order*—An order which, in express terms, suspended any proceeding to enforce it until the further orders of the court, and gave appellant leave to amend his pleadings in essential particulars, was not final.

3. *Administrators—Set-off*—Where one holds and sues upon a note as administrator the defendant can not set-off the plaintiff's individual indebtedness to him.

4. *Same*—As a general rule the obligor in a bond, given to a personal representative for the purchase money of property sold to settle the estate, can not, in a suit thereon, set-off his claim against the decedent; and while there might possibly be a case of such strong equities as would permit such a set-off, there is nothing in this case to take it out of the rule.

O'Hara & Bryan for appellant; Leslie T. Applegate for appellee.

Hart v. Scheible.

Filed January 11, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Judge Brent, reversing.

Performance of an award will be decreed or refused upon exactly the same principles and considerations which would weigh with the court in the case of a contract. The chancellor, therefore, has a discretion as to the granting and withholding such relief, and ought not to grant it to any party who has failed or is backward as to the performance of his part. Nor should part performance avail the party seeking such relief unless what remains

Digitized by Google

undone is practically immaterial, the substance and really material part having been carried into effect.

In this case the matters in which there was a failure to comply upon both sides were the essence and substance of the award, and as neither party has shown himself entitled to any relief in the nature of specific performance, the case should be transferred to the other side of the docket and prepared as a common law suit for damages, and so heard and determined.

Sprigg & Chelf for appellant; Hobson & O'Meara for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. FEBRUARY 15, 1893. No. 16

KENTUCKY COURT OF APPEALS.

NORMAN, AUDITOR, v. THE KY. BOARD OF MANAGERS OF WORLD'S COLUMBIAN EXPOSITION.

(*Filed Dec.* 9, 1892.)

1. *Duty of State auditor—Constitutional law*—Where money is sought to be drawn from the State treasury under an act of the legislature making a specific appropriation, the State auditor, before drawing his warrant upon the treasury authorizing a payment thereunder, may inquire into the constitutionality or legality of the act by which such appropriation was made. He is, in a certain sense, a trustee of the public money, and can draw his warrant on the treasury only in pursuance of an appropriation *made by law*, and may refuse to issue a warrant on the ground that an appropriation bill was not constitutionally enacted, or that the legislature had no constitutional right to make such appropriation

2. *Constitutional law—Appropriation for State exhibit at Columbian Exposition*—An appropriation by the legislature for the purpose of making an exhibition at the World's Columbian Fair of the resources and evidences of the progress of this Commonwealth, is for a public purpose and is not inhibited by our Constitution. Such act is not the loaning of the credit of the State.

Where it is doubtful whether the legislature has the constitutional power to appropriate money for a certain object and the legislature exercises the power, the judiciary will resolve the doubt in favor of the legislative interpretation of the Constitution.

3. *Same—Final passage of a bill*—When a bill for the appropriation of money is passed by the house of the general assembly in which it originated, by a majority of all the members elected to such house, by a yea and nay vote entered on its journal, and is then, after being amended, passed in a similar manner by the other house, and is reported back to the house in which it originated with the amendment, which concurs in such amendment, the "final passage" of such bill in the house in which it originated, within the meaning of section 46 of the Constitution, is the vote by which such amendments or the bill as amended was passed. On this last passage such bill must receive, by a yea and nay vote entered on the journal, the vote of a majority of the members elected to such house. If such amendments are concurred in by a mere *viva voce* vote, the bill has not been constitutionally enacted.

Digitized by Google

4. *Same--Evidence*--The fact that such a bill has been regularly enrolled and signed by the speakers of both houses and approved by the governor, it seems creates only *prima facie* evidence that it was constitutionally enacted, and it is believed that, in certain instances, the journals of the houses may be appealed to as evidence to show that the bill was not constitutionally enacted. (Prior, judge, dissenting.)

5. *Same--Mandamus*--Even if the rule is otherwise this court will not by mandamus compel the auditor to draw his warrant upon the treasury to carry out the provisions of an act appropriating money for the Kentucky exhibit at the World's Columbian Fair when the commissioners seeking the writ, and who are the mere agents of the State for that purpose, admit, by their demurrer to the answer herein, that the act under which the appropriation is claimed was not enacted in the manner required by the Constitution, as appears from the journals of the two houses of the general assembly. (Prior, judge, dissenting.)

Knott & Edelin, Wm. Gobel and Helm & Bruce for appellant.

Humphrey & Davie and W. P. D. Bush for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Holt.

The questions in this case are of supreme importance. The president of the State Board of Managers of the World's Columbian Exposition presented a proper order to the appellant, the State auditor, for a warrant upon the State treasury for a portion of the $100,000 claimed to have been appropriated by an act of the legislature to make an exhibit of the resources of our State at the exposition.

The auditor, acting, no doubt, from a conscientious desire to properly discharge his duty, and under the advice of the attorney general, who is by law his legal adviser in such matters, refused it, and this is an action for a mandamus to compel him to give it.

It is said *in limine* that he has no personal interest in the matter; and, being a ministerial officer, can not refuse to issue it upon the ground that the legislature could not constitutionally make the appropriation, or that the act was not constitutionally passed. In short, that his only duty was obedience, and that he has no standing in court.

It is a general rule that a court will not listen to one who says a legislative act is unconstitutional, unless his rights are involved or he has a right to question it.

Section 230 of our new Constitution, however, says: "No money shall be drawn from the State treasury, except in pursuance of appropriations made by law;" and our statute forbids the issue by the auditor of a warrant upon the treasury, "unless the money to pay the same has been appropriated by law." (General Statutes, chapter 6, article 1, section 6.)

If the act of the legislature be void for want of power to pass it, or because it was not passed in the manner required by the Constitution, then it is not law, and the auditor is vested with such power, and occupies such a position, that it is not only his right but his duty, whenever he is called upon to order the payment of money out of the treasury, to inquire whether it is being done legally. He is, in a certain sense, a trustee, and the public interest requires that his office should give him the right to question the validity of a legislative act under which, by means of his warrant, the public money is to be expended.

The right to the mandamus is denied by him, first, upon the

Digitized by Google

ground that the legislature had no power to make the appropriation. It is urged that it is not for a public or governmental purpose. Our Constitution says: "Taxes shall be levied and collected for public purposes only."

It is often difficult to draw the line which bounds constitutional taxation, or to determine whether the purpose is one in aid of which the taxing power may be invoked, or the money thus raised expended. If it be doubtful, and the legislature has seen proper to exercise the power, the judiciary should not interfere. The doubt is then to be solved in favor of the legislative action.

The object in this instance, however, is to exhibit the resources and progress of the State. It is not to promote the interest of one or a few individuals, and perhaps, incidentally, that of the public; but the purpose is public in character, and calculated and intended to benefit the entire State.

Our legislature has repeatedly heretofore, and running through many years, appropriated money for like purposes, and its power to do so is now, for the first time, questioned.

It was done in 1876 for the Centennial Exposition at Philadelphia, and later for the one at New Orleans. This was well known to the framers of our present Constitution, adopted in 1891, and had it been intended to forbid the exercise of the power of the legislature for such purposes, it would, no doubt, have been done in unmistakable terms. In our opinion it contains no such provision.

It is not a loaning of the credit of the State, and, therefore, forbidden by it. The commissioners selected to expend the money are merely the State's agents to do so, and provide the exhibit for the benefit of its people. The legislature had the power to provide the means for such a purpose; but, in doing so, was bound to act in conformity to the Constitution.

The troublesome question in the case is whether it has done so, and what is the duty and power of this court as the parties present themselves. The auditor claims that it has not, and this is the second ground of his defense.

Section 46 of our Constitution provides: "No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each house, and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal: *Provided*, Any act or resolution for the appropriation of money, or the creation of debt, shall, on its final passage, receive the votes of a majority of all the members elected to each house."

The act originated in the senate and passed that body upon a yea and nay vote, entered upon its journal, by the required majority. It then went to the other house, where, after being amended, it passed upon a like vote, entered upon its journal, by a like majority. It then came back to the senate, where the amendments were concurred in without a yea and nay vote, and without the vote of a majority of the members elected.

It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the Constitution. It complied with it in neither letter nor spirit.

The object of the section above cited was to have the assent of a majority of all the members elected to each house to *all* the provisions of the act, and that this should appear by a yea and nay vote entered upon its journal.

If a bill, after passing one house in the proper manner and then, after amendment, passing the other house in like manner, could

Digitized by Google

come back to the house in which it originated, and be adopted by a majority of those voting or a quorum, it would defeat this object and render the section ineffectual.

Let us look at it practically. An appropriation bill of $100 originates in the senate and is properly passed. It goes to the house, where it is amended by making the sum $10,000, and is then properly passed by it. It returns to the senate for concurrence, and is adopted as amended by a majority of those present, without a yea and nay vote.

Can it be well contended that this would be a compliance with the Constitution? If so, then, there being thirty-eight senators, it would require twenty or a majority of them to pass a bill for a trifle, but, after being amended in the house so as to perhaps bankrupt the treasury, it could be concurred in by the senate by the votes of eleven members or a majority of a quorum; and, in case of the house, with its one hundred members, it would require fifty-one to pass the bill if it originated there, but only twenty-six or a majority of a quorum to concur in it after it had been changed in like manner by the senate.

Further illustration seems needless. It is true it has been held that the "final passage" of a bill means when it first passes the body and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yea and nay vote on the journal, does not apply to amendments, or the reports of conference committees. If so, then no matter how material the change, a majority vote of a quorum may pass the bill.

The words "final passage," as used in our Constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill or what is first introduced, and which may, by reason of amendment, become the least important. If so, then the body may pass what is practically a new bill in a manner counter to both the letter and spirit of the Constitution.

When the bill was voted on in the senate, as amended, and after its return from the house, there never was any further action by the senate. It was the final vote, and, therefore, its final passage, and being so, a majority vote of all the members elected, with an entry by yea and nay vote upon the journal, was necessary to its constitutional enactment.

The bill, as approved by the speakers of the two houses and by the governor, never was passed by the senate by a majority of all its members, nor by a yea and nay vote.

It is said, however, upon the one side that, having been enrolled, signed by the presiding officer of each house and approved by the governor, the act must be conclusively presumed to have been constitutionally enacted; that public policy requires this rule, else confusion will result by our statute law being reduced from a state of certainty to one of doubt.

Upon the other side it is urged with equal ability that a *prima facie* case only is thereby presented, and that resort may be had to the journals of the legislature, which are required by the Constitution to be kept and are kept under the supervision of all the members, as to the truth of the matter.

Each position is supported by numerous authorities, and whether the one rule or the other obtains, more or less abuse and danger may result. There is some dynamite either way, but perhaps not as much in the latter as some apprehend, as the party questioning the en-

Digitized by Google

rolled and approved act must at the outset overcome a *prima facie* case.

The first view is the English one, where there is no written Constitution. It has been followed by our supreme court and by at least nine of the supreme courts of the states. The weight of authority in this country, as declared in perhaps as many as nineteen states, is, however, the other way. All agree that the enrolled and approved bill can not be impeached by loose papers or parol evidence. Public policy forbids it. Too much mischief would result. A review or citation of the numerous cases is unnecessary. They have been examined. The most, if not all of them, will be found cited in the notes on page 135 of Cooley's Constitutional Limitations, and to the case of Field v. Clark, 143 U. S., 661.

It is not necessary, however, to a proper determination of this case, to decide this question. It would, at most, be settling a mere rule of evidence not prescribed by Constitution or statute, and subject to exception and modification by the courts. If it had heretofore been prescribed it would not control this case. Here no property rights have become fixed, no interests vested, but two parties, each the agent of the State, are contending for the control of a fund, and we must consider this case as it is presented.

The court is asked to exercise its power and compel the auditor to comply with an act of the legislature which the Constitution required should be passed in a certain way. If the answer of the auditor merely averred that it was not a law, or denied its existence, or that it had not been constitutionally passed, this would be merely pleading a legal conclusion. It would need no denial. The failure to do so would not be an admission of its truth. A court takes judicial notice of and determines for itself the law. You can not aver or prove a public statute. Thus, although a pleading may purport to state its terms or effect, but do so incorrectly, a demurrer does not admit the averment. (Pennie v. Reis, 132 U. S., 464; Interstate Land Co. v. Maxwell Land Co., 139 U. S., 569.)

The court tries the question as one of law, and a demurrer admits as true only averments of facts well pleaded, and not legal conclusions.

The answer of the auditor, however, sets out the steps connected with the passage of the act. It states what was done and what was not done. It avers the facts connected with its passage, and files as a part of it a copy made by the public printer of the journal of the senate relating to it.

These facts, as to the manner of its passage, were admitted by a general demurrer. They show the act, when it came back to the senate after amendment, was not voted for by a majority of all the senators, and that a yea and nay vote was not taken. It was not, therefore, constitutionally passed, and yet the court is asked by the appellees to use its power to enforce it by mandamus, when, by their demurrer to the answer and failure to plead, they are to be regarded as agreeing that this is true.

A court, when asked to exercise its power by means of mandamus, should regard the substance and not the shadow. Its use is confined to those cases where the law has given no specific remedy, and where, in justice and good government, there ought to be one. It is summary in character and may be resorted to when injustice is about to be done. A court should, in its discretion, grant it only when it is essential to this end. The petitioner must have a clear right, and no other appropriate remedy to prevent injustice and wrong. It is defined in our Civil Code as an order "to perform an act or omit

Digitized by Google

to do an act, the performance or omission of which is *enjoined by law*," and is the instrument of a court of law much as an injunction is that of a court of equity.

Cases may be found where it has been refused in the exercise of a proper discretion, although the petitioner had a clear legal right, and it is to be granted or withheld, in the discretion of the court, as the purposes of justice may require.

This being the end and object of the writ, it should not be granted to afford relief which the party claims by virtue of an act confessed by him to be unconstitutional. The attitude of the appellees, and the nature of the relief asked, must be considered Although the appellees, like the auditor, represent the State, yet they demur to the answer, saying you can not go behind the enrolled bill nor consider the admitted facts set out in the answer, the intended effect of this being to prevent a decision as to the validity of the act. Their action can not be disregarded when asking this writ.

The provision of the Constitution is mandatory, and when this court is called upon to exercise a power, respect for a co-ordinate department of the government can not be suffered to override the fundamental law, by virtue of which both act and exist.

A constitutional rule is not only for the legislature, but this and all other courts. We must exercise our power with fidelity to it, and when we are urged to hold that the signatures to the act import what is confessed by the party asking relief to be untrue, and to enforce as law an act plainly in violation of the Constitution, the court, in the exercise of its discretion in the use of this writ, should withhold it. Our personal wishes in the matter can not be consulted. If the people desire this appropriation made, the legislature will doubtless do so; but nothing connected with the matter is more important to all than that it shall be done according to law.

It is manifest the answer can not be truthfully denied. This was in substance admitted upon the argument of the cause by the appellee's counsel. Under this state of case it is proper to reverse the judgment, with directions to dismiss the petition, and it is so ordered.

Judge Bennett delivered the following separate opinion:

The appellees, as World's Fair Commissioners, filed their petition in the Franklin Circuit Court against the appellant, as auditor, to compel him to issue his warrant upon the treasury for the sum of $25,000 upon their vouchers approved by the governor for that sum, alleging that the auditor was directed to issue the warrant by the act of the legislature making the appropriation. The auditor in his answer alleged that the bill making the appropriation of $100,000 to the World's Fair originated in the senate and passed that body upon the call of the yeas and nays, which were entered in the journal, by a constituitonal majority; that the house refused to pass the bill as it came from the senate, but passed it with amendments, and then the bill and house amendments were sent to the senate, and that body concurred in the house amendments, but not by a constitutional majority, nor by the yeas and nays entered in the journal; that the bill was, therefore, unconstitutional and void.

The appellees, by their demurrer to the answer, admitted the allegations of fact to be true and insisted that, notwithstanding the truth of the allegations, the bill being *prima facie* regular and valid, the auditor, whose duty was, in this particular, mandatory, was a ministerial officer and could not refuse obedience to the law's man-

Digitized by Google

date, because there was some latent infirmity in the bill that rendered it invalid. The chancellor, upon the hearing upon the agreed facts, adjudged that the auditor, acting in a ministerial capacity, should issue his warrant, because he had no right, as a ministerial officer, to question the constitutionality of the bill, it being *prima facie* valid.

The auditor appeals. The auditor relies upon section 46 of the Constitution, which reads as follows:

"No bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each house, but the second and third reading may be dispensed with by a majority of all the members elected to the house in which the bill is pending. No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each house and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal; provided, any act or resolution for the appropriation of money or the creation of a debt shall, on its final passage, receive a majority of all the members elected to each house."

There is a history of abuses and wrongs in the legislative department under the old Constitution that caused the section *supra* to be engrafted in the Constitution and adopted by the people, to wit: It had become a frequent practice under the old Constitution to pass bills as reported by the committe by their titles and by *viva voce* vote, the bills never having been read for the information of the members, only the few and faithful understanding that they contained large appropriations, grants, monopolies and other iniquities. It was intended by said section to prevent the repetition of these methods and to secure honest and enlightened legislation; therefore it was provided that the bill should be printed for the use of the members; that it should be read at length on three different days in each house, unless the second and third reading was dispensed with by a majority of all the members elected to the house in which the bill is pending; but the reading of the bill at least once can not be dispensed with; then, if the members feel fully advised, they may dispense with the other two. Also, no general bill can become a law unless it receives, on its final passage, the votes of at least two-fifths of all the members elected to each house, and that number must be a majority of those voting, and the vote must be taken by yeas and nays and entered in the journal; also a bill for the appropriation of money or the creation of a debt must receive, on its final passage, a majority of all the members of each house, the vote to be taken by yeas and nays and entered in the journal. Now there can be no doubt that each of these provisions requiring, on the final passage of a bill, at least two-fifths or a majority of the votes, as the case may be, of all the members elected to each house to be taken by yeas and nays and entered in the journal, is mandatory, and unless each of them is complied with the bill is not constitutionally enacted.

This court, in the case of Varney v. Justice, 86 Ky., 601, says, in reference to the mandatory character of constitutional provisions: "When the language of the Constitution gives a direction as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed, and in no other manner. It is an instrument of words, granting powers, restraining powers and reserving rights. These words are fundamental words, meaning the thing itself; they breathe no spirit but the spirit to be found in them.

Digitized by Google

To say that these words are directory merely is to license a violation of the Constitution every day and every hour."

Now, as the appropriation to the World's Fair is an appropriation in the sense of the Constitution, the bill, in order to be constitutionally passed, should receive, on its final passage, fifty-one votes in the house, supposing the whole number of members to be one hundred, and twenty in the senate, supposing the whole number of senators to be thirty-eight.

So the question is, what is the final passage of a bill? And does the final passage of a bill include the adoption of an amendment by either house that is sent to it by the other house? It seems to be clear that the final passage of a bill is the vote by which the bill becomes a law, when signed by both speakers and the governor. And that this definition includes all amendments there can be no manner of doubt, as one illustration will show: Say the house appropriates $50 and the bill is sent to the senate for concurrence in the appropriation, but it does not concur in that appropriation, but increases it to $100, and sends it back to the house for its concurrence in that sum; the bill is not as yet a law; the senate has refused to concur in the house bill, but increases the sum and asks the house to concur in appropriating that sum; unless the house does concur, the bill is not a law; therefore, it takes the action of the house to appropriate $100, and it is then finally passed and becomes a law, appropriating $100; it is then enrolled as one bill; no amendment appears. So, to say that the last action of the house is not the final passage of the bill is clearly a mistake. Such a construction would restore, in full panoply, the evils that existed under the old Constitution, instead of suppressing them forever; for not less than fifty-one members of the house could vote away the $50 of the people's money; but the senate, by amendment, could raise that sum to $50,000, and the house, by a mere majority of a quorum, could concur in the amendment, thus defeating and nullifying the provision *supra*.

The next question is, can the auditor, conceding his duty, under the bill, to be purely ministerial, raise the question as to the validity of the bill, and be justified in refusing to issue the warrant? It seems that when a law commands an officer to do a certain thing, it is mandatory, and the officer can not rightfully refuse obedience, if the law is *prima facie* regular and valid. Public policy requires that this rule be strictly adhered to; for, to allow a ministerial officer to call in question a law *prima facie* valid that it is made his duty to execute, would license him to interrupt and defeat the administration of the government at his pleasure. The clerk of this court, if such principle was tolerated, might refuse to-day to read or sign the orders, because, in his opinion, the law requiring him to perform that duty was invalid by reason of some latent infirmity in it.

Mr. Mechem, on Public Officers, section 523, states the rule correctly upon this subject, as follows: "It is not within the scope of the duties of a ministerial officer to pass upon the validity of laws, instructions or proceedings *prima facie* valid, and requiring his action. His only duty in such a case is obedience, and, as will be seen hereafter, he can not excuse himself by undertaking to show the unconstitutionality or other invalidity of the law, or the irregularity of the proceedings."

The rule thus announced is fully sustained by the leading cases of the United States, and is eminently conservative. This court has, time and again, recognized the right of the auditor to resist the mandate of the legislature upon the ground that it had no constitutional

Digitized by Google

authority to require it; but in all such cases, as admitted by one of the counsel for appellant, the infirmity was suggested by the bill itself. But the question here is unlike any that has been reported. Here, on the one side, is the auditor, the financial officer of the State, required to pay to the agents of the State certain moneys to be expended in a certain way—not to pay debts or to discharge obligations incurred. No rights of third persons have intervened; but the contest is between the officers as to whether the money should be handed over to be expended in behalf of the State, and the auditor refuses to pay it upon the ground that the bill, although regular and valid upon its face, is, on account of the failure to do certain things required by the Constitution, unconstitutional and void. The agents admit, upon demurrer, the facts, and one of their counsel admits in his argument before the court that the bill, by reason of the said non-compliance with the provisions of the Constitution in the particulars pointed out by the auditor, and as suggested by the governor in his veto of a similar bill, is unconstitutional and void. So for us to say to the auditor that he must pay out the people's money, notwithstanding the bill is unconstitutional and void, and no rights of third parties have intervened making it just and equitable to do so, would be a travesty upon justice and a self-stultification.

All the members of the court agreeing that the bill is unconstitutional, and three agreeing that the auditor, under the circumstances, has the right to withnold his warrant on that account, the judgment ought to be reversed, with directions to dismiss the petition.

Judge Pryor delivered the following dissenting opinion:

On the 9th of February, 1892, and during the present legislative session, a bill was introduced in the senate, entitled "A bill to provide for the collection and exhibition of the resources and evidences of the progress of the State of Kentucky at the World's Fair Columbian Exposition of 1893."

The bill contained an appropriation of $100,000 for that purpose, and placed that sum under the control of a board of managers, who were required to execute a bond for the faithful discharge of their duties, and to draw the money from the treasury of the State upon the warrant of the auditor on proper vouchers, first approved by the governor. The bill passed the senate in the manner required by the Constitution, and that fact having been announced to the house, that body considered and passed the bill in like manner, with an amendment, and then returned the bill to the senate, where it originated, when that body suspended the rules and concurred in the amendment; but on this amendment no vote was taken by a call of the yeas and nays, and in so far as it appears from the senate journal, without a majority voting for the bill as amended. The 40th section of the Constitution provides that "each house of the general assembly shall keep and publish daily a journal of its proceedings, and the yeas and nays of the members on any question shall, at the desire of any two of the members elected, be entered on the journal."

The 46th section provides that "no bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each house, but the second and third readings may be dispensed with by a majority of all the members elected to the house in which the bill is pending; but whenever a committee refuses or fails to report a bill submitted to it in a reasonable time, the same may be called up by any member and be

Digitized by Google

considered in the same manner it would have been considered if it had been reported. No bill shall become a law unless, on its final passage, it receives the vote of at least two-fifths of the members elected to each house and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal; provided, any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each house."

It appears, therefore, that the bill, as it originated in the senate, was passed by the constitutional vote and in the manner prescribed by the Constitution, and when sent to the house the bill, as amended, passed that body as required by the Constitution, but on its return to the senate as amended there was no call of the yeas and nays by that body, but a concurrence only in the amendment, and what the vote was does not appear.

Section 56 of the Constitution provides that "no bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session, and before such officer shall have affixed his signature to any bill he shall suspend all other business, declare that such bill will now be read and that he will sign the same to the end that it may become a law. The bill shall then be read at length and compared, and, if correctly enrolled, he shall, in the presence of the house, in open session, and before any other business is entertained, affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other house; when it reaches the other house the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceeding shall thereupon be observed in every respect as in the house in which it was first signed, and thereupon the clerk of the latter house shall immediately present the same to the governor for his signature and approval."

The governor, on the presentation of the bill to him, after it has received the signature of each speaker, either approves the bill or returns it with his objections to the house in which it originated, or if he fails to return the bill within ten days (Sundays excepted), it becomes a law, unless a legislative adjournment prevents it, and in that event he must disapprove it within ten days after the adjournment, by having his veto spread upon the register kept by the secretary of state.

The bill in question was approved by the governor, and has been deposited with the archives of State as the enrolled bill and as the law of the land. I have been thus careful in setting forth these various provisions of the Constitution, as from them originates this litigation between the auditor and the board of managers of the fund appropriated.

It is insisted by the one side that by section 46 of the Constitution, just quoted, *the final passage of a bill* means the vote on the bill, after it has been perfected by amendments or otherwise, and in a condition to become a law; that is, *final passage means the last vote on the bill.* On the other hand it is maintained that when a bill has passed either house by a two-fifths vote or by a majority vote of all the members, when money is appropriated, it must be regarded as the final passage of a bill; that is, there can only be one passage of a bill, and that is its final passage, and subsequent amendments, whether formal or substantial, can be adopted by the vote of a majority of a quorum. The board, by its president, W. L. Dulaney, in accordance with the provisions of the bill, presented to the auditor his vouchers, properly approved by the governor, and demanded a

Digitized by Google

part of the sum appropriated to defray expenditures connected with Kentucky's exhibit at the World's Fair, and the auditor refused payment on the ground that the bill was unconstitutional for two reasons —first, the bill having been amended by the house, a mere concurrence in the amendment by the senate, without a call of the yeas and nays, showing that a majority of the senate voted for the bill as amended, is in violation of section 46 of the Constitution; second, the legislature had no power, even by a majority vote, to make such an appropriation. The auditor having challenged, in this manner, the validity of the bill, the board of managers instituted these proceedings in the Franklin Circuit Court for a mandamus requiring him to issue his warrant on the treasury for the sums specified in the vouchers presented to him. The answer filed by the auditor sets forth in detail the legislative proceedings as to the manner in which the bill was passed; that the journal of the senate fails to show the yea and nay vote on the bill, as amended by the house, or that a majority of the senators voted for the bill as amended. A demurrer was sustained to the answer, and the case comes to this court with the admission made by the demurrer, and also as a matter of fact, that the journals will show that no vote was taken in the senate by a call of the yeas and nays on the bill as amended by the house, and nothing on the face of the senate journal showing that a majority of the senate voted for the amendment.

It is argued that the auditor, being a ministerial officer, could not raise the constitutional question as to the manner in which the act passed. It is true that he nor his bondsmen would have been liable if payment had been made and the act held, as it has been, unconstitutional, but I think it equally clear, under numerous decisions of this court, that it is not only his right, but his duty, to contest every claim in regard to which he is required to draw his warrant on the treasury, when, in his opinion, it is not properly verified or has not been allowed or appropriated according to law. He is the trustee of the State's funds, and to such an extent that not one cent can be drawn from the treasury without his warrant, and his persistency in refusing to pay this claim not only attests his fidelity and efficiency as an official, but his defense, in which he is sustained by my associates, has saved to the State an expenditure from the treasury under a void constitutional enactment the sum of $100,000.

I do not believe his defense in response to the petition for a mandamus is available, and shall proceed to give my reasons for dissenting from the principal opinion.

I shall assume, without any discussion, as the entire question has been considered in consultation, that the legislature had the power, under the Constitution, to pass the bill, and the only objection to its validity as a law is, that the bill *was not passed in the manner* provided by the Constitution.

It is contended by my associates that the demurrer, as well as the agreed facts, admit the bill was not passed in conformity to the Constitution, and by this admission the appellees have, in some manner, deprived themselves of the right to a mandamus; in other words, that a party may come into court, and in a litigation involving the construction of constitutional provisions, by admitting that a bill was not read for the first time or that the yeas and nays were not called, as provided by the Constitution, he admits the unconstitutionality of the act, and will not be heard to say that the journals of either house showing that fact are no evidence as against the enrolled bill. The appellees only admitted the truth, and if a denial had been made as to what the journals would show in this particu-

Digitized by Google

lar it would have been false, for they do show that the yeas and nays were not called when the amendment in the house was concurred in by the senate; therefore, the question is, can the journals be introduced as evidence to contradict or to nullify the enrolled bill? It is plain that the constitutionality of an act can not be determined by the admissions of a party, and when brought in question, where evidence is offered to show the act to be void, the highest and best evidence must be adduced, and if the journal of the senate is incompetent for that purpose, the admission that it is competent would not make it so.

Mr. Justice Cooley says: "The court will not act upon the admission of parties that an act was not passed in accordance with the Constitution." (Cooley on Constitutional Limitation, 6 Ed., page 163, note. See also Legg v. Mayor of Annapolis, 42 Md., 203, for a discussion of this question.) If the issue had been made by a denial the auditor would have offered to introduce the journals, and, upon the objection by the appellees as to the competency of the testimony, the identical question would have been made that was raised by the demurrer. If the appellees had not filed a demurrer nor replied to the answer of the auditor, and submitted the case in that condition, the court would have been compelled to hold that the answer constituted no defense. The appellees have done nothing to waive their legal rights. They come into court with a clear legal right to demand of the auditor this money. And it is the auditor setting up a defense, based upon incompetent testimony, which is taken hold of by my associates as evidencing such an unconscientious claim as to justify them in denying a remedy for the enforcement of a clear legal right, and to do this they go back, not at the instance of the appellees, but at the instance of the auditor, to see whether the journals establish the truth of the facts alleged by the defense—facts the appellees admit to exist; and admitting the truth in regard to a matter over which they had no control, and that is incompetent testimony for any purpose on this issue, they are denied a remedy to which they would have been entitled but for this incompetent testimony. This is based on the idea that the appellees have no interest in this controversy, and, if this be true, they have no standing in court, and the case should be dismissed on that ground.

I can see nothing in the argument sustaining this view, and it is at last a decision, in effect, that you may declare a law invalid by reason of the legislature failing to pass a law in the manner required by the Constitution, and the question arises: Is the validity of the act to be determined by the enrolled bill or by the journals of the senate showing the manner of its passage. It is contended on the one hand that where the journals show that the Constitution has not been complied with on the passage of a bill that the bill is a nullity, and on the other it is argued that the manner of passing bills is exclusively within the province of the legislature in the exercise of the powers conferred by the Constitution, and that when a bill is authenticated in the manner provided by section 56 of the Constitution and promulgated as a law, it is conclusive evidence of its existence as a law, although the requirements of the Constitution as to the manner of its passage may not have been complied with. It is not claimed that the two speakers can sign a bill, either in or out of session, and have it approved by the governor, and that this makes it a law, although it may never have been introduced. To do this you must impute corruption and fraud to both speakers and the executive, a case that would never arise, and too futile in its suggestion to deserve notice in an opinion. Shall the courts, when a bill has

Digitized by Google

been signed by the speaker of each house and declared a law in the presence of the members of each body, approved by the governor and filed with the archives of State as the law of the land, look to this enrolled bill as conclusive of the fact that the bill was properly passed, and leave the co-ordinate branch of the government, whose duty it is to pass laws when acting within the scope of its power, responsible to its constituency for the manner of its exercise? The case of the Auditor v. Haycraft, 14 Bush, 284, is relied on by each party as sustaining the views they respectively present. The writer of this dissent wrote the opinion of the court in that case. The pleadings in that case raised no such question, and all the court said was "that no inquiry will or can be instituted, as the case is presented for the purpose of ascertaining the manner in which the enactment was passed. There has been no pleading filed by the State or auditor presenting any such issue, and we must, therefore, adjudge it was constitutionally enacted, and can not take judicial notice at the mere suggestion of counsel as to the votes cast for or against the measure on its final passage. If a bill of this character did not receive a vote of a majority of the members, the only mode of reaching the question is by an allegation of fact in an appropriate pleading, and the journals offered as evidence to sustain the defense." This was not done in that case, nor the journals offered, so an objection might be made to them as evidence, and from a casual reading of the opinion it will be seen that the question was not decided or discussed.

The importance of this question can not be overestimated, and this court is now urged, for the first time in the judicial proceedings of the State, by appropriate pleadings, to adjudge an act unconstitutional by reference to the legislative journals, when we have before us the enrolled bill authenticated as the Constitution requires. If the validity of the bill was assailed for the want of power on the part of the legislature to enact it, a judicial question would at once arise, and I would not feel that I was invading the domain of a co-ordinate branch of the government as supreme in its jurisdiction as the judiciary when determining the extent of legislative power. It is manifest that there is a marked distinction between determining a law to be in violation of the Constitution and in adjudging that it has not been passed in the mode required by that instrument.

In defining the powers of government the Constitution gives to the legislature the sole power to make the laws and to judge of their expediency, and upon the judicial department devolves the duty of interpreting those laws when made, and I can perceive but little necessity for a distribution of the powers of government if the judiciary can be called on to determine, in the first place, whether an act was passed in accordance with the mode prescribed by the Constitution, and then determine the power of the legislature to enact the law.

This bill has been promulgated by the legislature with its validity as a law attested by the signature of the speaker of each house and its approval by the governor. It may be properly said that judicial opinions from able lawyers and courts as to the power of a court to go behind an enrolled bill, in order to determine the manner of its passage, are such as to cause a doubt as to any conclusion the judicial mind may reach on the question, but when the cases decided are carefully analyzed it will be found the decided weight of authority is that an enrolled bill, attested as in this case in the manner provided by the Constitution, becomes a perfect law, and its validity can not be questioned except on the ground

Digitized by Google

the legislature had no power to enact it. The cases opposed to this view are based, some of them, on the idea that certain provisions of their state constitutions are mandatory and others not, many of them following the earlier cases rendered by the Supreme Court of New York that have been overruled, and the cases from the Supreme Court of Illinois, that, by its recent utterances, intimate strongly that the enrolled bill is the best evidence of what is the statute law of the State.

It is difficult to perceive why every provision of a constitution is not mandatory, and to be so adjudged, unless it is made directory in expressed terms; and if left open to judicial interpretation, as ordinary legislative enactments, then the provision in question becomes either mandatory or directory, as it may appear to the mind of the judge called upon to interpret it, and with such uncertainty there would be no uniformity in the construction of constitutional provisions. Mr. Justice Cooley, in his work on Constitutional Limitations, says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct, and if it descends to prescribe mere rules of order in unessential matters it is lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation." Regarding, therefore, every provision of a constitution as mandatory, it furnishes no reason for holding that the journal of either house is the best evidence to the courts and the people of the validity of a bill. Some test, however, must be had, and the citizen, *who is presumed to know the law*, must have the means of knowing when a law has been enacted, and while no case, reported or unreported, in this State is to be found deciding this question, there has in effect been a practical construction as to what constitutes the evidence of the passage of laws by the manner in which our statutes are published and verified by the enrolled bills. Our statute laws have been embodied for years in what is known as the Revised and General Statutes and published acts of the legislature. When the law, as found in the statute book, is claimed not to be the law enacted by the legislature, resort is had to the enrolled bill, and I venture the assertion that the able revisors of our statutes and codes of practice never at any time consulted the legislative journals with a view of ascertaining whether the enactments they were publishing as laws to guide the people had been constitutionally passed, and for the reason the enrolled bill was the best evidence of that fact; and although there has been no decision on the question, this raises a strong presumption as to the manner in which such constitutional provisions have been interpreted.

What is the evidence upon which this court is asked to pronounce this law unconstitutional? Section 40 of the Constitution provides: "Each house of the general assembly shall keep and publish daily a journal of its proceedings, and the yeas and nays of the members on any question shall, at the desire of any two of the members elected, be entered on the journal." This journal is kept by the clerk or his assistant; is not signed or required to be signed by any one; its second and third reading dispensed with in almost every instance where a motion is made; it is not required to be attested in any manner whatever. Can it be that the framers of the Constitution contemplated that journals kept in this way are to

Digitized by Google

be regarded as records containing such absolute verity as to be looked to by the courts for the purpose of nullifying a legislative enactment that has been attested and approved in the mode prescribed by section 56 of the organic law?

This bill was signed by the presiding officer of each house *in open* session, and before the speaker signed the bill he suspended all other business, declared that such bill will now be read, and he will sign the same to the end that it may become a law. It is then read and compared and found to be correct; he affixes his signature in the presence of the house in open session, and, when this is done, to say that such solemn acts, after the bill has been filed with the secretary of state as the law, are to be disregarded by reason of entries in the legislative journals, "would shake," as Chief Justice Beasley said in deciding a similar question, "the stability of all written law to its very foundation." (Perrybone v. Young, 32 N. J., 37.)

If a court can leave the enrolled bill and search for evidence in the journals to nullify it, this rule of evidence would apply not only to the passage of laws enacted since the present Constitution was adopted, but the manner of passing every statute since the Constitution of 1849 would be subjected to judicial investigation, and whether involving the right of property or enacted for the punishment of crime, with an issue raised as to the manner of its passage, the court would be compelled to look into the journals of either house, or allow the litigant to do so, for the purpose of determining whether or not the enactment was passed in the mode prescribed by the organic law. The Constitution of 1849 contains this provision: "No bill shall have the force of a law until on three several days it be read over in each house of the general assembly, and free discussion allowed thereon, unless, in cases of urgency, four-fifths of the house where the bill shall be depending may deem it expedient to dispense with this rule." If, therefore, the journals of the legislature under the Constitution of 1849–'50 fail to show that the bill was not read three several days and the reading had not been dispensed with, it is not a law; or if the journals show affirmatively that the bill was only read two days and the third reading not dispensed with, the same disastrous results must follow, and, according to the majority opinion, if, under the present Constitution, the governor and the house had coincided with the views of the senate, all the bills where the yeas and nays had not been called on the original bills, or the bills as amended, would necessarily, when assailed, be adjudged null and void, although authenticated as the Constitution required.

The fear of the consequences resulting from such a rule does not alone induce me to regard the enrolled bill conclusive as to the valid passage of a bill. It is because it is a certain and fixed test, and is the highest evidence of what the legislature has done.

The laws embodied in our statutes come from the enrolled bills. All the rights of the citizen, derived under statutory enactments, depend on the verity of the enrolled bills. The published laws are verified by them and every statutory report becomes endangered when you permit other evidence to show that an enrolled bill is not the law.

Many of the decisions on this question evidence great ability, and with provisions in their Constitutions in many respects similar to ours, they hold, in discussing the right to go back to the journals of either house, that the enrolled bill is conclusive.

In the case of Perrybone v. Young, 32 N. J. L., 37, the court in speaking of the journals as evidence, said: "In the nature of things they must be constructed out of loose and hasty memoranda, made in the

Digitized by Google

presence of business and amid the distractions of a numerous assembly. There is required not a single guarantee to their accuracy or to their truth. No one need vouch for them, and it is not enjoined that they should be either approved, copied or recorded."

Again: "The legislature has adopted a method of certifying its own acts in an authentic form. * * * To the correctness of the present bill, for example, we have the signature of the presiding officer of each house. In its present form it was exhibited to the governor as the bill which had been enacted and met his approval. It was then made public by being filed in the office of the secretary of state. These are the sanctions the legislature has provided for the authentication of its own acts, both to the public and to the judicial tribunals, and the question is, therefore, presented whether such authentication must not be deemed conclusive This question, in my opinion, must be answered in the affirmative. How can it be otherwise? The body that passes a law must of necessity promulgate it in some form."

And continuing, the court said: "In the frame of our State government the recipients and organs of this three-fold power are the legislative, the executive and judiciary. They are co-ordinate—in all things equal and independent, each within its sphere is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? The proposition is whether, when the legislature has certified to a mere matter of fact relating to its own conduct and within its own cognizance, the courts of the State are at liberty to inquire into or dispute the veracity of that certificate. I can discover nothing in the provisions of the Constitution, or in the general principles of government, which will justify the assumption of such superior authority."

In the case of the State v. Swift, 21 Am. Reps., 721, from the State of Nevada, where a provision of the State Constitution is analogous to ours providing "that the reading of a bill by sections, on its final passage, shall, in no case, be dispensed with, and the vote on the final passage of every bill shall be taken by yeas and nays to be entered on the journals of each house," &c.

The court held that the official copy of a statute, duly enrolled and authenticated, is conclusive evidence of the law, and the court can not resort to the journals of the legislature, nor to any other extrinsic evidence, to ascertain whether the statute was duly enacted. That court, in response to the argument in favor of receiving the journals as evidence, said: "The hope of doing good (that is, by correcting mistakes in enrolled bills by the journals) by the course suggested, is more than overbalanced by the danger of doing harm, and, therefore, presents no equivalent for the incalculable disadvantage of reducing the statute law from a state of certainty to one of everlasting doubt." To the same effect is the case of the People v. Devlin, 33 N. Y., 269.

In an opinion delivered by Mr. Justice Harlan, of the supreme court, and concurred in by his associates, the case of Field v. Clark, 143 U. S., 649, many of the cases on this question were referred to, and in an able and exhaustive discussion of the point involved in that case, the court held: "The signing by the speaker of the house of representatives and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president that the bill, thus attested, has received in due form the sanction of

Digitized by Google

the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him; and when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable."

In response to the argument that was made in that case, and also urged before us, that some supervision was necessary, otherwise the officers of the respective houses and the members might purposely defeat the popular will, the court said: "But this possibility is too remote to be seriously considered in the present inquiry. Judicial action, based upon such a suggestion, is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act in the custody of the secretary of state, attested by the signatures of the presiding officers of the two houses of congress and the approval of the president, is conclusive evidence that it was passed by congress according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend on the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them."

The court also said: "In regard to certain matters expressly required by the Constitution to be entered on the journal, to what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination."

It is, therefore, argued that the precise question presented here was not before the court in Field v. Clark, still it is evident the court was not inclined to recognize the doctrine found in the Illinois and other cases as sound. The provision of the Constitution of Illinois is, "that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members-elect."

The supreme court of that state, in People v. Starm, 35 Ill., 121, said: "According to the theory of our legislature, when a bill has become a law, there must be record evidence of every material requirement from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses." The court further saying: "We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect."

Mr. Justice Harlan, in reviewing the various decisions on this subject, quoted the language of the Illinois court, in which the soundness of the rule established in that state is questioned, and approved the doctrine of the state courts, making the enrolled bill conclusive evidence of the law.

The case from the Mississippi Supreme Court, of *ex parte* Wren, 63 Miss., 512, is also referred to in the case of Field v. Clark, in which Mr. Justice Campbell said, after reviewing the adjudged cases: "Every other view subordinates the legislature and disregards that co-equal position in our system of three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty, appalling in its contemplation, and multiplying a hundred fold the uncertainty of the law."

Digitized by Google

"If the court may go beyond the enrolled bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, and we will have the spectacle of examination of journals by justices of the peace, and statutes declared not to be law as the result of journalistic history. Let the courts accept as statutes duly enacted such bills as are delivered by the legislature as their acts, acknowledged as such in the prescribed mode."

In Weeks v. Smith, 81 Maine, 547, it was said: "No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and president of the senate and approved by the governor, is a statute or not."

It is insisted that section 46 of the Constitution, containing the provision that "no bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each house, the vote to be taken by the yeas and nays on the journals," and a majority of all these members, where an appropriation of money is made, opens the door to an investigation of the journals by the courts.

I see no distinction between a provision of a Constitution requiring a call of the yeas and nays by the legislative body upon the final passage of a bill and the provision to the effect that the first reading shall not be dispensed with. They are all mandatory provisions, regulating the mode in which the legislature shall enact laws, the construction of which belongs to the two houses and the executive, and not the courts, and especially when the Constitution contains a provision directing the mode of authentication by which the courts and the people are to be governed.

By the statute of our State a deed of a married woman, to be effectual, the clerk is required to examine her separately and apart from her husband; and, although he may have examined her in the presence of her husband, the courts, by reason of an express statute, will not allow the clerk or the married woman to show that he did not comply with the law when he has certified that he did, in the absence of fraud on the part of the grantee, and for the reason that such a rule of evidence would make the title to land too uncertain; and while the statute as to the clerk is mandatory, just as the provisions of the Constitution in regard to the enactment of laws is mandatory to the legislature—where the bill is certified or authenticated in the mode required, you can not go behind it.

The enrolled bill should be held conclusive. The building may be defective in its construction, but when received from the hands of the architect will be allowed to stand.

Section 56 of the Constitution is plain and unmistakable as to the manner in which a bill is to be authenticated *and promulgated as the law*, and affords the means for every one ascertaining what the law is. When you find an act filed with the secretary of state authenticated by the signatures of the speakers and the approval of the governor, every citizen can rely on its efficacy, if within the power of the legislature to enact it, and no evidence of any character assailing its validity should be listened to.

It will be found that courts entertaining opposite views on this question are constantly perplexed in their efforts to sustain the validity of laws with the view of preserving rights acquired under statutes where the mode of passing them was not as prescribed by the Constitution.

In the cases of Hall v. Steele, 82 Ala., 562; Glidwell v. Martin, 51

Digitized by Google

Ark.; 559; State v. Algood, 87 Tenn., 163; State v. Hasting, 24 Minn., 78, and in the courts of Kansas and Colorado, it has been held that the journals may be looked into with a view of assailing the enrolled bill; but where they are silent on the question as to the manner of passing the bill, the court will presume that they were passed in accordance with the Constitution; and in some of the State courts, in order to avoid the disastrous consequences resulting from contradicting the enrolled bill, a legislative estoppel, in some cases, has been applied, to the effect that subsequent legislation, in the nature of amendments, cured a void legislative enactment.

The highest authority, adverse to the rule here recognized, is Mr. Justice Cooley, in his work on Constitutional Limitation, following the decisions of the courts of his own state. The supreme court of that state has gone so far as to hold that where there is no entry on the journals, and no resolution authorizing such entry, an entry found in the bound volume of the house journal will be presumed to have been properly made, two of the judges, Long and Grant, dissenting. (Common Council v. Board of Assessors, 51 N. W. Rep., 787.)

I can not assent to such a doctrine. Nor should the bill before us be held unconstitutional upon the idea that no one is injured by a reversal of this case; that it is only one agent of the State government trying to keep the money in the treasury and another trying to get it out. It is either a law or not a law. If a law, the appellees have the legal right to the money, and to compel the auditor to pay it. There can be no exception to the rule.

It is true they are the agents to disburse this fund, but the ears of the court are not closed to the fact that the managers have been engaged in preparing the exhibits for the World's Fair. They have doubtless expended their own means in making such preparations as were necessary for that purpose. They had the right to act under the law, and the approval of the governor of their vouchers for $25,000 raises a strong presumption that they have made expenditures. The executive was right in approving the vouchers, because he knew the board of managers had acted in good faith, still, from the majority opinion, if expenditures have been made, as the act was void, it affords them no protection.

Can this be? Are the courts of this State to search the journals to find out whether or not statutory rights can be enforced? Such a rule not only makes the forms of legislation, but all legislative expediency, the subject of judicial approval. It invites the judge from the bench, that he may become a partisan to the passage or rejection of bills, where partisan influence and excitement prevails. It is an encroachment upon the exercise of legislative power. Its effect will be to sweep from the statute bills of the highest importance, passed during this legislative session. and open the doors to an assault on all past legislation. It is a legal dynamite hidden from the public view, ready, when the occasion requires, to be used in the destruction of any statute.

In the language of a great judge (Judge Black), in an opinion given on a similar question, "I fear to turn loose a principle which might devour the whole statute book." (1st Attorney-General opinions, page —.)

While I do not differ from my associates as to what is the final passage of a bill, it is a question that was not debated by counsel, and, from my view of this case, the opinion, at best, would only be advisory in its character, and given to a representative body that has not sought it.

I again repeat that this court is only determining what evidence

Digitized by Google

we will look to, in order to ascertain whether the act in question is or not a law. It is one entirely distinct from the legislative power in passing bills, or that of the governor in pointing out defects and constitutional omissions in the attempt to pass them. I feel the importance of a court of last resort concurring on all constitutional questions, but the magnitude of the question involved and the danger, as I conceive, flowing from the construction given the Constitution by my associates, compel me to dissent from their views on the main question involved.

* IN SENATE.

WEDNESDAY, JANUARY 11, 1893.

Mr. Lindsay, of the committee on the judiciary, to which was referred a bill, which originated in the senate, entitled "An act concerning jailers," together with an amendment adopted by the house of representatives, presented the following report, which was ordered printed, viz:

To the senate:

Your committee on the judiciary, to whom you referred the bill, entitled "An act in regard to jailers," with instructions "to report whether, in its present condition, it is necessary, under the provisions of section 46 of the Constitution, that it shall be referred to a committee, and with its amendments again printed, and then read on three several days and again put upon its final passage," submit the following:

The bill was passed by the senate and sent to the house of representatives, and there amended and passed and returned to the senate. In each house the yeas and nays were called; in each the bill received the constitutional number of votes, and in each these facts were entered in the journal.

By the universal practice of the general assembly up to the present session, and by general parliamentary law, the question would now be: Shall the senate concur in the house amendment? And if so the fact would be communicated to the house and the bill would then be ready for enrollment. If not, the house might recede, or the two houses insisting upon their respective positions, a conference would follow. This long established rule seems to have been abrogated by the construction placed by the Court of Appeals, in the recent World's Fair case, upon the 46th section of the Constitution.

By the World's Fair bill the sum of $100,000 was appropriated for certain purposes in connection with the Columbian Exposition to be held in Chicago this year. The bill was introduced in the senate, referred to and reported by a committee, printed for the use of the members, read on three different days, and then put upon what was deemed its final passage. It received the votes of a majority of all the senators elect, upon a call of the yeas and nays, and the entry thereof was made in the journal.

In the house of representatives the same course was pursued, except that the bill was amended before being put upon its passage. In the house it received the votes of a majority of all the

* The following report, made by the senate committee on the judiciary, which contains the interpretation given by the legislative department of government to the 46th section of the Constitution, concerning the "final passage" of bills, is published by request of that committee.

Digitized by Google

members elected, upon the call of the yeas and nays, and the proper entry was made in the journal.

In the senate the house amendment was concurred in *nem. con.*, no two senators choosing to exercise their right, under the 40th section of the Constitution, to require the call of the yeas and nays.

The amendment thus concurred in was essentially immaterial. It in no way affected the scope or any of the purposes of the original bill, nor changed the sum of money appropriated.

As the bill passed the senate, the questions whether the contemplated Kentucky Headquarters Building should be kept open on Sunday, and whether intoxicating liquors should be kept or sold therein, or on the grounds under the Kentucky management, were left to be controlled by the board of managers.

The house amendment provided that the building should be closed on Sundays and that no liquors should be kept or sold in the buildings or on the grounds allotted to Kentucky.

It was not supposed by any senator that the amendment, so plainly in the interest of morality and sobriety, and looking to the due observance of the Christian Sabbath, so changed the bill as to make it necessary the senate should manifest its concurrence by calling the yeas and nays, and securing the vote of a majority of all the senators elect, and having the facts entered in the journal. It was then believed that the bill, as amended, was the same bill, in all its essentials, that had once finally passed the senate, and that it was enough to concur in the amendment by a vote presumptively unanimous, and then notify the house of the fact of the concurrence The senate then had in view, and followed substantially, the rule of parliamentary procedure thus stated by Mr. Justice Story:

"If the bill is ordered to be engrossed for a third reading, it is, when engrossed, put upon its final passage. * * * If the vote is that the bill shall pass, the title is then settled, though the title is always reported with the bill, and that being agreed to, the day of its passage is noted at the foot of it by the clerk. It is then signed by the speaker and transmitted to the other house for concurrence.

"The bill, when thus transmitted to the other house, goes through similar forms. * * * If a bill is amended by the house to which it is transmitted, it is then returned to the other house in which it originated for their assent to the amendment. If the amendment is agreed to, the fact is made known to the other house."

The senate did not understand that the 46th section of the Constitution required a bill that had been thus "finally passed" by the necessary constitutional vote, with the necessary constitutional entry on the journal, should, after amendment by the house of representatives, be treated as substantially a new bill, or that it was necessary, to the effectual concurrence in the house amendment, that it should receive "the votes of at least two-fifths of the members elected * * * and a majority of all the members voting, the vote to be taken by ayes and nays, and entered in the journals." And in the case of an appropriation, the votes of a majority of all the members elected. The senate did understand that these prerequisites attached to the "final passage" of the bill, but did not suppose the Constitution contemplated either that the same bill should be twice passed or that the concurrence in the house amendment should be deemed the "final passage." The senate supposed that when the convention used the term "final passage," as applied to a bill pending in the general assembly, it intended that term to receive its established and generally understood signification. The senate knew that the courts of other states with constitutions having similar provisions

Digitized by Google

to those of section 46 had construed the words "final passage" according to their accepted parliamentary signification. (McCulloch v. State, 11 Indiana, 434; Hall v. Miller, 4 Nebraska, 505.)

It also knew that Sutherland, in his work on Statutory Construction, had reviewed all the cases arising under state constitutions containing provisions similar to those of section 46 and had stated the rule thus: "Nor does concurrence by one house to an amendment made by the other require the yeas and nays, and their entry on the journals, under the provisions for these things on the final passage of bills." (Sections 48 and 49.)

The senate also borne in mind, that the Constitution of 1849 contained the provision that no act or resolution for the appropriation of more than one hundred dollars should take effect unless it should, "on its final passage," be voted for by a majority of all the members elected to each house, and the yeas and nays be called and entered on the journals; and was also aware of the further fact that the general assembly, commencing with the first session under that Constitution, and with a bill for the benefit of the Asylum for the Blind, and continuing session after session up to 1878, when the bill was passed for the construction of the Eddyville prison, had construed the words "final passage" as Storey construed them, and that each house had time and again concurred in amendments proposed by the other to bills for the appropriation of money in excess of one hundred dollars without the call of the yeas and nays. The senate assumed that in the construction of the present Constitution great weight would be attached to the fact that the late constitutional convention readopted the section under discussion, and added thereto the provision that as to bills not involving an appropriation of money, the yeas and nays should be called and recorded on their final passage.

It saw no reason why the rule declared in Harrison v. Commonwealth, 83 Ky., 171, might not be applied by the general assembly to a case precisely analogous to the one there considered and decided by the Court of Appeals. The question in Harrison's case was as to the meaning of the word "list," used in the statute regulating the pay of assessors. It was conceded that the meaning was doubtful. But it was said the executive department had construed it, and, with knowledge of that construction, the legislative department had continued its use in the revision of the statutes, and then the court said, by Judge Holt:

"Admitting for argument's sake that the *letter* of the statute under consideration does not allow the assessor any pay for a list which does not comprise property, yet the legislative meaning has been placed beyond question by the action of the State. It was said by Chief Justice Marshall, in the case of Colens v. Virginia, 6 Wheaton, 418, that a 'great weight has always been attached, and very rightly attached, to contemporaneous exposition,' and this rule is so well settled that citation of authority is needless. Not only those claiming rights under the law now in question, but the county courts of the State, and those who have had charge of its execution, have for over half a century interpreted it otherwise; and while this was being done the various legislatures, and the people behind and over them, have known of it and recognized it by failing to interfere. They have, in fact, not only ratified it by their silence, but by their action. Knowing the practical construction which was being put upon the provision of the statute as contained in the Revised Statutes of 1852, the legislature re-enacted it in equivalent and nearly the same language in the one now in force, thus virtually re-enacting

Digitized by Google

that construction, giving it the force of a positive law, and placing beyond question that it was the one intended by the law-making power. Judicial precedent or expostion could not give greater sanctity to it, and as the language of the statute and the legislation upon the same subject, in force prior to its enactment, render it of at least doubtful import, we can not doubt, in view of the long continued legislative, executive and judicial action as to it, that the interpretation placed upon it by the lower court is incorrect."

The senate, as we have seen, knew how the words "final passage" used in the Constitution of 1849 had been uniformly construed and applied by the "*courts, legislatures and the people behind and over them*," from 1851 up to 1891; and also that the late constitutional convention, "*knowing the practical construction*" that had been put upon those words by those various legislatures, and by the executive and ministerial officers charged with the duty of carrying out the legislative will, had deliberately used them in like connection and for similar purposes in the new Constitution, and, not unnaturally, concluded that it was intended to continue in force the construction those words had so long received. This conclusion seemed, at the time, to harmonize with the rule thus stated by Judge Cooley:

"When a particular statute or clause of the constitution of one state has been adopted from the statute or constitution of another, after a judicial construction has been put upon it in such last-named state, it is but just to regard the construction as having been adopted, as well as the words, and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case." (Constitutional Limitations, section 52.)

The conclusion seemed also to derive support from the doctrine of the case of Allen v. Romey's heirs, 1 Metcalfe, 637, where the Court of Appeals quoted, with approval, from Chancellor Kent, the declaration that "where a law, antecedently to a revision of the statutes, has been settled by judicial construction, such construction should be given to the regulation on the same subject in the revision, unless there is a manifest intention of the legislature that a different one shall prevail." But in these conclusions, however reasonable they may have been, the senate was mistaken.

In the World's Fair case, the majority of the court, speaking through Chief Justice Holt, in regard to the bill under consideration, said: "It then came back to the senate, where the amendments were concurred in without a yea and nay vote, and without the vote of the majority of the members elected It is conceded by the counsel for the appellees, and seems plain, that this mode of procedure did not conform to the Constitution. It complied with it in neither letter nor spirit." The opinion does not point out any expression in the Constitution, or any provision thereof, showing a manifest intention by the convention that a different interpretation should be given the words "final passage" in the revised Constitution to that given to them in the Constitution of 1849 by the continuous action of the legislature and executive department for more than forty years; but we are bound to assume the new Constitution does somewhere contain such expression or provision, and in order to the enactment of laws in such manner as to meet with judicial approval, the general assembly must conform to the judicial rather than the parliamentary rules of legislative procedure. It is unfortunate that we are left in doubt whether, in a case like the bill "concerning jailers," the vote upon the concurrence in the amendment is to be treated as the "final passage" of the bill. If so, then a call of the yeas and nays on that question, with only the necessary constitu-

Digitized by Google

tional vote in the affirmative, entered in the journals, will be a sufficient compliance with the constitutional requirement.

The following extract from the opinion of a majority of the court seems to indicate that when there is a single amendment, a concurrence by the necessary vote, the yeas and nays being called and entered in the journals, is to be deemed the "final passage" of the bill. viz:

"When the bill was voted on in the senate as amended, and after its return from the house, there never was any further action by the senate. It was the final vote, and, therefore, its final passage, and, being so, a majority vote of all the members elected, with an entry by yea and nay vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two houses and by the governor, never was passed by the senate by a majority of all its members, nor by a yea and nay vote."

Whether the court meant to say that the amendment proposed by the house was not concurred in "by the senate by a majority of all its members, nor by a yea and nay vote," or that the bill, after concurrence in the amendment, was not so passed, is left somewhat obscure; but when this language is read in connection with the further expression that the bill, "when it came back to the senate, after amendment, was not voted for by a majority of all the senators, and that the yea and nay vote was not taken," and that "it was not, therefore, constitutionally passed," it might be inferred that if, upon the question of concurring in the house amendment, the journal had shown the call of the yeas and nays, and that a majority of all the senators elected voted in favor of the concurrence, the bill would have been upheld by the court as having been constitutionally passed.

But other portions of the principal opinion forbid the acceptance of this view, except to a very limited extent. Continuing the discussion of facts admitted by the demurrer, and legal propositions conceded by counsel, the court said that the bill, as signed by the speakers of the two houses and approved by the governor, "never was passed by a majority of all the senators elected, by a yea and nay vote." This conclusion can be supported only by the theory that the bill, when amended by the house, was converted into a new and different bill. The original bill, every one agrees, was passed on a yea and nay vote, entered on the journals, a majority of all the senators elected voting for it. The court's illustration shows that it meant to say that the first passage of the bill by the senate was of no avail after the adoption of the house amendment, and that another passage was essentially necessary.

Having referred to the house amendment and the return of the bill to the senate, the court said: "Then there being thirty-eight senators, it would require twenty or a majority of them to pass the bill for a trifle, but after being amended in the house, so as to perhaps bankrupt the treasury, it could be concurred in by the senate by the vote of a quorum;" and again, "if so, then no matter how material the change, a majority vote of a quorum may pass a bill."

The illustration goes to the utmost verge of possible legislative action, involving conduct inconsistent with good faith on the part either of the presiding officer or the accidental majority of the members present. To enlarge an appropriation from a trifling sum to an amount sufficient to bankrupt the treasury would be to change the original bill into a wholly different, and, therefore, essentially new bill.

As has been seen, the amendment to the World's Fair bill did not

Digitized by Google

change the appropriation or the purposes to be subserved thereby, but merely attached conditions in the interest of morality and sobriety, and to secure a due observance of the Christian Sabbath; yet the court treated this as equivalent to an amendment increasing an appropriation from $100 to a sum sufficient to bankrupt the treasury. Hence it must follow that any amendment made by one house to a bill passed by the other converts the amendment into a new bill, which, in order to become a law, must be "finally passed," according to the provisions of section 46 of the Constitution, by the house in which the legislation was inaugurated. The logic of the court's opinion clearly is, that a bill, in its entirety, must have the assent of the constitutional number of votes, and that assent must be given upon an yea and nay vote, and that vote must be recorded in the journals.

When a bill is returned to the house in which it originated, with a single amendment, this necessary assent may possibly be secured on the vote of concurrence or non-concurrence. But not so with any degree of certainty, when a bill is returned with two or more amendments, as is frequently the case. Take, for instance, a senate bill returned from the house with three amendments, and all the members of the senate present: The first amendment may be concurred in by a vote of twenty yeas to eighteen nays; but the adoption of the amendment renders the bill so objectionable to the eighteen objectors that thenceforward they are unalterably opposed to it. Some of them, however, favor the second and third amendment, and with their votes, and against the wishes of a number of those who voted for the first amendment, the second and third are concurred in. As thus amended the bill is objectionable to a decided majority of the members. Upon each amendment, however, the yeas and nays have been called, and the journals show that each has been concurred in by a constitutional number of votes. Now, unless it be necessary to put this bill as amended upon its passage, we will have a case in which a bill has been enacted into a law to which a majority of the members are opposed, and against which they would vote if an opportunity were afforded them.

In order, therefore, to insure the assent of the necessary number of votes to the bill, with all its provisions, it must be put upon its passage after the amendments have been concurred in, otherwise, under the guise of concurring in amendments, a bill may be enacted into a law to which a majority of the members are unalterably opposed. A course of procedure open to such uncertainty falls far short of accomplishing the purpose of the 46th section of the Constitution, as declared by the Court of Appeals in the World's Fair case, of permitting no law to be passed without receiving in its entirety, with all its provisions, material and immaterial, the assent of the requisite number of votes in each house, evidenced by yea and nay votes entered in the journals.

In view of all of which, it seems to your committee that, in cases in which a senate bill has been amended in the house of representatives, the only safe course is to act upon the amendments with or without the call of the yeas and nays; but when one or more of the amendments have been concurred in, then that the bill, as amended, be put upon its passage (final or otherwise, as future events may determine), and the vote taken by yeas and nays and entered of record in the journal. This rule being established, however, further difficulties are encountered.

If the bill, when returned to the senate with house amendments, be a bill that "was never passed by the senate," and "practically a

Digitized by Google

new bill," then this new bill has never been printed for the use of the members, and has not been reported by the committee. Section 46 of the Constitution provides, in express terms, that "no bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members." This provision is equally mandatory with the provision that "no bill shall become a law unless, on its final passage, it receives the votes, etc." Whether the courts can examine the journals to ascertain whether a bill has been reported and printed, the opinion in the World's Fair case does not indicate. But the court does say that a constitutional rule is for the legislature as well as the courts. Therefore, when the Constitution is understood, it is the duty of the general assembly to carry out its provisions without regard to what the courts may or may not have the power to do. If the bill "concerning jailers," with the house amendment, is not the bill heretofore reported by a senate committee and printed and read on three different days and finally passed by the necessary number of votes, upon a call of the yeas and nays, entered in the journal, then the bill in question has not been printed or read as the Constitution requires, so far as the senate is concerned.

In McCulloch v. State, 11 Indiana, 434, where the Supreme Court of Indiana held to opposite of the rule declared by the Court of Appeals in the World's Fair case, it was said: "But suppose the journal, in reference to the point thus made, shows all that was done, still the proceeding would, in our opinion, be unobjectionable, because the bill, before it went to the house, has passed the senate by a majority of all the members elected to that body, and it can not be assumed that the amendment of the house converted the original into a new bill. Indeed, such construction might result in the necessity of the whole series of readings being commenced anew every time an amendment is made."

Our Court of Appeals decides that any amendment made by one house to a bill originating with the other, converts the original into "practically a new bill," and we must meet the question whether this "practically new bill" shall be reported, printed and read in accordance with the requirements of section 46 of the Constitution. New bills are required to be printed for the use of the members. They are to be read on three different days to insure deliberate consideration.

"The requirement has an important purpose in making legislators proceed in their action with caution and deliberation; and there can not often be difficulty in ascertaining from the legislative records themselves, if the Constitution has been violated in this particular. Therefore, there is no inherent difficulty in the question being reached and passed upon by the courts in the ordinary mode, if it is decided that the Constitution intends legislation shall be reached through the three readings and not otherwise." (Cooley, Con. Lim., sec. 81).

Peremptory provisions of the Constitution are to be deemed mandatory. The direction that each bill shall be read on three different days is peremptory. Where the second and third readings may be dispensed with, such action can only be taken on the days named; that is, there can be no two readings on the same day. Nor can the second and third readings be dispensed with on the same days. As to a bill being reported and printed, it is plain the Constitution intends that legislation shall be reached in that way "and not otherwise." The language is: "No bill shall be considered for final passage unless the same has been reported by a committee and printed for

Digitized by Google

the use of the members." The important ends to be attained by these provisions apply equally to a practically new bill, as to one absolutely new. Take the illustration of the Court of Appeals: A senate bill appropriating $100 is so amended in the house as to increase the appropriation to $100,000. The court holds that the bill is thus made practically a new bill. Manifestly it is most important that this new bill shall be considered and reported by a committee. It is equally important that it shall be printed for the use of the members, and still more important that it shall be read on three different days in order that deliberate action may be insured. And so as to a bill involving no appropriation, where numerous and material amendments are made by the house to which it is sent. These provisions of the Constitution could readily be observed if the two houses of the general assembly were left to determine *prima facie* in what cases amendments adopted by the house to which a bill is sent do, in fact, convert it into a new bill, and when such amendments, merely perfect, without changing the scope or character of the proposed enactments. But the opinion of the Court of Appeals in the World's Fair case negatives any such power in the general assembly. All bills so amended must be treated alike. All are to be deemed practically new bills. No one denies that amendments may be so radical and far-reaching as to convert the original into a new bill. Writers on parliamentary law all recognize that fact. No one disputes that when such amendments are adopted, and the bill is returned to the house in which it originated, it ought to be treated as a new bill. But the Court of Appeals takes away all right of legislative judgment, and places all bills so amended and returned on the same footing. Therefore, following the reasoning of the majority opinion in the World's Fair case to its necessary conclusion, all bills amended in any respect by the house to which they are sent, ought, when returned, to be reported by a committee, printed and read on three different days and then put upon their final passage.

But such a rule of procedure will not only involve very great delay and expense, but will practically defeat all legislation of importance during the sessions of sixty days, to which the 42d section of the Constitution confines future general assemblies.

This consideration constrains your committee to believe the courts will not incline to follow the World's Fair opinion to its logical conclusion in the application of the new rule of parliamentary law therein declared. To do so would bring about the most inconvenient and destructive results. So far as the point decided is concerned, we do not hesitate to advise exact conformity thereto by the general assembly; and, so far as the rule can be followed, without the practical abdication of the power to legislate, the reasoning of the court ought to govern the legislative department.

But when it is borne in mind that the opinions of the judges show that the questions we have to decide were not presented to the Court of Appeals, that the sufficiency of the enactment of the World's Fair bill "was not argued" to the court, and that the World's Fair Board of Managers, who were seeking to control and expend the money supposed to have been appropriated, appeared in the court to which they were appealing for affirmative relief against the auditor, and instead of defending the validity of the act upon which they based their claim, conceded that the mode of procedure followed by the general assembly in the enactment thereof "did not conform to the Constitution," we feel that this is a case in which the senate may adhere to the correctness of its own construction of the Constitution, until the question has been presented to the Court of Appeals by a

Digitized by Google

litigant who believes in his case, and the court, after deliberate consideration, shall declare that the reasoning of the court, as well as its decision, is to be the rule of legislative conduct under the existing Constitution.

Your committee appreciate the inconsistency of treating a senate bill that has been amended in and returned by the house of representatives as a new bill for the purpose of being put upon its "final passage," and not as a new bill when it is to be reported by a committee, printed and read on three different days. But consistency must yield to the inexorable rule declared by the Court of Appeals on the one hand and the reasonable or rather possible methods of legislation on the other.

The power to legislate is liable to abuse, and may have been abused in the past. The framers of the Constitution had in view the prevention of such abuse in the future, but we can not assume they intended to practically destroy the power of the general assembly to legislate at all.

They preserved the legislative department and must have intended it should take some part in the enactment of the laws under which the people are to live. To substantially preserve that power we must decline to go further in the new line of parliamentary procedure than, after concurrence in a house amendment to a senate bill, to put the bill, as amended, again upon its passage. This course will lead to other serious complications in cases in which there are several proposed amendments, and some are concurred in and others rejected. But in this regard we must say for the present, sufficient unto the day is the evil thereof.

We recommend that the house amendment to the bill under consideration be concurred in, and that the bill, as amended, be then passed.

JONES, &C. V. JONES, &C.

(*Filed Dec.* 3, 1892.)

Devise—Life estate—Trusts.—A testator devised his entire estate, consisting of 400 acres of land, to his wife, "to be by her managed and controlled during her natural life for the joint benefit of herself and my (testator's) six children, with power in my said wife to give immediate title and possession of such portion of any of said property as she may think fit to any one or all of said children at such time or times as she may think fit; provided, the entire portion given to any one of said children shall, in no event, exceed in value one-sixth of my entire estate; and at the death of my said wife I desire that each of my six children have an equal share of my entire estate, taking in consideration the value of whatever any one may have received from my said wife by virtue of the power herein conferred upon her. *Held*—That the wife takes an estate in the property for her life, with power to give any of the children such portion of the estate, or rents or profits therefrom, not exceeding one-sixth, as she saw fit. She did not take merely as a joint tenant with the children, and does not hold in her own right only one-seventh of the estate, and is not liable to the children for rents and profits of the remaining six-sevenths as a trustee.

H. Marshall Buford and G. C. Webb for appellants.

Geo. B. Nelson for appellees.

Appeal from Clark Circuit Court.

Digitized by Google

Opinion of the court by Judge Pryor.

The principal and only question to be decided on this appeal is the construction of the will of Roger Jones. He owned some 400 acres of valuable land, and left surviving him his widow and six children, one of them an adopted child. Two of his children were married and not living with the testator; the others were on the farm and living with him at testator's death.

The will is as follows: "I will and devise all my property, of every kind and description, real, personal and mixed, unto my beloved wife, Lucy M. Jones, to be by her managed and controlled during her natural life for the joint benefit of herself and my six children (naming them), with power in my said wife to give immediate title and possession of such portion of any of said property, as she may think fit, to any one, or all of said children, at such time or times as she may think fit; provided, the entire portion given to any one of said children shall, in no event, exceed in value one-sixth of my entire estate; and at the death of my said wife I desire that each of my six children have an equal share of my entire estate, taking into consideration the value of whatever any one may have received from my said wife, by virtue of the power herein conferred upon her. Should any one of my children, to whom a portion of my property shall have been given, in exercise of the power conferred upon my said wife, die before attaining the age of twenty-one years, and without issue, I will that the property so given to him or her *shall revert to my said wife*, to be held and controlled by her in the manner and subject to the restrictions and limitations and power under which it was held before it was so given, etc. At the death of my said wife the said property to be divided equally among my surviving children as herein provided."

There are other clauses of the will not involved, and the question is: Did the widow take a life estate in the devised property, or did she hold as a tenant with the children and entitled to the one-seventh of the estate for life only, holding the other six-sevenths as a trustee and liable for rents.

The court below held she was a trustee for the children, and that that they had a present interest and were entitled, at the death of the devisor, to the one-sixth interest of the rents and profits. This contention, in our opinion, is erroneous.

The wife, by the provisions of the will, held the title for the joint benefit of herself and children, with the power to give to each child, as she saw proper, a part or all of his or her interest in the estate, which was not to exceed one-sixth; but that she was, as trustee, to hold and manage all the estate but one-seventh for these children, the proceeds to be applied by her for their use, is inconsistent with the plain intention of the testator.

The whole estate was devised to the wife for life, with the power to give any part of it, including the rents and profits, if any, to the children, and for which the child is chargeable.

The wife and mother of these children was vested by the provisions of this will with the same power the testator had over it during his life, with the exception that she could not sell the principal or give to any child more than a one-sixth interest. The estate was hers for life, and the benefits to be derived by the children were such as the wife saw proper to confer during her life.

He directs how these benefits are to be conferred, and that is, at the pleasure of the wife, with the restrictions as to the extent of the

Digitized by Google

value of the gift, not to exceed one-sixth interest, *and at* her death the whole estate is to be divided between them.

Any other construction would make the wife manage and control this farm for the small pittance of the proceeds of the one-seventh part during her life, leaving her liable as trustee for rents and profits. Such could not have been the intent of the testator, because he gives to the wife the power to give as she pleases, both as to the time of the gift and the amount.

The idea, therefore, of conferring such power on the wife and confine her to the income of the one-seventh of the estate was never thought of by the devisor.

The case of Stillwell v. Leavy, 84 Ky., 379, is not like this case. In that case the devise was to the wife, Nancy Fleming, for the support of all the family, and to be divided between the children at her discretion. The language of the will is different in the one case from the other, as well as the circumstances surrounding the testators.

The wife, in Stillwell v. Leavy, was to *support* the children, who were then in no condition to support themselves, and she sold the land in violation of the trust. Here the children, or some of them, were married and able to support themselves, or if not, the devise being for the joint benefit of all, the will, in express terms, directs the manner in which the benefits are to be bestowed—not for the support of the children, but to be given in the manner and when the life tenant, the mother, sees proper. She controls it all—gives to the children as the testator could, if he was alive, and this is the plain meaning of the will.

The widow is entitled to the rents and profits of the estate, and is not a trustee to use and manage it for the present use of the children. He made his wife executrix and required no bond of her, knowing that she could not dispose of this land, and, at the same time, vesting in her the right to surrender to any of the children their part of the estate "*when she saw fit.*"

As the mother of these children she is empowered to give as if it was hers, but not to give one more than the other; and that she may do this the testator gives her the entire control for her life for the joint benefit of all, no doubt believing that she will not violate his wishes, but that when she does give, that no distinction will be made.

The judgment below is reversed, with directions to adjudge that this estate is for the wife for life, remainder to the children. This is the plain meaning of the instrument.

CITY OF COVINGTON V. SHINKLE.

(*Filed Dec.* 6, 1892—*Not to be reported.*)

Chancellor's finding authorized by evidence—The evidence was sufficient in this case to sustain the finding of the chancellor that the appellee had a right to use the property herein involved, in common with others, without invading the rights of appellant therein.

W. A. Byrne for appellant.

Collins & Finley for appellee.

Appeal from Kenton Circuit Court.

Digitized by Google

Opinion of the court by Judge Bennett.

This case was here in the name of U. Shinkle v. The City of Covington, and decided and reported in 83 Ky., 420. That case is particularly referred to for the facts in this case. It was alleged in that case that the then appellant, U. Shinkle, was in the possession of that part of the bank of the Ohio river, in common with others between Scott and Madison streets in the city of Covington, for mooring his coal and flat boats, etc.; that said land was not used by the city for streets, alleys, wharves, etc., but was a common; that U. Shinkle had the right to use said property in common with others, provided he did not interfere with the rights of the city for the purposes indicated, which rights of the city should be established by civil proceedings instituted by the city or in this proceeding; that the lower court, upon the return of the cause, should grant U. Shinkle an injunction staying proceedings by the city to enforce and collect penalties for the alleged trespass by U. Shinkle until the right to the property was settled by adjudication.

Upon the return of the case the injunction was granted in obedience to the mandate of this court, and, upon final hearing, the injunction was perpetuated. The city has appealed. The only question to be settled is, did U. Shinkle establish his right to the use of said property in common with others without invading the rights of the city? We think the evidence authorized the chancellor's conclusion that U. Shinkle, under his lease, had such right, subject to the superior right of the city to establish streets, wharves, etc.

Therefore, the judgment perpetuating the injunction is affirmed.

WADLINGTON V. N. N. & M. V. R. R. CO.

(*Filed Dec. 6, 1892.—Not to be reported.*)

1. *Neglect—Burden of proof—Peremptory instruction*—In an action to recover damages for death alleged to have been caused by the willful neglect of a railroad company, the burden of proof is on plaintiff to show such willful neglect; it can not be presumed.

In such an action the plaintiff's evidence failed in toto to show such willful neglect, but at its conclusion the trial judge refused to grant defendant's motion for a peremptory instruction, stating that he preferred to hear the testimony of the engineer of the train that had caused decedent's death before passing upon the motion. Thereupon the defendant introduced said engineer as a witness, and at the conclusion of his testimony renewed its motion for a peremptory instruction, which the court then gave. *Held*—That the instruction ought to have been given at conclusion of plaintiff's evidence; but since the evidence introduced by defendant did not aid plaintiff's case, it was proper to give the instruction at its conclusion.

2. *Railroads—Willful neglect*—It is not willful neglect for a section foreman to send one of the section hands out on the road at night to give a certain warning to a passing train, even though the section hand had performed a hard day's work on that day, and was much fatigued at night, such service being a part of the work for which the section hand was paid, and it being the custom to require such service of section hands.

3. *Same*—It was not an act of willful neglect to send a section hand out on a railroad at night to warn a certain train of danger, if he should discover any, without furnishing him the customary red danger lamp, but with only a white one, it appearing that such hand did not discover any danger to

Digitized by Google

said train, and that he would not have had any use for such red lamp if provided with it, and that the white lamp could also be used if necessary to give a danger signal.

T. J. Watkins for appellant.

F. A. Wilson and P. H. Darby for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Chief Justice Holt.

Alfred Wadlington was a section hand on appellee's road. He was sent by his section boss, upon a certain night after it had been raining, to watch at a certain cut and give warning to passing trains of any danger.

It was customary for the section hands to perform this service, they getting pay for it. He was killed about midnight not a great distance from the place where he had been sent to watch by a passing train. His widow sues to recover damages, the ground being that his death resulted from the willful neglect of the company's agents. The petition avers that it was caused by his being required to perform the service after a day's labor, and when he was so worn physically as to be unable to care for himself; also, that the engineer of the train failed to stop it and save the life when by proper care he could have done so. The appellant offered evidence tending to show that her husband was killed by the passenger train, and that he had been sent to render the service above named. She introduced no eye-witness of the accident, and no testimony as to the circumstances of the killing. At the close of the appellant's testimony the attorneys for the appellee asked that the jury be told to find for it. The court acting, perhaps, upon the erroneous idea that, although the ground of the action was alleged willful neglect, the burden rested upon the appellee to show its absence; said it would be more satisfactory to him to hear the engineer testify who had charge of the train before the making of the motion, and required it to introduce him. The appellant made no objection. He testified that, although he was on the lookout, he saw no light, and did not see the deceased until just a moment before he was struck, when it was too late to save him; that the train was running at about thirty-five miles an hour, and the deceased either had no light burning or was holding it on the other side of him, else the witness would have seen it from the train, as the night was quite dark and the track straight and nearly level for about a mile before the train reached the deceased.

At the close of this testimony the appellee again renewed its motion for a peremptory instruction, and it was granted. It is now urged that this should not have been done after the introduction of the engineer as a witness by the appellee. It, however, had a right to cease offerring evidence whenever it desired. It had only introduced a witness by the court's request and direction, and, if the appellant's evidence failed *in toto* to support a case, and had not been supplemented by that introduced by the company, then the instruction was proper. The rule is too well settled in this State to need the citation of authority; that if there be any evidence, however slight, to support a recovery, the case should be allowed to go to the jury. Willful neglect, however, must be shown; it will not be presumed.

It is evident the deceased went willingly to perform the duty. It had always been customary for the section hands to render this serv-

Digitized by Google

ice. He knew he was to be paid for it. The section boss, in having him do it, was only performing a proper and customary duty. He was a stout, able-bodied man, and, under such circumstances, the charge of willful neglect does not lie upon this ground. This record fails to show what the deceased was doing when he was killed. It is and will likely always remain a mystery. There is no evidence whatever upon the appellant's part to show that those in charge of the train knew of the presence of the deceased upon the track before he was killed. It was at a point where the train had a right to run at a rapid rate, and if the testimony of the engineer be consulted it appears the fact that the deceased was on the track was not known in time to save him from injury. It was proven, however, upon the trial that he was sent out to watch the track with only a lamp, giving a white light, and that it is usual to furnish a man not only with it, that he may see and look for dangerous places, but also with one giving a red light, to signal trains in case of danger

The usual light for signaling the movements of trains is a white one; but the red one is used and better adapted, perhaps, to giving notice of danger. The white light, when swung across the track, will, however, stop a train. It is, therefore, said that it was necessary for the deceased, in order to signal danger, to get upon the track and there swing his lantern; whereas, if he had been provided with the red light also, he could have done so without getting on the track; that having to get on the track, he was likely to be deceived as to the distance of the train from him or to expose himself by its too near approach in an effort to stop it. There is an entire absence of evidence, however, showing that the deceased was making any effort to signal the stopping of the train, or that there was any danger whatever that rendered it necessary. In fact, it may be said it was shown there was none, as the train, after stopping and picking up the body of the deceased, proceeded on its way, and no danger appeared. Instead, therefore, of its being shown that the deceased was trying to signal danger to the coming train, it is to be presumed he was not, as it is affirmatively shown no danger existed, and there was no need of such a signal or of stopping the train. This being so, he had no business on the track.

The alleged willful neglect in failing to furnish the additional lamp is not set out in the petition, the grounds stated being the sending of the deceased to render the service when, as alleged, he was exhausted by his day's labor, and the alleged failure of those in charge of the train to save his life when they could have done so. But aside from the omission of this ground in the petition the evidence entirely fails to show that occasion existed for the use of the red light when the accident occurred, or that the deceased was then engaged in an effort to stop the train. For aught that appears he may have fallen asleep upon the track, or been walking upon it with his back to the coming train without his light burning, or it in front of him, and failed to notice its approach.

So far as the record discloses, therefore, the color of the lamp furnished to him, or the fact that but one was furnished, is immaterial. Certainly the charge of willful malice is not thereby sustained. In our opinion there was no evidence whatever to support the charge, and the peremptory instruction to find for the company was, therefore, proper.

Judgment affirmed.

Digitized by Google

EAKINS, &C. V. EAKINS, &C.

(*Filed Oct.* 13, 1892—*Not to be reported.*)

1. *School taxation—Constitutional law*—An act, authorizing an election to determine if a school tax should be imposed in a certain school district, which authorizes only white persons to vote at such election, is unconstitutional if it imposes such tax upon colored citizens of the district.

But plaintiffs, who are white voters and taxpayers of said district, are not injured by such denial of right to vote to colored voters, and will not be heard to complain on that account.

It will not be presumed, unless expressly so required by the act of the legislature, that it was intended to impose such taxation on the property of colored citizens of the district, who were not allowed to vote at the election, concerning such taxation.

2. *Same—Notice of election*—The act authorizing such election to be held fixed only the maximum limit of the amount of such taxation, and intended to give the trustees of the district discretion to determine the amount thereof within the designated limit. *Held*—The notices of election ought to have stated the rate of taxation the trustees intended to impose, but the omission to do so was not material in this case.

3. *Same—Mode of fixing rate of taxation by school trustees*—Where school trustees are vested with a discretion as to the rate of taxation to be imposed for school purposes, there ought to be some order or equivalent entry in the books evidencing their proceeding fixing such rate.

But a mere tax book, with the names of taxpayers inserted therein, and the amount of their property and the school tax assessed against each taxpayer opposite the name, sufficiently evidences the rate fixed in this case.

4. *Same—Election—Transfer of voter from one district to another*—An act of the legislature consolidated two school districts and directed that the question of the payment by it of a certain tax in aid of common schools be submitted on a certain day to the voters of said consolidated district. On the day of the election the superintendent of common schools for said county cut off a part of its territory from the consolidated district and formed a new school district out of it. No voters of the territory so cut off were permitted to vote at the election and the tax was voted for by a majority of those voting. *Held*—That the division of the district on election day did not render the election or the tax imposed void.

Yeaman & Lockett for appellants.

S. B. and R. D. Vance for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

"An act for the benefit of common school districts numbers thirty-three and thirty-four, of Henderson county," was passed and approved March 14, 1890, authorizing the trustees of said districts consolidated to submit to qualified voters thereof, at a general or special election, the question whether the district shall be taxed, in discretion of the trustees, at a rate not exceeding seventy-five cents on one hundred dollars and a per capita tax of not exceeding five dollars upon each male person over twenty-one years of age for the purpose of erecting a suitable school building and creating a fund necessary to insure pay of teachers for a ten-months school each year for a period not exceeding five years.

The election having been held, at which votes of a majority of those voting were cast in favor of the tax, and a person selected by the trustees for the purpose having proceeded to collect the tax, this action was brought May 19, 1891, by appellants, the taxpayers of

Digitized by Google

the district, against appellees, three of whom are trustees and one the collector, to enjoin perpetually such collection; and this is an appeal from final judgment dissolving the injunction temporarily obtained and dismissing the action. Various grounds for reversing the judgment are urged in argument that we will consider in order:

1. The act authorizes only white persons to vote at the election, and certainly if negroes residing within the district can be taxed for the purposes set forth, being at the same time denied the right to vote at such election, their constitutional rights would be violated. But appellants can not make that objection for two reasons: first, being white persons, they are not injured, and, as has been more than once decided by this court, can not complain; second, the act fairly construed does not subject the property or persons of negroes in the district to taxation; for while it is not expressly provided that only persons and property of white persons are to be taxed, it would be so plainly unjust and unconstitutional to tax negroes under the circumstances that it is the duty of the court to presume the legislature never intended it to be done.

2. The notices of election appear from the evidence to have been given the length of time previous to the election, and posted at the number of places required by the act, and also substantially informed those interested of the time and place at and the purpose for which the election would be held.

3. By the act, as will be observed, only the maximum limit of taxation was prescribed, the legislature evidently intending to give to the trustees discretion to fix the precise rate of taxation to be assessed both *ad valorem* and capitation. But the trustees do not appear to have fixed or stated in the notices what would be such rate, the question submitted being whether the district should be subjected to taxation for the purposes mentioned not exceeding the limit prescribed in the act. We do not, however, regard that omission as material, in view of the fact discretion was given by the statute to the trustees, and sanctioned by a majority of those voting, to fix such rate as might be necessary to accomplish the objects contemplated But there ought to have been some order, or equivalent of it, entered in their book fixing the rate of taxation after if not before the election, as without it the collector appointed by them was without any authority whatever to collect the taxes.

A book was produced in evidence by one of the trustees, called by him the tax book, in which there was an entry, in substance, that the trustees had sworn C W. Eakins to collect said school tax and return a true statement of the same to the trustees. And in the same book is a list of names of taxpayers, opposite to each of which appears the value of his property, taken from the county assessor's book, and the school tax assessed against him at the rate of seventy-five cents on each one hundred dollars' worth of his property, and five dollars poll tax. The same witness stated the trustees did fix the rates mentioned. but no formal entry was made of it in their book. But it seems to us that the entry of each taxpayer's name and the amount of tax due from him, according to the rates mentioned, should be regarded as equivalent to a formal order and as authority to the person appointed to collect the amount of taxes thus ascertained and assessed against each taxpayer.

4. It appears that districts thirty-three and thirty-four were consolidated into one district, called and known as Robard's district, and the act authorized the question to be submitted to the voters thereof, and the taxation, in case of a majority of votes being cast

Digitized by Google

in favor of it, was provided to be levied and collected on the property and persons therein. But the superintendent of public schools in Henderson county testified on the trial that, on the day of the election in question, he carved out of the territory of the Robards district another, numbered seventy-five, and that no person residing therein was permitted or did vote at the election. And the argument is made by counsel such change of the district rendered the election void and of no effect. It will not do to say that the act was intended to fix the boundary of the two districts consolidated unchangeable for all time; nor do we see how those left in the Robard's district were prejudiced by lessening the boundary thereof, for, after all, the purpose was to impose the special taxation on the people of that district, the identity of which was not destroyed, only in case a majority of those upon whom the burden would fall and who would receive exclusively the benefits, voted in favor of it. The superintendent had the power to make the change, whereby those put in district seventy-five were at the same time relieved of the proposed taxation and cut off from the privilege of voting upon the question. It seems to us that, as all the conditions and requirements of the special act were substantially complied with, and a majority of voters in the Robard's district, as constituted when the election was held, voted in favor of the tax, the trustees had the right to assess the amount due from each white taxpayer of the district, as they did do, and appoint a person to collect.

Judgment affirmed.

MASSIE V. COMMONWEALTH.

(*Filed Dec.* 13, 1892.)

Criminal law—Motion for trial judge to retire from the bench—A motion to compel the judge to vacate the bench on the trial of a particular case and permit a special judge to preside must state such facts as show that the regular judge can not properly preside in the case and of the sufficiency of the facts so stated the judge is of necessity the judge, but his determination is subject to appeal.

In this case the defendant averred facts that showed that the judge could not properly preside at his trial, and the case is reversed because of the refusal of the judge to so retire, although the record of the trial may not disclose any error committed by the court to the prejudice of appellant.

E. E. Settle, Lindsay & Botts and Jas. A. Scott for appellant.

W. J. Hendrick for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted in the Owen Circuit Court, charged with the crime of murdering Jesse Honaker. The second trial of the case resulted in convicting the appellant of the crime charged, and fixing his punishment at confinement in the penitentiary for life.

The appellant, before the second trial had commenced, moved the trial judge to retire from the bench and not preside in the case, and supported his motion by the following affidavit:

"The defendant, J. I. Massie, states that his honor, Warren Montfort, will not afford this defendant a fair nor impartial trial of this

Digitized by Google

case; that the said judge has repeatedly expressed his opinion of the guilt of the defendant upon the former trial of this defendant; has that opinion now, and has, at all times since said trial, had said opinion, and repeatedly and publicly expressed the same, and that, while the jury was impaneled to and did try this defendant's case at the May term, 1892, of this court, were considering of their verdict, said judge became angry after said jury was discharged; said judge did repeatedly, and to divers persons, talk of and criticise severely those of the jury who favored the defendant, and said that this defendant's case was the most cold-blooded ever committed; that said judge has also repeatedly said to divers parties that if his counsel argued this case, or attempted to argue his case as upon a former trial, that he would see that such argument was not made; that said attorneys had no right to give to the jury their opinion of the meaning of the words "willfull," "feloniously" and "malice aforethought," and that said judge well knew the strong, rabid and unhealthy public sentiment against the defendant; and that there is now divers races for public office being made, of which the race for circuit judge is one, and that unconsciously the said judge so rules as to satisfy the blood-thirsty throng, and has repeatedly discussed the defendant's case with the common crowd, and would and did express his opinion of defendant's guilt, and that the said judge is personally hostile to this defendant."

This affidavit is supported by the other affidavits required by law. Appellant's affidavit discloses the fact that the judge, after the first trial of his case, criticised to divers persons, those of the jury that favored the appellant; that he denounced the appellant's case as the most blood-thirsty that was ever committed; that the judge knows that there is a rabid and unhealthy feeling against him in Owen county, and that the judge, in the presence of crowds, expresses, during canvasses for the various offices, the circuit judgeship being one, his opinion as to the affiant's guilt, and the judge so rules as to satisfy the blood-thirsty crowd; that he is personally hostile to the affiant.

This court, in the case German Insurance Co. v. Landrum, 88 Ky., 433, said that the affidavit to compel the judge to vacate the bench and give place to a special judge to try the case, must state such facts as should prevent the judge from properly presiding in the case—such as personal hostility, personal interest, partiality, etc., the sufficiency of which the judge must of necessity judge, but subject to appeal.

Now, the affidavit says that the judge is personally hostile to the affiant, and gives such reasons for his belief as to show, if true, that the judge should not preside in his case. The grounds are sufficient, but it is said the record, so far as the judge's rulings are concerned, indicates no hostility or prejudice against the appellant. But that is not the question, for the accused has the right to be tried by a judge that is fair and impartial; and when he has good reason to believe, supported by facts, that he will not afford him such trial, he should not be compelled to take chances of a trial before that judge in order that the truth of the matter may be developed, which may never be developed, because there are many ways that a partial or prejudiced judge may knife a party that he is trying without it appearing from the record, or without his being able to ascertain the fact. So, when the fact is made to appear by proper affidavits, the judge should then vacate, and it is a reversible error if he does not.

The judgment is reversed and a new trial is granted.

Digitized by Google

LAWRENCE, BY GD'N, V. HAGEMEYER & CO.

(*Filed Dec.* 15, 1892.)

1. *Neglect—Master and servant—Peremptory instruction*—A servant about sixteen years of age was operating a saw which had been used for more than eight years and was worn out and unsafe for use. From his inexperience and youth he did not know how to repair the saw, and the appliances which kept it in its proper and safe place were concealed from view. He found that the saw was in bad repair and refused longer to work at it unless it was repaired. The master subsequently told the boy that the saw had been repaired and was safe. The latter attempted to use it but it was still out of repair and cut off a part of his hand. In a suit by the servant against the master: *Held*—That a peremptory instruction for the defendant was improper. If the defect in the saw was not apparent when the servant returned to his work he had a right to rely upon the representation of the master that it had been repaired. On the other hand, if the continued danger from its use was apparent to one in the exercise of ordinary care, then a continuance of the work by the servant was contributory neglect; but these were questions that should have been submitted to the jury.

2. *Same—Evidence*—The statement of plaintiff that when he began working with the saw, after it was reported to be safe by the master, its defective condition could not be perceived, was competent evidence and should have gone to the jury.

L. P. Fryer and Jno. H. Barker for appellant.

W. M. Rardin and Jas. F. Ellis for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, James A. Lawrence, while engaged as an employé of the appellee, a corporation, in operating a ripsaw in its mill, had a part of his hand cut off, and he sues to recover damages upon the ground that the appelle, through those in charge of its mill, was guilty of gross neglect in having him use a saw unfit for use, and which was so unskillfully placed in position as to render its use dangerous, all of which was unknown to him at the time of the injury.

At the close of the testimony for the appellant the jury were, upon appellee's motion, peremptorily instructed to find for it. It appears the appellant, a boy sixteen years old, was operating a saw that had been in use for over eight years; that from age and inexperience he was unfamiliar with repairing such machinery; that the appliances which kept the saw in place were hid from view by a table, the saw only being visible; that they were worn out, which rendered the saw unfit and unsafe for use, and that the workman had to use his hand in running the boards through as he walked along the side of the table. The employment was quite hazardous. A short time before the accident occurred the appellant found the saw did not run straight and steady; that it jumped and wabbled and would pinch the boards as they went through, and he went to the person whose business it was to repair the machinery and told him of it and requested its repair. The reply was that he did not have time. The appellant then reported the matter to the foreman, and declared he would quit work unless it was repaired. The foreman then said he would have it fixed, and directed the machinist to do so, and, in a short time, the latter came to the appellant and told him he had done so, and that it was all right. The appellant at once

Digitized by Google

began work with it, but the saw pinched the second board and stopped it. The appellant's hand slipped off the board as he attempted to push it through and against the saw and was injured.

These are substantially the facts of the case as shown by the testimony for the appellant. It is the duty of the master not to expose the servant when in the conduct of his business to hazards, which may be guarded against by proper diligence upon the part of the master. The latter is not required to guarantee absolute safety or perfection of machinery or other apparatus provided for the use of the servant, but in furnishing and keeping them in proper condition he must observe all the care which the exigencies of the situation and nature of the business reasonably require for the safety of the servant. This is implied as a part of the contract for service. (Hough v. Railway Company, 100 U. S., 213.) It is also equally implied, however, that the servant agrees to take the natural and ordinary risks incident to the service, such, for instance, as arise from the negligence of his fellow servants. The compensation is considered in law as being adjusted accordingly. Considerations of justice and public policy require this adjustment of rights and liabilities, and the difficulty arises in their application to the facts of the particular case.

While the master must use reasonable skill and care in providing the agencies to be used by the servant in the conduct of the business, yet the latter must act likewise in their use, because he ought not to be allowed to hold the master liable for injury resulting from his own reckless conduct. He ordinarily has no hand, however, in providing these agencies, or with keeping them in suitable condition, and he can not, therefore, be understood as assuming, by his contract of service, any risk in these respects. This is the master's side of the business, and what is reasonable care in the matter upon his part is graded by the character of the business and the dangers incident to it. This rule applies to corporations as well as individuals. When the employer is a corporation, the duty must, of course, be discharged by its agents and officers, but in doing so they are not to be regarded as fellow servants of those who operate these agencies. They are then performing the duty that the master owes to the servant, and represent the company. (Wharton on Negligence, sections 211, 212, 232, a.)

It is said, however, that, viewed by the testimony for the appellant, an examination by him of the saw would have shown its unsafe condition, and that it was required of him to make it, as it was his duty to start and stop the saw. Undoubtedly, if the employe, after discovering the defective condition of machinery furnished to him for his use, continues to use it without complaint or giving notice to the employer or the proper officers of a company, he would be guilty of such contributory neglect as would prevent a recovery for an injury arising from the defect. He would be regarded as having assumed the risk or danger arising from its defective condition. In this case, however, the appellant, upon discovering, by use, the defective condition of the saw, notified the proper agents of the company, and refused to use it if it was not repaired. The foreman directed it to be done, and the party whose business it was to repair and care for the machinery reported to the appellant that it was all right.

In this matter the machinist and the foreman represented the corporation. For this purpose they were the company. The testimony tends to show that when the appellant again began to use the saw its defective condition was not apparent. If so, he had a right to

Digitized by Google

rely upon what the machinist said as to its condition. It was in law the statement of the company.

If the continued danger from its use was apparent to one in the exercise of ordinary care, then a continuation of the work by the appellant would constitute contributory neglect and prevent a recovery, but otherwise he had the right to assume that what the company's agent had said was true. In the latter case the use of the saw by him, although dangerous, was not contributory neglect upon his part. This question the appellant had a right to have submitted to the jury, and it should have been done under proper instructions.

The court refused to let the appellant state as a witness whether, when he began working the saw after it had been reported to him as being all right, its defective condition was perceivable. This was error. If it was not apparent to one of ordinary care, then he had the right to rely upon the statement made to him and proceed with his work without an examination of its condition. He was not bound to hunt for a defect. It is evident the injury was not the result of mere accident. It arose from the defective condition of the apparatus connected with the saw.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

C., N. O. & T. P. RY. CO. V. CONLEY, ALIAS WARD'S ADM'R.

(*Filed Dec.* 17, 1892—*Not to be reported.*)

1. *Railroads—Negligence—Employes*—On the issue as to whether the decedent at the time of his death was an employe of appellant, the uncontradicted evidence showed that he had been employed as a section hand by the day, or as a mere day laborer; that he worked for the appellant on Saturday, did not work for it on Sunday or Monday following, and was killed Monday night: *Held*—That such employment was merely from day to day, and either party had the right to terminate it on any day, and the deceased was not an employe of appellant on the day or at the time he was killed, and there was no evidence to authorize the submission of this question to the jury.

2. *Same—Instructions*—Where the claim of the petition is that the deceased was killed by the rear portion of a train that had been divided in two sections, defendant can not successfully complain because the trial court refused to instruct the jury that plaintiff could not recover if deceased was killed by the front section, when all the instructons which authorized a recovery required the jury to find that the deceased was killed by the rear section.

C. B. Simrall, J. W. Yerkes and C. A. Hardin for appellant.

Bell & Bell and Phil. B. Thompson for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Bennett.

This case, in the name of Edward Conleys' adm'r v. the present appellant, then appellee, was decided by this court upon substantially the same facts as appear in the record of this case. That case was reversed (see 11 KY. LAW REP., 602) and sent back for a new trial, and the new trial resulted in a verdict and judgment for $6,000 for the present appellee.

Digitized by Google

The report of the case is referred to for the law and facts as there, and now presented, except as referred to hereafter in this opinion.

The appellee sought to recover for the killing of his intestate upon the grounds that the appellant, on a dark night, in the town of Bergin, going on a down grade, disconnected its train and suffered the rear end of the train to descend the down grade by its own momentum without being lighted in front and without a lookout; and that, while said train was in motion, it ran over the appellee's intestate and killed him. We held that the question of the appellant's liability should have been submitted to the jury, which, upon the return of the case, was done, and the new trial resulted in the verdict and judgment indicated.

It is alleged in the petition, and not denied until after the case was reversed, that the deceased, at the time of the accident, was not in the employment of the appellant. Upon the return of the case the appellant was allowed to amend its answer and put in issue that allegation. Issue was joined. The evidence as to the deceased being in the employment of the appellant at the time of the injury is to the effect the deceased had been in the employment of the appellant as a section hand a considerable time, by the day; in other words, as a day laborer, the appellant being at liberty to dispense with his services at any time, and he being at liberty to quit at any time, permanently or for a day. Such contracts of service are contracts by the day; neither party is bound by it except for the day of the employment, and if the service continues longer than that day it is under a new implied contract each day of the service.

The evidence is conclusive that the deceased, while he worked for the appellant as section hand on Saturday, did not work for it on Monday following, but he was his own man on that day, and on Monday night, when he was killed, he was not in the employment of the appellant. For the foregoing reasons the court did right in not submitting the question of employment to the jury.

The appellant complains that the court refused its instructions to the effect that if the deceased was run over by the front portion of the train the appellee could not recover. But the court, in the instructions given, confines right of the appellee to recover to the fact that the appellee was run over and killed by the rear portion of the train. The instruction upon that subject is plain and full, and the proof authorizes the conclusion that he was killed by the rear train. The appellant also claims that the court refused its instructions in reference to contributory negligence by the deceased. But the court, in the instruction given, fully instructed the jury upon that subject. The damage was not excessive. There appears no reversible error in the record.

The judgment is affirmed.

MULLINS V. COMMONWEALTH.

(*Filed Jan.* 5, 1893—*Not to be reported.*)

1. *Criminal law—Breaking into outhouse with intent to steal*—Appellant, with others, went to a smokehouse for the purpose of stealing meat; some of them broke into it with that purpose while appellant aided and abetted by standing watch at a convenient distance. *Held*—That the breaking into the house with the intent to steal authorized the conviction of appellant under chapter 29, section 4, article 6, although no meat was taken therefrom.

Digitized by Google

2. *Same—Corroboration of confession*—The evidence that an offense had been committed was a sufficient corroboration of the confession of the defendant.

R. C. Warren for appellant.

Wm. J. Hendrick for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was tried and convicted of the crime of breaking a smokehouse belonging to James L. Yontes, with the intention of stealing meat therefrom, and of actually stealing the same. Two other persons were indicted with the appellant, but only he has been tried. There is no evidence that any meat was actually stolen. The evidence authorized the jury to believe that the appellant and others went to Yontes' smokehouse for the purpose of stealing meat, and some of them broke it open for that purpose, the appellant aiding and abetting by standing watch at a convenient distance to give assistance. The court instructed the jury, in substance, that they should find the appellant guilty if (under the circumstances indicated) the smokehouse was feloniously broken with the intention of stealing meat therefrom. By the indictment no entry is made necessary to complete the offense. Section 4, article 6, chapter 29, General Statutes, says that, if any person shall feloniously break a warehouse, etc., "with intent to steal," etc., he shall be punished by confinement in the penitentiary. All that is necessary to be done to complete the offense, under said statute, is that the house be feloniously broken with intent to steal. It was evidently the purpose to make that a felony, which was at common law only a trespass.

The appellant was also charged with having stolen the meat, but he is charged with that offense as a distinct and additional act. In our opinion the statute *supra* allows both to be charged as distinct acts, and a conviction of feloniously breaking, with intent to steal, upon proof of that fact alone. The evidence as to the appellant's confession was competent, and it is sufficiently corroborated by proof of the offense having been committed, etc., to authorize a conviction.

The judgment is affirmed.

GAYHEART V. PATTON.

(*Filed Jan.* 5, 1893—*Not to be reported.*)

Appeals—Verdict sustained by evidence—The only issue in the case being one of fact as to whether certain land was within or without the boundary of a designated patent, and the verdict of the jury being sustained by some evidence, this court will not reverse the judgment, although the evidence of the greater number of the witnesses is contrary to the facts as found by the jury.

A. H. Howard for appellant.

Appeal from Knott Court of Common Pleas.

Opinion of the court by Judge Lewis.

Digitized by Google

The only issue in this case is whether the land upon which the alleged trespass was committed is within or outside the boundary of the patent under which the defendant, now appellee, claims, that patent being older and superior to the one under which plaintiff, now appellant, claims. There is direct conflict in the testimony on that issue, though a majority in number of witnesses state the line of the elder patent, if run properly, would not include the land in controversy. But the jury being judges of the credibility of witnesses and weight of testimony, this court can not undertake to say their verdict in this case is palpably against the evidence, in view of the fact there is testimony to support it; that they may have been fully justified in treating as satisfactory and convincing. There does not appear to us any error by the lower court in giving instructions, or any other respect.

Wherefore, the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

GOUGE V. GOUGE.

(*Filed Feb.* 1, 1893.)

1. *Divorce* under the statute which provides that "there shall not be granted to any person more than one divorce, except for the causes for which a divorce may be granted to both husband and wife and to the party not in fault against the other for living in adultery," no party who has once obtained a divorce can obtain another on like ground unless it be for impotency, living apart for five years, or adultery. Drunkenness does not authize a divorce to "both husband and wife" within the meaning of the statute.

2. *Divorce from bed and board*—The word divorce, as used in the section of the statute quoted, means an absolute divorce, and not a divorce from bed and board, and, therefore, the plaintiff in this case is entitled to a divorce from bed and board upon the ground of the husband's drunkenness, although she has previously been granted a divorce upon the same ground.

H. Clay White for appellant.

Jas. T. Willis, R. L. Webb and Wm. Carnes for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Presiding Judge Yost.

"A judgment of divorce authorizes either party to marry again; but there shall not be granted to any person more than one divorce except for the causes for which a divorce may be granted to both husband and wife *and* to the party not in fault against the other for living in adultery." Section 2, article 3, chapter 52, General Statutes.

The appellant, Mary E. Gouge, married the appellee in September, 1879, and they lived together as man and wife from that time until 1888, when she sought and obtained a divorce from him on the

Digitized by Google

ground of a confirmed habit of drunkenness on his part accompanied by a wasting of his estate. Later they again married, and in October, 1891, she instituted this action against him for another divorce on the same ground, and sued out an injunction restraining him from collecting the rents from her real estate. The only defense urged was that the wife was estopped, under the law above quoted, from prosecuting the action, and the court below so held.

The causes for which a divorce may be obtained are in the statutes divided into four heads: First, to both husband and wife for impotency or living apart for five consecutive years; second, to the party *not in fault* for abandonment, living in adultery, etc.; third, to the wife, when not in like fault, for a confirmed habit of drunkenness on the part of her husband, etc.; and fourth, to the husband, when not in like fault, for habitual drunkenness on the part of the wife.

Appellant's counsel now insists that this case comes within the exception laid down in the section cited, as both the husband and wife can secure a divorce on the ground of drunkenness. We do not so construe the law. Drunkenness does not authorize a divorce to "both husband and wife" within the meaning of the statute, nor indeed to either of them save *when not in like fault*. That this class of causes for divorce does not come within the exception is shown by the fact that adultery, a ground available to either husband or wife, when not in like fault, is conspicuously singled out from this class and embraced in the exception of this section. It is clear that the intention of the law makers was that no party who had once obtained a divorce could obtain another on like ground unless it be for impotency, living apart for five years or adultery.

So far as an absolute divorce is concerned, the appellant must, then, lie upon the bed she has this for the second time made.

In an amended petition, however, she asked that in the event the court refused her an absolute divorce she be granted a divorce from the appellee's bed and board. This application was refused, her injunction dissolved and her action dismissed. In this the court erred. Her former divorce was not a bar to this relief, to which the evidence clearly showed she was entitled. The term divorce in this section is used in the strict acceptation of the word, meaning a legal dissolution of the marriage bond, and not in the sense of, and, therefore, is not applicable to, a mere divorce from bed and board. It will be seen that the word appears three times in the section. Thus, in the first clause it is provided that "a judgment of divorce authorizes either party to marry again," a thing expressly prohibited in cases of divorce from bed and board by the 8th section of the same article. In this clause the word necessarily means an absolute divorce, and the simplest rule of construction requires us to give it the same meaning where it appears again in the same section, unless clearly intended otherwise. The answer presented no obstruction to the appellant's prayer for a divorce from bed and board.

The judgment is, therefore, reversed, with instructions to the court below to grant her this relief, perpetuate her injunction and for further proceedings consistent with this opinion.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

PHOENIX INSURANCE COMPANY v. CREASON.

Filed January 18, 1893. Appeal from Graves Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *Insurance—Authentication of proof of loss*—In this action upon a policy of fire insurance the complaint that the proofs of loss were not properly authenticated because they were sworn to before an examiner instead of a magistrate or notary, is not well taken, as the policy does not require that they should be sworn to before a magistrate or notary, but simply that the insured shall, within a given time, furnish them to the company under oath and accompanied by a certificate as to the loss from one of the latter officers.

2. *Notice to agent*—When notice to the company is required of any particular fact it may be given to any officer or agent of the company whose duty it is, upon receiving such notice, to communicate it to the company. Notice of loss given to an agent appointed to receive and forward appplications and premiums is sufficient.

3. *Failure to furnish proofs of loss within required time*—Where the policy requires the insured to furnish proofs of loss within a certain time after the fire, but further provides that the loss shall not be payable until the proofs are produced, the failure of the insured to furnish the proofs within the time required does not work a forfeiture of his right of recovery. It is sufficient that they are produced before the institution of the action.

4. *Evidence* It was not error to require defendant's agent to testify as to his receipt of notice of loss.

5. *Same*—The testimony of other merchants in the same town as to the amount of their daily sales was not competent, and was properly rejected.

William Lindsay for appellant; Smith & Robbins for appellee.

COMMONWEALTH v. SMITH, &c.

Filed January 18, 1893. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

The sureties in an official bond are held only for the term for which their bond was given, and it is not material that the bond does not so express the obligation, as the law determines it.

In an action upon the bond of a county clerk, executed in September, 1886, the petition alleged that between the 17th day of January, 1881, and the 25th day of April, 1887, the principal in the bond received in his official capacity, certain sums of public money, of which he had paid to plaintiff only a certain smaller sum, leaving in his hand on the 25th day of April, 1887, the time of his death, "a balance of $1,195.53, which he and his sureties were accountable for to the plaintiff."

Held—That the petition did not state a cause of action, there being no allegation that any sum whatever was collected after the execution of the bond sued on.

W. J. Hendrick and R. Reid Rogers for appellant; Knott & Edelen for appellees.

LOCKE v. BOLES.

Filed January 18, 1893. Appeal from Barren Circuit Court. Opinion of the court by Judge Barbour, reversing.

Specific attachment—When a creditor has a lien upon goods and they are about to be sold in violation of his right he can have a specific attachment

Digitized by Google

without alleging or proving an actual fraudulent intent upon the part of the debtor. But where the selling is in accordance with the agreement of the parties, as the selling of a stock of merchandise in the ordinary course of trade, it does not come within the spirit or reason of the statute. Nor does the fact that the debtor is selling the goods as contemplated but not applying the proceeds to the payment of the debt or debts the lien was intended to secure entitle the creditor to an attachment.

W. L. Porter for appellant; Boles & Duff and E. W. Hines for appellee.

MORRIS v. MORRIS' TRUSTEE.

Filed January 18, 1893. Appeal from Clark Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Assignments for creditors—Death of assignor—Settlement of estate*—A deed of assignment for the benefit of creditors was executed by a debtor to his wife, who had, by a judgment of the chancellor, been made a *feme sole*. The assignee taking no steps to execute the trust, certain creditors instituted this action for its enforcement. Thereafter the wife resigned her trust, and another trustee was appointed in her stead. Subsequently the assignor died intestate, and the heirs filed their petition in the action, seeking a settlement and distribution of the estate. The chancellor adjudged that the widow held in her hands of the trust estate a certain sum, and ordered that she pay that sum to the commissioner within twenty days, directing an execution to issue if she should fail to do so. *Held*—That the judgment is erroneous in not allowing to the widow the exemptions to which she was entitled. But even if the judgment had been correct as to the amount with which she was charged it was error to require her to pay the money into court in view of the fact that she had purchased all the debts against her husband's estate, which amount to more than the sum with which she was charged.

2. *Appeals—Transcript presumed to be complete*—Section 742 of the Civil Code provides the mode in which omissions in a record may be supplied, and in the absence of any application for a certiorari, as provided by that section, this court must assume that the record is what it purports to be.

W. M. Beckner for appellant; George B. Nelson and Haggard & Benton for appellee.

WOOD & CO. v. WILCOX.

Filed January 18, 1893. Appeal from McCracken Circuit Court. Opinion of the court by Judge Barbour, reversing.

Receiver—Set-off—A receiver who has been directed by the court to pay out funds collected by him can not set-off his individual claim against the party to whom the court has directed the funds to be paid.

Quigley & Quigley for appellant; C. K. Wheeler for appellee.

POSTAL TELEGRAPH CO. v. COFER.

Filed January 18, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Removal of suits—Jurisdiction of United States courts*—The amount which must be in dispute to authorize the removal of a cause to the United States Circuit Court is $2,000, exclusive of interest and cost.

2. *Same*—In this action against a telegraph company to recover damages for trespasses upon plaintiff's land lying along a public highway, as the controversy was not as to what rights the company had to be upon the road, but as to whether, as a matter of fact, it was upon the public road or plaintiff's land, a decision of the issues does not require a construction of the acts of Congress in relation to the right of telegraph companies to use public roads in the construction of their lines, and defendant was not entitled to a removal of the cause to the Federal court on that ground.

Digitized by Google

3. *Same*—To authorize the removal of a cause to the Federal court upon the ground of local prejudice, it is not sufficient for the litigant to state in his application that he can not get justice in the State court in which the action is pending; he must also state that he can not get justice in any State court to which, under the law, he is entitled, by reason of such prejudice, to remove the cause.

4. *Improper designation of defendant*—The plaintiff having in its original petition improperly designated the defendant, the action of the court in permitting him to amend his petition so as to conform to what defendant's answer showed to be its proper designation did not prejudice the defendant.

5. *Title to public road by adverse possession*—A private citizen may, by inclosing and holding adversely for fifteen years a part of a public road, acquire title thereto.

6. *Punitive damages*—An instruction telling the jury that if they find the acts of trespass complained of were done "willfully" they may give exemplary damages, was hardly full enough to inform them of the circumstances of aggravation necessary to entitle the plaintiff to punitive damages, yet as it is evident from the amount of the verdict that it was in no way founded on this instruction, the court will not reverse on that account.

O'Neal, Phelps & Pryor and S. M. Peyton for appellant; James Montgomery for appellee.

JARRARD v. HILL.

Filed January 18, 1893. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *A contract to dig a well* in the absence of any specification in the contract as to the quantity of water to be secured, implies a quantity reasonably sufficient for the purpose for which the contractor knew the well was to be used.

2. *Sending jury to view premises—Prejudicial errors*—Under section 318 of the Civil Code it is in the sound discretion of the trial judge as to whether, and if so when, the jury shall be sent to view the place where a material fact occurred. And in this action to recover the contract price for digging a well, in which defense was that the contract had not been complied with, the plaintiff's complaint that it was error to send the jury to view the well because its condition might have materially changed since he ceased to bore therein, is not available, for the reason the plaintiff himself introduced testimony, and permitted defendant to do so without objection on his part, touching the condition of the well and the quantity of water it would furnish only a few days before the trial, thus conceding that the then condition of the well had an important bearing on the case. And as the court expressly instructed the jury that the point of inquiry as to the well was its condition at the time plaintiff ceased to bore therein, and that they might examine its then condition for that purpose, but no other, the plaintiff could not have been prejudiced.

George H. Galloway for appellant; Sims & Covington for appellee.

CITY OF HENDERSON v. SCHLAMP.

Filed January 25, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

A city is liable in damages to a person injured by the falling of a decayed tree in its streets if it had notice, either express or implied, of the dangerous condition of the tree for a sufficient length of time before the happening of the accident to have enabled it, by exercise of reasonable diligence, to have the tree removed.

In this case dead limbs among the branches of the tree and its partly decayed trunk were sufficient to authorize the jury to find that the city authorities could, by the use of reasonable diligence, have detected its condition in time to have removed the tree before the accident.

Dorsey & Sebree for appellant; Montgomery Merritt for appellee.

Digitized by Google

WIEGELMAN V. BRONGER.

Filed January 25, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Brent, reversing.

1. *Benefit societies—Charter*—Persons claiming through a member of the "general department" of the American Mutual Aid Society must look to the fund provided by the contributing members of that department for payment; and the amendment to the charter authorizing the creation of that fund is the charter law for its distribution, while the original and previous amendatory acts constitute the charter law of the "special department."

2. *Same—Insurable interest*—As the charter of the "general department" of the society expressly provides that the society "shall not issue certificates of membership to any applicant who designates any one as beneficiary thereof who has not an insurable interest in the life of the said applicant," if a certificate designates as beneficiary one who has not an insurable interest in the life of the member, he can not recover the fund

3. *Where the designated beneficiary can not take, there is no reversion to the society*, but the persons for whose benefit the charter declares the fund was created take the place of the person named in the certificate and are entitled to the fund.

As the charter of the defendant in this case declares the sole purpose for which the society was created and the funds accumulated to be "to provide financial aid to the widows, orphans, heirs, legatees and assigns of its deceased members," the beneficiary designated in a certificate not being eligible because he had no insurable interest in the life of the member, the widow is entitled to the fund, there being no children.

4. *Judgment not binding on one not a party to action*—A judgment against the society in favor of the designated beneficiary does not include the widow, she not being a party to the action in which the judgment was rendered.

J. E. Gaither and Stone & Sudduth for appellant; Lane & Burnett and O'Neal, Phelps & Pryor for appellee.

COMMONWEALTH, FOR USE, &C., V. STOUT.

Filed January 25, 1893. Appeal from Woodford Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Hearsay testimony*—In an action against a sheriff to recover damages for his failure to make the money on an execution which came to his hands, as one of the questions to be investigated on the trial was what diligence the sheriff had shown in endeavoring to find property on which to levy the execution, the information on which he acted was proper to go to the jury, and was not hearsay.

2. *Instructions to jury*—The court having instructed the jury as to the meaning of "proper diligence as used in the first instruction," it was not necessary to define that term again when afterwards used, as the jury would naturally conclude that the definition given was intended to explain or define that expression wherever used in the instruction.

3. *Same*—The fact that the court, evidently by inadvertence, used the word "and" instead of "or" in an instruction was not prejudicial, as the idea which the court manifestly intended to convey was expressed with precision in a number of places in the instructions.

4. *Verdict not flagrantly against testimony*—While the court is strongly inclined to think the weight of the testimony is decidedly in appellant's favor, yet as the verdict is not flagrantly against the testimony, the court will not reverse on that account.

E. M. Wallace for appellant; D. L. Thornton for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. MARCH 1, 1893. No. 17

KENTUCKY COURT OF APPEALS.

TERRELL v. TOWN OF BLOOMFIELD, &c.

(*Filed Oct.* 18, 1892.—*Not to be reported.*)

Dedication of streets—Burden of proof—Evidence—Where plaintiff seeks to compel defendants to remove obstructions in alleged alleys of a town, and defendants deny that said alleged alleys have ever been dedicated to public uses or placed under authority of the town, the burden is on plaintiff to show such dedication of the alleys.

The mere filing of a map purporting to show the original plan of the town, but not authenticated or proved in any manner to be such, is not sufficient evidence of such dedication.

John D. Wickliffe for appellant.

John A. Fulton for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this, a joint action, against two distinct lot owners and trustees of the town of Bloomfield, the relief asked for being a judgment compelling the individuals to remove obstructions put by them respectively in two alleged alleys and compelling the municipal corporation, by its trustees, to open said alleys.

An insuperable obstacle to a judgment in favor of appellant is, as the record stands, that each of the defendants, now appellees, the trustees, as well as individuals sued, deny expressly that the two alleys which he seeks to have opened and freed of obstructions ever were dedicated to public use or placed under authority of the town of Bloomfield.

The issue being thus made it was incumbent on appellant to show the land now claimed as alley ways was, at some time, and in an authoritative way, dedicated and established for public use. What purports to be maps showing the original plan of said town are filed

Digitized by Google

but are not authenticated and proved in such manner as to authorize the court to divest the individual owners of their alleged title and actual possession or to require the trustees to interfere with such possession and use.

Judgment affirmed.

BERRY, &C. V. KINNARD, &C.

(*Filed Nov.* 15, 1892—*Not to be reported.*)

Conveyances—Descent—Dower—A deed of conveyance was properly executed, acknowledged and delivered to a married woman, who died before it was recorded. After her death her husband caused the grantor to alter such deed by erasing his deceased wife's name therein and inserting his own as grantee, after which he had the deed recorded. *Held*—That the execution, acknowledgment and delivery of the deed to the wife passed the legal title of the land therein described to her, and such conveyance could not be set aside or revoked by the grantor except by the consent of the wife. The legal title was in the wife at the time of her death, and the alteration of the deed did not vest it in the husband. Such title passed, at the wife's death, to her heirs at law, consequently the husband's widow and children by a second marriage acquired no homestead, dower or other right in said land.

Geo. T. Duff and Thos. H. Hines for appellants.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Bennett.

The appellants, as the children of Elizabeth E. and Thomas D. Kinnard, brought this suit to set aside a deed of conveyance of a certain tract of land in Barren county, Ky., to Thomas D. Kinnard by O. F. Mosby, upon the ground that the deed, having been made to Elizabeth E. Kinnard on the 24th of August, 1878, which was acknowledged and delivered to her by said Mosby, it was, after her death, changed by the direction of Thomas D. Kinnard by erasing her name as the grantee and inserting the name of Thomas D. Kinnard as the grantee, and then recorded as a deed to him. The proof is clear and complete and without contradiction that the change was made as alleged.

There is no question that the deed to Mrs. Kinnard passed to her the legal title to the land. It was an executed contract which, if a gift by her husband, could not be revoked without the consent of those interested. There is no pretense that such consent was obtained. Therefore, as the legal title was in her at her death, her children inherited the land from her, subject to the husband's courtesy therein; but he could not acquire the fee in the manner indicated, consequently his widow or child by the second mortgage acquired no homestead, dower or other interest therein.

The judgment is reversed, with directions as herein indicated.

Digitized by Google

WINTUSKA'S ADM'R V. LOUISVILLE & NASHVILLE R. R. CO.

(*Filed Dec.* 17, 1892—*Not to be reported.*)

1. *Conflict of law—Death by negligence—Damages*—When a resident of Kentucky and an employe of a railroad is killed by the willful neglect of said road in another state, the decedent's administrator, appointed in this State, may maintain an action in this State against said railroad to recover damages for such negligent killing, it appearing that the statute of the state where the death occured gives such right of action. (Following Bruce's adm'r v. Railroad Co., 83 Ky., 174.)

2. *Railroads—Neglect—Peremptory instruction*—The decedent, a brakeman, was, when last seen alive, upon the top of a car, and was found subsequently dead alongside the railroad track. What caused his death the evidence did not show. It may have been caused by a projecting rock near the track, or may have resulted in some other way. *Held*—That the evidence wholly failed to show that the death was caused by the neglect of the railroad in permitting said rock to remain near its track, and a peremptory instruction for the defendant was proper.

B. F. Proctor, Thomas H. Hines and E. W. Hines for appellant.

W. F. Browder for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Holt.

This action was brought by the administrator of Charles Wintuska to recover damages for his death when acting as a brakeman upon appellee's train, it being alleged that it resulted through the gross and willful negligence of the company in failing to provide a proper roadway, to-wit: In allowing a ledge of rocks to remain so near the edge of its road that the deceased was knocked off the train by it and killed.

He lived in this State, but the accident occurred in Tennessee. He died, leaving no widow or child, and his administrator was appointed in Kentucky.

The law of Tennessee authorizes an action by the personal representative where the death results from the fault, omission or wrongful act of another, the recovery to be "for the benefit of his widow, or next of kin, free from the claims of creditors."

The right to maintain the action is denied, because the deceased died unmarried, it being contended that under a proper construction of the Tennessee statute the recovery must be for the benefit of the widow or child; that our statute so limits the recovery, and if there be no widow or child, therefore, there can be no recovery.

The states are *inter se* foreign countries, and the right to sue in one state, the cause of action having arisen in another, rests upon comity.

The Supreme Court of the United States, in Dennich v. Railroad Company, 103 U. S., 11, held that where either by the common law or a statute a right of action has accrued and a liability been incurred, it may be enforced in any court having jurisdiction of the subject matter and the parties.

It holds this to be the rule, although the liability has arisen by virtue of a statute, and no similar one exists where it is sought to be enforced.

It is unnecessary to say, however, how far this court would extend the rule.

Digitized by Google

It is sufficient to say that in a case like this one, and where the liability arose in Tennessee, this court held in the case of Bruce's adm'r v. Railroad Company, 83 Ky., 174, that the action could be brought in this State and by an administrator appointed in its court. That case is decisive of this question.

It is urged, however, that the peremptory instruction to find for the appellee, given at the close of the testimony for the appellant, was proper.

In this we concur. A careful examination of the record fails, in our opinion, to show any testimony tending to prove that the death of the deceased resulted from the cause above stated. It occurred upon a dark, rainy night. He was last seen upon the top of a box car going in the direction of the flat car in front of it. To reach it he had to go down a ladder at the side of the box car, and there is evidence tending to show that one in doing so would be in danger of coming in contact with the ledge of rocks. No one saw the manner of the death. The deceased was missed after the train had made one stop and gone some eight or ten miles beyond where his body was found. Some of the trainmen went back upon the engine and found his lifeless body in the cut where the ledge of rock projected. He may or may not have attempted to descend the ladder and been struck by the projecting rock. It is urged, however, that the only wound was upon the rightside of his head, and that as the train was going the ladder and the ledge of rock were upon its right side; also that a coupling stick the deceased had was found resting upon a projecting part of the ledge about ten feet up from the ground, where it is said the deceased probably threw it by the action of his hands when he came in contact with the rock. It seems to us, however, that all this is mere speculation.

Why not as well suppose that the deceased never came in contact with the ledge, but became dizzy or stumbled in the darkness as he walked along the top of the car and fell off, the wound upon his head being caused by coming in contact with some hard substance as he struck the ground?

The company were, perhaps, guilty of neglect in allowing the rock to remain projecting so near the passing trains, but unless this caused the accident to the deceased a recovery can not be had on account of it.

One may suspect that it did, but unless there is some evidence tending to so show, it was proper to give the peremptory instruction. There was none, and the judgment is, therefore, affirmed.

COTTRELL V. BRANIN, BRAND & GLOVER.

(*Filed Dec.* 17, 1892—*Not to be reported.*)

1. *Where a consignee of tobacco instructs the warehouseman not to have his tobacco insured* while stored in said warehouse awaiting sale, such instructions determines the warehouseman's duty in such case, although the custom among warehousemen may have been generally to insure all tobacco in their houses.

2. *Same—Contracts—Insurance*—Whether the owner instructed the warehouseman not to insure his tobacco is a question of fact, and the finding of the lower court in regard thereto is sustained by the evidence in this case.

R. S. Todd and Geo. W. Jolly for appellant.

Digitized by Google

Sweeney, Ellis & Sweeney and John W. Rodman for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, prior to June, 1887, had for several years been a tobacco merchant in the city of Owensboro, and from about June the 22d, 1885, until about June, 1887, had shipped his tobacco to the appellees as tobacco warehousemen, Louisville, Ky., for sale at that place, the appellees making advancements on the faith of said shipments, and deducting the advancements, interest, commissions, etc., from the price of sales.

The firm of which appellant was a member, prior to June, 1885, had also shipped their tobacco to the appellees. On the 27th of June, 1887, the appellees' warehouse was consumed by fire, together with a large quantity of their customers' tobacco awaiting sale, among which was a lot belonging to the appellant. Not long thereafter the appellees instituted this action against the appellant to recover between $5,000 and $6,000, balance due for advancements, interest, commissions, etc., and obtained an attachment against the appellant's property in Owensboro.

The appellant contested the grounds of attachment and the right of the appellees to a judgment for the sum claimed, etc. The appellant contests the right to recover judgment upon the ground that the appellees were indebted to him for the value of the tobacco burned, upon the ground that the appellees agreed to keep the tobacco insured while stored in their warehouse for its value at their own expense for the benefit of the appellant and appellees, as their interest might appear, and, having failed to comply with their agreement, they were responsible for the value of the tobacco lost by the fire. Issue was joined. The appellant and his witnesses, probably two, swear positively that such was the agreement made with Murphy, appellees' agent, in 1885, and that the appellees recognized and renewed the agreement from time to time until the tobacco was burned, and it was in full force when the tobacco burned. All the appellees positively contradict the appellant and his witnesses. They say that in June, 1885, they had a settlement with the appellant, etc.; that the appellant then directed them not to insure any more tobacco for him, covering the time that it was in storage in their warehouse; that he would carry his own risk; that the direction was renewed each year that the appellant shipped to them and they obeyed; that they had no agreement or understanding with the appellant to insure the tobacco at their own expense.

The appellant took Mr. Murphy's deposition. He swears that in 1885 he made an agreement with the appellant that no insurance should be charged, but he fails to sustain the appellant to the effect that the appellees were to insure at their own expense. As to whether or not the agreement was as alleged by the appellant or by the appellees was purely a question of fact, and the lower court having found the fact to be as alleged by the appellees, the judgment in that record must stand.

The custom as to insuring by warehousemen the tobacco shipped to them has nothing to do with the question at issue, for the reason that an agreement not to insure is established, and that agreement controls the custom. Also, as to the open policies on tobacco in the appellees' warehouse, the said agreement, controls that matter, and the policies relate to those that were entitled to the same, but the ap-

Digitized by Google

pellant is not one of those entitled, because his agreement precludes him. The court purged the transaction of usury. The attachment was properly sustained.

The judgment is affirmed.

TRUSTEES OF TOWN OF GREENVILLE V. TOWNES, TRUSTEE JURY FUND.

(*Filed Jan.* 5, 1893.)

Division line—Adverse possession—Limitation—The location of the division line of the adjoining lots of appellant and appellee is in dispute. Each claims through the same remote vendor. Such vendor conveyed one lot to H, who, in 1880, conveyed to appellee. H testified that while in possession he did not claim any land outside of that called for in his conveyance. *Held*—That if the strip of ground in dispute was within the inclosure of H, but not embraced in his deed, his possession of it was not adverse, and appellee can not rely on the statute of limitation, unless such strip was within the deed to H, since he (appellee) has held possession only since 1880.

Jonson & Wickliffe for appellant.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Judge Hazelrigg.

The charter of the town of Greenville, Muhlenburg county, provides "that the police judge of said town shall have exclusive jurisdiction over the county judge and justices of said county for the trial of all penal offenses occurring within the corporate limits of said town, over which he now has jurisdiction, and all fines and forfeitures for offenses committed in said town, when collected, shall be paid to the treasurer of said board of trustees of said town, to be by them used in the improvement of the streets of said town."

By further act it is provided "that for all fines imposed for violation of the by-laws and ordinances of said town, as well as for all violation of the penal laws of the Commonwealth, committed within the corporate limits of said town, that the fine and penalty so assessed shall be for the use and benefit of the town of Greenville, and shall be, when collected, paid to the treasurer of the trustees of the town, and by the trustees used for the benefit of said town."

The provision first quoted was approved March 4, 1869, and the amendment March 23, 1886. At its April term, 1891, certain fines were imposed in the Muhlenburg Circuit Court on indictments by the grand jury, for misdemeanors and violations of the penal laws of the State, committed subsequently to March 23, 1886, and within the corporate limits of said town.

The trustee of the jury fund collected these fines, and thereupon the trustees of the town, by motion in the circuit court, sought to compel the appellee, the trustee of the jury fund, to pay to the town treasurer the moneys so received by him. The circuit court adjudged the act of March, 1886, unconstitutional, overruled the motion and dismissed the proceeding. From this judgment the trustees of the town have appealed.

By the act of March, 1869, exclusive jurisdiction was attempted to be given the police court "over the county judge and justices of the county."

Digitized by Google

By the amendment of March, 1886, it is provided that "for all fines imposed"—evidently meaning in said police court—for violation of the by-laws and ordinances of said town, as well as for all violation of the penal laws of the Commonwealth, committed within the corporate limits of the town, that the fine and penalty so assessed —still clearly referring to an assessment of fine and penalty in the police court, that being the sole court mentioned in the act—"shall be for the use and benefit of the town of Greenville."

We are of opinion that the acts mentioned were not intended to divert from their usual course, as provided by the general law, the fines recovered in the circuit court and cover them into the town treasury.

The only court under consideration was the police court, and the fines and forfeitures referred to must have been those imposed in that court. And especially should this construction be adopted, as by it the constitutionality of the provisions of the charter of the town is saved from question.

The judgment below is affirmed.

BROWN V. READY.

(*Filed Jan.* 7, 1893.)

1. *Bills and notes—Pleading*—A petition on a note, bond or other like instrument must aver, in substance, its execution and delivery; and a plea thereto of *non est factum* completes the issue. No reply is necessary.

2. *Same—Consideration*—To such a petition a plea of no consideration must be regarded as interposing new and affirmative matter, to which a reply is necessary.

The petition alleged that the note was executed "for a lot of land." The answer in one paragraph traversed this allegation, and in another paragraph alleged that said note was "without any consideration." *Held*—That a *reply was necessary* to this plea of no consideration.

3. *Same*—Where it is averred that the consideration for a note was a lot of ground "to be conveyed" to the maker by a certain person, there ought to be an allegation that such covenant to convey has been executed, or that such person is able, ready and willing to convey; otherwise the consideration for such note fails.

Z. Gibbons for appellant.

Parker & Warfield for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

The petition on a note, bond or other like instrument, must aver, in substance, its execution and delivery; and, therefore, a plea thereto of *non est factum* completes the issue, and no reply is necessary.

In the case of Trustees Kentucky Female Orphan School v. Fleming, ex'or, &c., 10 Bush, 234, relied on by the appellant as showing that, in default of a reply to this plea, judgment should have been rendered in his behalf in this case, it was held that "the plea of *non est factum* is an affirmative plea and can not be made in merely negative language;" and, being affirmatively made by him in his answer in this action, it is insisted by appellant that such affirmative

Digitized by Google

matter should have been taken as true, it not being traversed by a reply.

The case relied on, however, is one in which an executor merely denied "knowledge sufficient to form a belief as to whether or not" his testate had executed and delivered the writing sued on; and it was this form of the plea that was denounced by the court.

Where, however, the plea of no consideration is made, there is not necessarily a denial of a single allegation of the petition, and this defense must be regarded as interposing new and material matter, which, if not replied to, must be taken as true; and, if so taken in this case, the judgment should have been for the defendant and not for the plaintiff. (Evans v. Stone, &c., 80 Ky., 78.)

It is contended, however, that the petition in this case disclosed the consideration of the writing sued on to have been "for a lot of land," and that the denial of this in the answer completed the issue, and hence no reply was necessary; but the plea of no consideration, as made by the answer, does not stop at a denial merely of this alleged consideration, but distinctly and affirmatively, and in a separate paragraph from that in which this particular consideration is impeached, the writing sued on is averred to be "without any consideration." We conclude, therefore, that to the plea of *non est factum* no reply was necessary; but the plea of no consideration should have been responded to or taken as true. Further, it is alleged in the petition that the writing sued on was executed "as the consideration for a lot of land to be conveyed by said Adams," the payee therein, "to said Brown, upon the payment of said debt;" and it is nowhere alleged that Adams had performed his covenant to convey, or that his heirs or devisees, or persons in whom the title was vested at the institution of this action, were able, ready or willing to convey.

The covenants of the contracting parties were mutual—the one to convey, the other to pay. "It has been repeatedly held," said this court in Calvin v. Duncan, 12 Bush, 101, "that a party seeking to enforce a vendor's lien for unpaid purchase money for land must set forth substantially the terms of the agreement, the character of the title to be made, and that he is both able and willing to convey title according to the terms of contract of sale." See also Williams v. Abrahams, 3 Bush, 186, and Phillips v. Breek's ex'or, 79 Ky., 465. In this case it appears that the non-resident real representatives of Adams have been properly warned, but the daughter, Kate Milward, and her husband, do not seem to have been before the court by service of process or otherwise. Clearly, they are necessary parties. It is not proper that we express any opinion on the issue raised by the plea of *res adjudicata*, but for the reasons indicated the judgment below is reversed and cause remanded for further proper proceedings.

ROCHE V. GEORGES' EX'OR.

(*Filed Jan.* 7, 1893.)

Parol declaration of trust in personal property—Evidence—A trust in personal property may be created by a parol declaration thereof by the donor, even though the possession of the property be not changed and the trustee designated refuse to act; but the evidence to establish such trust must show clearly and explicitly the donor's purpose to transfer the subject matter thereof and the person intended to take as donee.

Digitized by Google

In this case the evidence shows, with sufficient clearness, the purpose of the donor to create a trust in favor of his sister in a note executed by such sister's husband and held by the donor, although the trustee named never qualified and the possession of the note was not changed before the donor's death.

D. G. Falconer and C. J. Bronston for appellant.

C. Suydam Scott for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

The testator, J. W. George, died in Fayette county in the year 1887. He left a will that was executed in January, 1886, and a codicil annexed in January, 1887. He held a note on his brother-in-law, I. M. Roche, for $2,500, dated on the 21st of January, 1884, and made payable at the banking house of D. A. Sayres & Co., at Lexington. This note is not specially mentioned in his will, but would pass under the general devise made to his wife and children if not otherwise disposed of. He accumulated a very large estate, and, shortly before his death, seems to have been desirous of making some provision for his sister, the wife of the obligor in the note for $2,500, and endeavored to vest in her by parol the right to this note, to be held by her for her separate use. Whether or not he accomplished this purpose is the question involved on this appeal.

The executor of the will instituted this action on the note against Roche, and his wife asserted her title to it by reason of an alleged trust created by her brother for her benefit shortly before his death. That a trust may be created by parol in personal property is not questioned, and the main contention is that the intention of the testator to create a trust was never made complete.

The party in whom the trust was confided was his son, Joseph, who was made one of the executors but never qualified, or, rather, was made executor in the event those named failed to act as such. The testator expressed his intention to give this note to his sister on several occasions, and at Long Branch, in August, 1887, the testator said to his son he wanted the note collected and the proceeds paid over to his sister, Mrs. Roche. This is shown by D. B. Kirk, a brother-in-law of the testator, and who was appointed one of the executors but did not qualify. Dr. Steele, of the city of New York, an intimate personal friend of the testator, was his physician, and came with him from New York to the residence of his sister, Mrs. Roche, near Lexington, where the testator died. About forty-eight hours before his death he asked the physician if he could commit to his charge a matter of much importance, and called on a man by the name of Gray to witness what he was about to say to his friend, Steele. He said to his physician: "There would be found a note among his papers from his brother-in-law, Roche, for about $2,500; that he wished him to say to his son, Joseph, he wished that note collected from his brother-in-law and the proceeds to be given to his (testator's) sister, Alice, for her individual use and benefit," and, a few moments before he died, he said to the doctor, "be sure and not forget to tell Joe to execute this wish." The note was then in New York with his other papers. This statement is corroborated by the witness, Gray, and the case comes to this court upon the facts in no wise contradicted.

It is manifest that this was neither a gift *causa mortis*, or a gift *inter vivos*, and the question is, did he appoint his son, Joseph, a

Digitized by Google

trustee without transmitting the possession of the note to him, and thereby create a trust empowering him to collect the note for the separate use of testator's sister? We think he did. His son was notified of this transfer by the father, and whether he was or not willing to accept the trust is immaterial; the chancellor will not permit it to fail by reason of the refusal of the named trustee to act. In the case of Bartley v. Lanes' ex'ors, 6 Bush, 589, this court held "the authorities are all agreed that, to fasten a trust on property by parol declarations, it was only necessary that the language used clearly and explicitly manifested the owner's purpose to transfer the right, and point out, with certainty, both the subject of the trust and the person who is to take the beneficial interest." This same rule is referred to in Sutherland v. Sutherlands' adm'r, 4 Bush, —, where a trust was created in favor of the wife upon testimony not as strong as in this case, but still it was clear, undoubted and explicit.

In the recent case of Williamson v. Yager, 13 KY. LAW REP., 273, the authorities were reviewed, and this court said: In seeking to enforce a trust of that character, "the donee must show that nothing has been left undone by the donor necessary to create the trust; and if nothing is required of the court but to give effect to the trust as executed, it will be called into effect although the possession of the property was not changed." Other authorities might be cited, but those referred to sustain the judgment of the Superior Court sustaining the trust and reversing the judgment below, denying to the wife of the obligor the relief sought. It is argued with much force by counsel for the executor that the facts of this case show only an intention to give and to establish a trust upon such testimony would be a dangerous precedent by reason of the facility with which this character of testimony may be obtained. If the views of counsel are to prevail, then no case can well be made out creating a trust by parol, unless the facts make the gift come within the doctrine of gifts *causa mortis* or *inter vivos*, where possession must be declared. We think, to establish a trust by parol, the chancellor should require certain and undoubted testimony, and, where it is conflicting in its character, and such as to leave in the mind of the court a natural doubt as to the act of the testator by which the transfer is claimed to have been made, the chancellor should deny the relief. Here the transfer of the right to the note was evidently made. The subject of the trust is certain, and the person having the beneficial interest is named: "Be sure and not forget to tell Joe to execute my wish." The trust was created, and this note or its proceeds should be secured to the separate use of Mrs. Roche.

Reversed and remanded for proceedings consistent with this opinion.

TILLMAN V. OTTER.

(*Filed Jan.* 7, 1893—*Not to be reported.*)

1. *Right to office—Burden of proof*—When the Commonwealth institutes proceedings against one holding an office, alleging a usurpation thereof by him, the burden is on defendant to show by what authority he holds such office.

But where a citizen institutes an action in his own name against such officer and asserts that he has a superior title thereto, the burden is on the plaintiff to establish his right.

2. *Right of mayor of Louisville to adjourn the general council*—Under the charter of the city of Louisville the mayor has the right to adjourn the gen-

Digitized by Google

eral council only when the two boards, both being in session, can not agree on an adjournment; and in such case the mayor must adjourn both boards and not merely one of them.

The board of councilmen of Louisville, on October 24, 1889, passed a resolution for a joint session of the general council at 9 o'clock on that evening, which the board of aldermen refused to concur in. A committee of conference was then appointed by the councilmen with a resolution for a joint session on the 28th of October, which resolution also was rejected by the aldermen. The mayor, at the request of the president of the board of aldermen, adjourned that body, but did not attempt to adjourn the board of councilmen. *Held*—That the mayor had no right to adjourn either board at that time, and his attempted adjournment of one of them was a mere nullity and the board of aldermen was still in session.

3. *Same—Election of sinking fund commissioner*—The charter of Louisville requires the general council to elect one commissioner of the sinking fund during the month of October of each year, and, in the event of a failure by the council to do so, authorizes the commissioners of the sinking fund to make such election themselves. On October 24, 1889, the board of councilmen attempted to go into joint session with the board of aldermen for the purpose of electing such commissioner, but the board of aldermen refused to unite in a joint session, and the mayor of Louisville, without right, attempted to adjourn the board of aldermen until the 7th of November following. On November 25th the board of councilmen met with six of the aldermen and elected the appellee commissioner of the sinking fund, more than two-thirds of the general council voting for him. Appellant was elected to such office by the commissioners of the sinking fund in November following. *Held*—That the election of appellee by the joint session in October was valid, and the election of appellant in November was a nullity.

Ernest McPherson, B. F. Buckner and Aaron Kohn for appellee.

Humphrey & Davie, Helm & Bruce and T. L. Burnett for appellant.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The controversy in this case is over the office of a commissioner of the sinking fund of the city of Louisville. The plaintiff, John J. Otter, who is the appellee in this court, claims to have derived title to the office by an election held by the general council of the city on the 25th of October, 1889, and the defendant, Wm. Tillman, claims his title under an election by the commissioners of the sinking fund on the 12th of November following. The provision of the act in relation to the sinking fund authorizing the election reads as follows:

"The general council shall, in the month of October in each year, elect a commissioner of the sinking fund to fill the place of the commissioner whose term of service expires that year. In the event the council fail to elect in that month, then the election shall be made by the commissioners themselves. If a commissioner shall die, resign or from any other cause there shall be a vacancy in the office of the commissioners of the sinking fund, the same shall be filled by the board of commissioners of the sinking fund at a regular meeting of said board."

The mayor and the president of the board of aldermen are *ex officio* members, and three others, to be elected by the general council, one in each year, constitute the board, being five in all. On November 12, 1889, W. R. Ray, president of the board, Charles D.

Digitized by Google

Jacobs, mayor, and George W. Griffith, president of the board of aldermen, elected the defendant, Tillman, as his own successor, and ignored the action of the general council electing Otter to that office on the preceding 25th of October.

A question has been raised as to the burden of proof, and, without discussing the sufficiency of the answer, it is sufficient to say that as the plaintiff, Otter, was asserting his title to the office, it was incumbent on him to make out his case, as it is well settled that such a proceeding is like the enforcement of any other private right when presented by or in the name of the party claiming to have been injured; but when in the name of the Commonwealth, alleging the usurpation of an office by one of its citizens, the burden is on the defendant to show by what authority he holds it. (State v. Harris, 3 Ark., 570; People v. Utica Ins. Co., 15 Johns, 358; Miller v. English, 21 N. J., 317.)

In this case Tillman had been in possession of the office and was again chosen by a board empowered, upon a certain contingency, to make the selection, and the burden was clearly on the plaintiff, Otter, to establish title in himself, although Tillman may have had no right to the office; and it also follows that if the power of choosing a commissioner by this board was in violation of the Constitution, a question not necessary to be decided, still the plaintiff must make out his case, as he has no right to appear for the State, and by an action in his own name show that some one is holding an office to which he is not entitled, when he (the plaintiff) has no claim to it himself.

Was the plaintiff, Otter, elected by the general council on the 25th of October, 1889, is the sole question in this case, and if he was, then the judgment below should be affirmed. The board of councilmen held a meeting at their chamber in the city hall on the 24th of October, 1889, and a resolution was passed, all the members being present but one, for a joint session at 9 o'clock that evening for the purpose of electing a sinking fund commissioner. The board of aldermen, holding a session in the same hall but in a different room, refused to go into the election and rejected the resolution. A committee of conference was then appointed by the board of councilmen with a resolution to the effect that an adjournment be had until the 28th of October (the same month), when a joint meeting would be held, and this was rejected by the board of aldermen. On that same evening the mayor, at the request of the president of the board of aldermen, each one being a commissioner of the sinking fund, adjourned the board of aldermen until the 7th of November, 1889, and if the power to adjourn this board so as to prevent this election was vested in the mayor, then no election could be held by the people or their representatives (the members of the general council) for commissioner, because the statute expressly provides that the council shall elect in the month of October, and if they fail to elect in that month then the commissioners of the sinking fund shall select the member.

The power of the mayor to adjourn this board is claimed to exist by reason of a section of the city charter providing that "when both boards are in session, one shall not adjourn without the concurrence of the other for a longer term than twenty-four hours. If they can not agree on an adjournment the mayor shall adjourn them to a day not beyond the regular time of meeting." The mayor made no attempt to adjourn the board of councilmen, and from the plain reading of the charter had no power to adjourn either body unless there had been a failure to agree on an adjournment, and

Digitized by Google

then it was his duty to adjourn both bodies to a day not beyond the regular time of meeting. The adjournment made by him at the suggestion of the president of the board of aldermen was a mere nullity and left both boards in session with the right to meet the next day; nor will a proper construction of the city charter or the provisions of the law creating and regulating the sinking fund vest the mayor with such a power as to deprive the legislative councils of the city from complying with the plain provisions of the statute authorizing this election to be held in the month of October.

Those opposing the election were each and all violating a plain duty, as they must have known that an adjournment until November, if the mayor had the power to make it, was taking from the representatives of the people of the city the right to select those who were to be the custodians of large sums of money and confide it to those who were authorized to make the selection only on the contingency of the members of the city legislature failing to do that which the law required them to do, and in regard to which there could be no mistake.

The board of councilmen met the next day, the 25th of October, and six of the aldermen with them, and eighteen councilmen and six aldermen voting for the plaintiff, he was elected commissioner, there being more than two-thirds of the general council voting for him.

This court is now asked to declare that election invalid because a majority of the members of the board of aldermen, with its president in the lead, had refused to discharge their duty and purposely, as their own exhibits filed show, adjourned, or attempted to adjourn, to a period with a view of preventing an election by the general council, and in utter disregard of both public and private interests. They were, however, still in session, with six of the members ready to act with the other board. They did act, and if the absconding members had remained could not have prevented the election of the plaintiff, as more than two-thirds of the members of the joint session and of the entire general council voted for him.

It is insisted that this body, the general council, acting as the mere agents of the State in the election of men to control, as members of the sinking fund, vast sums of money should be regarded in the light of legislative branches of the government with the right of a minority to resort to parliamentary rules in order to violate a statute and prevent an election of those who are to control a corporation entirely distinct from the municipal government which gives to the general council its existence.

It is conceded that the councilmen and board of aldermen are distinct the one from the other, and that in their legislation for the city the rules governing legislative bodies must ordinarily prevail, but here the general council was made the mere agents of the State to select some one to act for and control the corporation known as the sinking fund. This general council was required to hold an election once in each year in the month of October for that purpose, and if they had assembled in that month and elected, by a fair majority vote, a member of the board without any resolution to that effect, this court would have held the election good as against a mere usurper, and in this light the defendant must be regarded under the facts admitted in this case. It is not denied that on the 25th of October, 1889, the plaintiff received eighteen votes from one body and six from the other, making twenty-four votes in all; and to hold that the plaintiff was not elected, under the circumstances, because of the

Digitized by Google

violation of official duty by the majority of the board of aldermen, would be recognizing a rule that no court should be willing to adopt.

The judgment below is affirmed.

ROSS V. COMMONWEALTH.

(*Filed Jan.* 12, 1893.—*Not to be reported.*)

1. *Indictments—False swearing*—The indictment against the defendant for false swearing sets out with unusual particularity all the details of the offense and apprises him of the specific charge against him, and, therefore, comes up fully to all the requirements of the law.

2. *Same—Instructions*—Where the alleged crime of defendant consisted in his swearing that he was not at or behind a certain tree, presumably to waylay one James Gorey, and no other time or occasion than the one when Gorey saw him behind said tree, and at which time his (Gorey's) son was along, was attempted to be fixed by the proof, and the jury could not have understood the evidence to relate to any other time, the defendant was not prejudiced by the refusal of the court to instruct the jury they could not find him guilty unless they believed that he "was at the tree *at the time* James Gorey says he was there as he passed by with his son, Festus."

Webb & Johnston and W. W. Robertson for appellant.

W. J. Hendrick for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was tried and convicted in the Graves Circuit Court on a charge of false swearing; his punishment was fixed at confinement in the penitentiary for two years, and from that judgment he has appealed.

The indictment sets out the date of the offense, the nature and style of the case in which the defendant testified, the court in which the judicial proceeding was pending, the officer who administered the oath, with accompanying averments as to the jurisdiction of the one and the authority of the other to do what each did, the specific subject matter of the alleged false swearing, with special averment of its falsity, and the knowledge on defendant's part of its falsity.

Thus was the defendant apprised of the specific charge against him by the allegations of an indictment of more than usual particularity, and one which comes up fully to all the requirements of the law. (Commonwealth v. Still, 83 Ky., 275; Archbold's Criminal Pleading and Practice, volume 2, 965.)

Instruction number 1, given by the court, and objected to by the defendant, closely follows the allegations of the indictment, and the guilt of the defendant is made to depend on the belief of the jury beyond a reasonable doubt of each and every charge contained therein.

The other instructions were favorable to him, are not complained of and are, in fact, unobjectionable.

The defendant asked the court, which, however, it refused to do, to tell the jury that before they could find him guilty they must be-

Digitized by Google

lieve that he "was at the tree *at the time* James Gory says he was there as he passed by with his son, Festus."

The alleged crime of defendant consisted in swearing that he was *not* at or behind the tree, presumably to waylay Gory, as charged in the indictment, and for this he was being tried. No other time or occasion was attempted to be fixed by the proof than when Gory saw him there and when his (Gory's) son was along, and the jury could not have so understood

Gory, the prosecutor, fixes that time at about 8 or 9 o'clock in the morning. He says it might have been as late as 10 o'clock, and Creasen, the corroborating witness, says it was about 15 minutes after 9 o'clock on that morning when he saw defendant at the tree. Some of the witnesses for defendant prove that Gory testified on a former trial that he saw Ross at the tree at about 6 or 7 o'clock, and that Creasen, who was a mail carrier, could not have reached the vicinity of the tree on his mail route before 10 o'clock that morning.

Therefore, it is insisted by counsel that the defendant was placed at the tree at different times on the same morning, and that this instruction was needed to fix more definitely the time and occasion when he was at the tree for swearing with reference to which he was on trial. But the instruction of the court on the necessity of corroboration before conviction necessarily prevented any misconception as to the sameness and identity of the occasion in question. Upon Gory's testimony, without corroboration, or upon Creason's evidence, without like confirmation, an acquittal would have been the necessary result, and of the truth of the statements of these concurring witnesses the jury were the judges.

The seeming absurdity of the proposition that Ross would have traveled, as he is alleged to have done, in full view of his enemy, with his gun in hand, in order to secrete himself behind a tree to waylay Gory, and the many contradictory statements of witnesses alleged to be the special adherents of the prosecuting witness and of defendant, were all matters the consideration of which was strictly within the province of the jury.

Nor do we perceive any error of the court with respect to the introduction of testimony, or in refusing any competent evidence offered by the defendant, and on the whole case see nothing in the record indicating that defendant had not a fair and impartial trial.

The judgment of the lower court is, therefore, affirmed.

BATES, &C. V. SLOAN.

(*Filed Jan.* 12, 1893—*Not to be reported.*)

Reformation of deed—Mistake—Limitation—A purchaser of land at a judicial sale made by a sheriff to satisfy an execution in his hands can not, more than eleven years after he acquired a deed from the sheriff, maintain an action to reform said deed and correct an alleged mistake of the sheriff whereby, in the indorsement of the levy on the execution and in the description of the land conveyed in the deed, a smaller quantity of land was mentioned than that actually levied on, sold and intended to be conveyed. In no event can a party maintain an action for fraud or mistake after the lapse of ten years from the time of the transaction complained of.

S. B. Dishman for appellants.

Digitized by Google

D. W. Lindsey and John L. Scott for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Chief Justice Bennett.

By virtue of an execution issued from the Letcher Circuit Court in favor of the appellee against the appellant, the sheriff of said county indorsed the following levy thereon upon some land belonging to the appellant:

"Lying and being in Letcher county, on Millstone creek, and described in a deed dated the 12th of April, 1852, from Richard Quilling and Solomon Quilling to Robert Bates, and recorded in deed book 'B' of Letcher county," etc.

Said land was thereafter sold by the sheriff, and the appellee purchased it at the sale, and the sheriff thereafter made him a deed to the land and described it in accordance with the levy.

About eleven years thereafter the appellee instituted this action in the Letcher Circuit Court for the purpose of correcting a mistake in the levy and deed so as to include more land and to recover the possession of the land, including that described in the deed and the additional land left out by mistake.

If it be conceded that there was a mistake in indorsing the levy and in the deed as to the quantity of land actually levied on, it is entirely too late to correct the same, for in no event can a party maintain an action for fraud or mistake after the lapse of ten years from the date of the transaction complained of.

But the judgment appealed from does not give the appellee more land than was included in the indorsed levy and deed. For it is perfectly clear that the land described in the levy is that described in the deed from Richard and Solomon Quilling to the appellant, dated the 12th of April, 1852. The additional description calling for a creek and other farms was merely for the purpose of identifying said Quilling land, which in no wise enlarges or restricts the quantity of land levied on as the Quilling land. It was that land that was levied on and no more. The judgment appealed from in plain terms directs the writ of possession to be issued for the land embraced in the S. R. Fairchild report of survey, made on the 29th of April, 1891. Said survey was of the land embraced by the Quilling deed of the 12th of April, 1852, and no more. The appellant says that he is willing to surrender the land levied on and sold, and no more was given to the appellee by the judgment appealed from, but that much was given.

The judgment is affirmed on the appeal and cross appeal.

NANTZ V. COMMONWEALTH.

(*Filed Jan.* 12, 1893—*Not to be reported.*)

Criminal law—Self-defense—The deceased voluntarily and without excuse left a place of safety and, with pistol drawn, went to the place where two parties, each consisting of several persons, were fighting, joined one party and commenced firing his pistol indiscriminately at the other party. He was shot and killed by some one of the other party, and appellant, one of such party, was indicted and tried for manslaughter, but the evidence did not show whether appellant or another fired the fatal shot. *Held*—That even though both parties were in the wrong at the time deceased joined one

Digitized by Google

of them and commenced firing at the other, still no member of appellant's party can be considered in the wrong as to decedent at that time; and, if the decedent was shot by appellant or any member of his party at a time when they were in real or apparent danger of death or great bodily harm from the decedent or any member of his party, then the plea of self-defense is available to appellant.

The instructions given in this case qualified appellant's right of the plea of self-defense unnecessarily and did not present said right with sufficient clearness.

James Eversole for appellant.

W. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

Under a joint indictment against him and J. H. Bowling for manslaughter, appellant, being tried separately, was convicted. The person killed was Jack Downey, and it occurred under these circumstances: There were assembled several persons in a liquor saloon belonging to Bowling, when a dispute arose between him and one Sibert, who was drunk, about the number of drinks called for by and furnished to the latter, which resulted in both drawing their pistols, though the evidence shows the language used by Sibert only was insulting and offensive; but two of his friends interposed before any violence was done and induced Sibert to leave the saloon and started with him along the public road away from the place. Bowling then caused all persons to go out of the saloon, the door of which he closed, for the purpose, as stated by him, of stopping the difficulty. One Chadwell, a friend of Sibert, did not, however, accompany the others. Instead, he remained in front of Bowling's dwelling house, that was near the saloon, using violent language and brandishing his pistol, at the same time stating, in reply to a rather vigorous request of Bowling's wife to go away, that he would not do so until he got ready, and thereupon, without any apparent excuse or provocation, presented his pistol at one Stewart, a friend of Bowling, demanding delivery of his gun, but another person interfered and induced him to go away, upon assurance that Stewart would not use his gun against him if let alone.

About that time one Brown endeavored to take from appellant his pistol, which, it appears, he had drawn while in the saloon and then had in his hand, though not attempting or threatening to use it, and in the struggle between them the pistol was accidentally discharged, the ball, however, not going toward Sibert and his party. Thereupon firing commenced by both parties, though the evidence satisfactorily shows the first shot was fired by Chadwell, who had gotten a short distance away, not having overtaken Sibert and his other two friends, who were thirty yards or more distant from the saloon.

The evidence shows only Bowling, Stewart and appellant did any shooting on one side, while there were five of the Sibert party subsequently reinforced by the deceased, Downey. A great many shots were fired, many of them going into Bowling's dwelling house, compelling his wife, who narrowly escaped being wounded, and her children to leave it.

It appears that Downey was not at the saloon when the difficulty commenced, being off in the woods playing cards, but immediately

Digitized by Google

after being informed of it he drew his pistol and started to join Sibert's party, stating he would go to Sibert or to hell, and, when he got there, commenced shooting at Bowling, Stewart and appellant, and while so engaged was fatally wounded.

It is to us clear from the evidence that the Sibert party were the aggressors. For not only did Sibert himself, without excuse, use insulting and offensive language to Bowling, and also draw his pistol while in the saloon, but there is evidence tending to show that he premeditated and intended to bring on a difficulty. On the other side, neither Bowling nor his friends made a hostile demonstration after Sibert left the saloon until first fired on, although the conduct of Chadwell was not only insulting and menacing, but amounted to an assault upon Stewart.

The place where Downey was killed, and about where the Sibert party had at that time taken position, was considerably farther from the saloon than where they were when the firming commenced, and the other party had likewise shifted their position, because, as there is some reason to believe, they were not safe in or about Bowling's dwelling house, for there Stewart was shot and killed. But the evidence does not show that the Sibert party had retreated, or that the other party had followed or pursued them up to the time Downey was killed.

The evidence is not satisfactory who fired the particular shot that caused the death of Downey; nor does it appear that appellant or Bowling knew at the time he had joined the Sibert party. On the contrary, appellant testified he did not know Downey was there at all, which is quite probable, as it clearly appears he was off in the woods when the difficulty commenced. He further testified, without contradiction, that he and Downey had never had a previous difficulty and were entirely friendly.

There is not the slightest reason for belief that Downey joined the Sibert party with the purpose of preventing commission of a felony. But the evidence places it beyond question that he left the place he was at and joined that party with the purpose of rendering them all the aid in his power, even to the extent of killing or wounding indiscriminately the other party, without any previous inquiry or apparent care which of the two parties were in the right. We thus have the case, not of an innocent bystander killed, nor of a person losing his life in an effort to prevent commission of a felony, but of one who voluntarily, and without apparent provocation or excuse, leaves a place of safety and, with pistol drawn, goes where two parties are fighting, takes the side of one of them and commences to shoot at the other without regard to which of them he might kill or wound. It is, therefore, clear, as the record stands, that if the deceased had killed either Bowling, Stewart or appellant instead of being himself killed, he would have been guilty, not merely of the crime of manslaughter, for which appellant was indicted, but of murder. And even if it be conceded that all those of each party originally engaged in the combat were in the wrong, because they mutually and willingly engaged in it, and that consequently the plea of self-defense would not have availed any one of them for killing another, certainly appellant was not in the wrong as to the deceased, Downey, who, without legal excuse or provocation, commenced firing at the party to which he belonged. Therefore, though appellant did in fact fire the fatal shot, if he at the time believed or had reasonable grounds to believe himself in danger of losing his life or suffering great bodily harm at the hands of either the deceased or any other person with whom he was then acting in con-

Digitized by Google

cert, he was excusable on the ground of self-defense and apparent necessity.

The lower court in the first instruction told the jury, in general terms, to find appellant guilty if he killed deceased at a time when it was not necessary nor reasonably appeared to him to be necessary to protect himself from death or bodily harm at the hands of deceased or some other person. But the jury was not distinctly enough instructed that appellant was excusable on the ground of self-defense, if he believed or had reasonable grounds to beliieve he was in danger of losing his life or suffering bodily harm at the hands of either deceased or any one else belonging to the Sibert party, with whom deceased was acting in concert. If such instruction had been plainly given we do not see how the jury could have convicted appellant, for not only deceased, but five others, were at the time firing at him and his two companions, Bowling and Stewart. On the contrary, by the third instruction, his acquittal, though Bowling may have committed the homicide, was in terms made to depend upon his reasonable belief the deceased alone was then about to kill him or Bowling, and that the shot which caused the death was fired to protect appellant or Bowling from such impending danger of death or great bodily harm.

It does not appear who fired the shot that killed the deceased, nor at which one of the three persons he had been or were then firing, but by voluntarily and unlawfully joining the Sibert party he gave them aid and comfort; and, if his death resulted from a shot fired by either Bowling or appellant, the act was excusable if they were at the time in real or apparent danger from him or any one or all the Sibert party.

Wherefore the judgment is reversed for a new trial consistent with this opinion.

MAIN JELLICO MOUNTAIN COAL CO. V. LOTSPEICH.

(*Filed Oct. 22, 1892—Not to be reported.*)

Right of officers of corporation to contract between themselves in the name of the corporation for their own advantage--A contract between the president and one of the directors of a mining company, whereby the president attempts to obligate the company to deliver coal to the director at a certain price in consideration of the director's endorsement of a note executed by the president and his wife to a bank, is void and not obligatory on the corporation.

The president of such corporation has no authority to bind such corporation by a contract with a director entered into between the parties for their own personal advantage.

The board of directors have no authority to ratify such void contracts between the president and one of the directors, and, where a ratifying contract is entered into, its terms should be construed in a manner most favorable to the corporation, and not in such a manner as to impose a heavy liability upon the corporation for alleged breaches of the previous contracts.

W. O. Harris, Rozel Weissinger and M. E. Thornton for appellant.

Fowler & Fowler, J. W. Alcorn and Hill & Denham for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Pryor.

Digitized by Google

The appellee, A. W. Lotspeich, made, as he alleges in his petition, three contracts with the appellant, the Main Jellico Mountain Coal Company, by the terms of which, in consideration that he would act as agent in the sale of the company's coal, they would place upon the cars and ship as ordered coal, at certain prices. The contracts are here set forth:

"KENSEE, WHITLEY COUNTY, KY., June 26, 1886.

"Contract between A. W. Lotspeich, of Hamblin County, Tenn., of the first part, and Main Jellico Mountain Coal Company, of Kensee, Whitley County, Ky., of the second part, witnesseth that for and in consideration of the party of the first part agreeing to act as agent, and use due diligence in the sale of the Main Jellico Mountain Coal Company's coal, they, the party of the second part, have this day bargained and sold, and do agree to ship as ordered, 600 cars, or say 10,000 tons of coal per year at the following prices per ton, F. O. B. at the mines: Lump, all the year and to all points, at $1.25 per ton, except between Union and Cleveland, Tenn., and Warm Springs, N. C., from September 1st till April 1st at $1.35 per ton. Steam coal to all points at 90 cents. Lump for stocking purposes, in May, June and July, at $1.15 per ton, A. W. Lotspeich to have exclusive sale of second party's coal in East Tennessee above Knoxville, in Virginia, North and South Carolina, and to sell in other territory. This contract to hold good three years from date.

"M. E. THORNTON, *President.*
"A. W. LOTSPEICH."

"MORRISTOWN, TENN., November 12, 1886.

"I have received from A. W. Lotspeich, through the Lookout Bank of Morristown, the sum of $4,210.55, for which I am to ship him and to his order coal to the amount to cover as he may order it. And the said Lotspeich is to make a deposit of all his collections in said bank to meet said note. And the said Lotspeich to sell the coal as a dealer would above the quotations furnished by the Southern Coal Company. Should the said Lotspeich send orders to the amount of five cars per day, the same will be filled as far as I can get cars, regardless of other orders.

Accepted— M. E. THORNTON.
A. W. LOTSPEICH.

[Writing of May 3, 1887.]

"WHEREAS, On the 26th day of June, 1886, M. E. Thornton, President Main Jellico Mountain Coal Company, for and on behalf of said company, for the purpose of introducing into the markets of East Tennessee and Western North Carolina the products of the mines of this company, made with A. W. Lotspeich, of Morristown, Tenn., a written contract, which is as follows, to wit:

[Here follows copy of contract, *ante.*]

"AND WHEREAS, Afterwards, to-wit, on the 12th day of November, 1886, he, the said president of the Main Jellico Mountain Coal Company, made with said Lotspeich an additional contract to furnish as many as five car loads per day for a certain period to cover a fixed liability upon his order, which was reduced to writing, and is as follows:

[Here follows copy of contract copied, *ante.*]

"AND WHEREAS, There has been recently a strike among the miners in the mines of this company, thus deranging the operations of the company, whereby the company was rendered unable to fill the orders of said Lotspeich under said contract;

Digitized by Google

"AND WHEREAS, In adjusting the difficulties with the miners and preparing to resume work, such expenses have been incurred and will be incurred as will necessarily increase the cost of mining and preparing the coal for market;

"AND WHEREAS, Said Lotspeich, in view of the premises, has agreed, and being now present, doth agree and consent, to so modify said two contracts as to put the price of lump coal at $1.30 and the price of steam coal at $1 per ton the year round, on board the cars F. O. B.

"Now, therefore, the Board of Directors of the Main Jellico Mountain Coal Company, appreciating the importance and advantage to the company of having said Lotspeich continue to canvass in East Tennessee and Western North Carolina, and solicit purchases for the product of the Main Jellico Mountain Coal Company, doth approve and ratify said two contracts, and doth order the agents and officers of the company to fill the orders of the said Lotspeich for coal to the number of car loads and within the time stated in said two contracts, but at the prices as fixed in the modified agreement of the parties as hereinbefore stated.

"It is understood, however, that in case the company is actually unable, for any reason, to fill such order or orders, its failure to fill such order or orders at the time shall not operate as a breach of this contract, it being distinctly understood that said Lotspeich is to make his orders as regular as possible.

"In case an order can not be filled in thirty days, it shall be considered as cancelled; and said Lotspeich is to pay by the 10th of each month for all coal sold and delivered upon his order during the preceding month, such payments to be made to the Lookout Bank at Morristown until the note on which such Lotspeich is surety is paid or otherwise secured, and after that time to the treasurer of said company at Kensee, Ky.; this contract to terminate at the end of three years from the 26th of June, 1886."

The plaintiff claims that the coal was not delivered as agreed upon, and that various sales had been made by him in excess of the price he was to pay, and that the difference in the price to be paid by him and the market price of the coal in the cars, where the defendant was to place it, entitled him to recover $21,680. He did recover the sum of $8,000 and his costs, under an instruction to the effect that if the jury believed, from the evidence, that at any time between the 26th of June, 1886, and the 12th of November, 1886, the plaintiff ordered defendant to ship to him any coal, and that defendant failed to ship the coal so ordered, they will find for the plaintiff, in damages, the difference between the market price of coal on board the cars at Kensee and the contract price, as specified in the agreement of June 26, 1886.

As to the coal to be delivered between the 12th of November, 1886, and the 3d of May, 1887, under contract of 12th of November, 1886, a like instruction was given, with this exception: "That if the defendant was unable to procure cars in which to make the shipment of coal, they will not allow the plaintiff any thing for any orders not filled for that reason."

The difference in the two instructions was caused by the condition annexed to the contract of November 12, 1886, that is not found in the contract of June 26th, 1886.

The defense to the recovery seems to have been based on the ground that the company had either complied with its contract or had an excuse for its failure to comply, and for the additional reason

Digitized by Google

that the contracts were not binding on the company because of the want of authority on the part of Thornton, as president, to make them.

An amended answer was offered to be filed alleging that the agreement of the 3d of May, 1887, was not only a ratification of the acts of Thornton the president of the company, but a settlement and compromise of all matters in regard to the delivery of the coal up to that date, with the right of the company to comply with its contracts made previously, by delivering coal upon the orders of Lotspeich, and upon the terms and conditions set forth in the writing of May 3, 1887. The filing of this amendment was refused to the extent it set up this defense on the ground that it was inconsistent with the defense in the original answer. Whether that part of the answer is now to be considered a part of the record is immaterial; if such was the construction to be given these contracts the court below should have permitted the amendment filed.

On the same day that the appellee, who was a director in the corporation, made this contract with Thornton, Dupont was displaced as president of the corporation and Thornton elected in his stead. Thornton also, on that day, purchased of the appellee sixty-two shares of stock owned by the latter in the corporation, and the two, president and director, made the contract of June 26, 1886, without the authority of the board, and when no such right was vested in the president by any provision of the corporate grant. On the 10th of November following, less than five months after this contract had been entered into, Thornton and his wife borrowed of the Lookout Bank of Morristown $4,210.55, pavable in six months from the date of the loan. The paper was made payable to the appellee and indorsed by him.

In two days after this loan had been made, viz., on the 12th of November, 1886, Lotspeich, the appellee, took the writing termed a contract by the company from Thornton, by which the latter (Thornton) agreed to deliver to the appellee, or his order, coal sufficient in amount to pay off this individual debt, and the appellee was to make deposits of the amount collected from the sales of this coal in this bank in order to meet the debt when due. Thornton acknowledges the receipt of this money from the appellee, who was the payee and who had endorsed it, and as the proof conduces to show, used this money in buying up shares in this corporation and in paying the appellee for stock he had purchased of him. The paper on its face shows it to be an individual transaction, with which the corporation was not connected, and that the appellee and Thornton were contracting to advance their own individual interests, and not the interest of the corporation. The contract of November 12, 1886, was not signed by Thornton as president, and the appellee, a director of the corporation, did not resign his office until just before what is termed the ratification agreement was entered into, and the question is, what construction is to be placed on that agreement?

If the views of counsel for the appellee are to prevail, the corporation ratified two contracts that would involve a liability of many thousand dollars, and one of those contracts, based upon an agreement between Thornton and the appellee, by which the corporation assumes to pay the bank debt of a director with its own coal, and further agrees to pay damages because the debt was not paid by the delivery of the coal, as Thornton agreed. There may be some reason for fixing a liability because of the contract of the 26th of June, 1886, as the *manager* of the corporation delivered coal under it; but

Digitized by Google

at last this case, as now presented, must depend on the construction of the ratification contract made by the board of these contracts on the 3d of May, 1887. The time for filling the orders of the appellee from the date of the two contracts up to the 3d of May had passed, and the recital that the board "doth approve and ratify the two contracts, and doth order the agents and officers of the company to fill the orders of said Lotspeich for coal to the number of car loads *and within the time stated* in said two contracts, but at the prices as fixed in the modified agreement," &c., is mere surplusage, without meaning, and requiring the agents to do that which was impossible for them to do, as the time for delivery had passed. Under this modified agreement, if the company was unable to fill the orders, its failure to fill such orders at the time was not to operate as a breach, it being distinctly understood that the appellee was to make his orders as regular as possible. It had the right to comply after the 3d of May by filling the orders of the appellee as therein provided, and there is no valid reason for placing such a construction on these writings as would evidence either a total disregard of the interests of the corporation or a want of capacity to contract in its behalf. The pleadings do not present the question of fraud by way of defense; but, nevertheless, in construing a contract made between officers of a corporation, by which a corporate liability is attempted to be created to the one officer or the other, that construction should be placed on its terms most favorable to the corporation, and particularly when the great weight of the evidence, and in fact all of it, shows that the corporate property was being used by reason of this contract to pay an individual debt of one director to the other. It may be said that the contract of the 3d of May, by which the appellee agreed to advance the price, was an assumption of both obligations, with a full knowledge by the board of the character of the transactions; but a careful review of the testimony connected with the contract of May 3d clearly indicates a still further effect on the part of the two contracting members to make the corporation liable for their individual undertakings. It follows that instruction No. 1 was erroneous, because no obligation existed on the part of the corporation to deliver coal between the 26th of June and the 12th of November, and for the same reason instruction No. 2 was erroneous, as there was no obligation to deliver the coal on the part of the corporation between the 12th of November, 1886, and the 3d of May, 1887. The contract of the 12th of November, 1886, was purely personal, and made to indemnify the appellee as the indorser of Thornton and wife on the note to the bank. When this note was paid off by the payors the obligation ceased to exist. The note even bound the separate estate of the wife for its payment, and there is no escape from the conclusion that the corporation was in nowise bound for it. We are not unmindful of the fact that the appellee says Thornton told him that the money was used to build houses for the corporation, but this is inconsistent with the entire transaction evidenced by the writing and by the testimony that is competent on that issue. What Thornton said could only be competent to contradict him, and not to show that this money was actually used in that way. This entire case should be retried, with leave to the appellant to amend its pleadings, and the further leave to file the amended answer. As the record is now presented, there can be no recovery on the contract of November, 1886, by reason of the ratification of the 3d of May, 1887. There was no consideration for it, or power on the part of the board to assume it, for it is evident that the obligation on the part of the corporation to comply with that contract was

Digitized by Google

based on the fact that both Thornton and the appellee represented it as a corporate liability.

The judgment below is reversed and cause remanded, with directions to set aside the judgment and grant the appellant a new trial, and for proceedings consistent with this opinion. There were some objections urged as to the want of a complete bill of evidence.

There is enough in the record to show that the instructions were necessarily erroneous.

N. W. MUTUAL LIFE INSURANCE COMPANY V. LOWERY, ADM'X.

(*Filed Dec.* 1, 1892—*Not to be reported.*)

1. *Pleadings—Executors*—An objection to the maintenance of an action in this State by a nonresident personal representative, or the personal representative of a person who was a nonresident at the time of his death, prior to the execution by him of the bond required by chapter 39 of the General Statutes, must be made by special demurrer. If not so made, it is waiver.

2. *Same—Evidence*—Defendant can not object that the certificate of the appointment of the plaintiff administrator by the court of another State is not authenticated in the manner required by law, when no objection to the competency of such certificate as evidence was made, and when plaintiff, without objection, was permitted to testify that he had been appointed as such.

3. *Life insurance—Jurisdiction*—An action may be maintained in this State against a nonresident life insurance company by service of summons on its agent in this State on a contract of insurance entered into in another State, and when the death of the assured occurred in such other State.

4. *Life Insurance—Limitation—Laches*—The assured died in Alabama, May 3, 1878, and her administrator instituted this action October 4, 1888, on a life insurance policy held by her at the time of her death. The right to maintain such action was not, by the lapse of time, under the circumstances of this case, barred by the Alabama Statute of Limitation, because the insurance company had no agent in that State upon whom process could be served. *Held*—

First. That the Alabama Statute of Limitation applies, the cause of action having accrued there, and since the right of action is not barred by the statute of that State, it may be maintained here.

Second. But the failure of the administrator for so long a period to assert his claim was such laches as created a presumption of abandonment of the right to sue on the policy and renders it now inequitable and unjust to enforce payment of any part of the demand.

Barnett, Miller & Barnett for appellant.

Chas. S. Grubbs and Dodd & Dodd for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

September 15, 1868, a contract of life insurance was made between The Northwestern Mutual Life Insurance Company, a corporation created and having its principal business office in the State of Wisconsin, and Mary B. Lowery, a resident of the State of Alabama, by which, in consideration of an annual premium in advance, consisting of an annual premium note of $192.60, the interest on which was to be paid at date of maturity of the annual premium, and of the semi-annual cash premium of $144.35 to

Digitized by Google

be paid on 15th day of September and March in every year during first ten years of continuance of the policy, the company agreed to assure her life for the use of herself, her heirs or assigns, in the amount of $5,000, for the term of ten years from date; also that at each distribution of the surplus, after three years from date of policy, a due proportion of such susplus on each and every year's business during continuance of the policy, would be returned to her.

The company further agreed that if default should be made in payment of any premium it would pay, as above agreed, as many tenth parts of the original sum assured as there might have been complete annual premiums paid at the time of such default, but that in order to secure such proportion of the policy, all premium notes were to be taken up or the interest thereon paid annually in cash on date of the annual maturity of the premium until the notes were cancelled by returns of the surplus, or else the whole policy was to be forfeited.

May 3, 1878, Mary B. Lowery died intestate at her residence in Alabama, and October 4, 1888, Richie Norton, as her administratrix and only heir at law, brought this action in the Louisville Law and Equity Court to recover of the company the sum of $1,000 and interest from September 15, 1878, alleged to be due on the policy.

This is an appeal from a judgment for plaintiff for $550.95 and interest from September 15, 1878, being balance of $1,000 or two-tenths of the sum for which the policy was issued, after deducting as of that date $440.05, amount of two outstanding premium notes given by the intestate.

The objection that plaintiff failed to give bond, required by section 43, article 2, chapter 39, General Statutes, as a condition of the right of a non-resident administrator or executor of a person non-resident at time of his death, to prosecute an action for recovery of a debt due such decedent, can not now avail, because, being a ground of special demurrer, it was not made in the lower court. Equally unavailing is the objection that the alleged appointment of plaintiff as administrator by the Alabama court is not authenticated in the manner required by law, because no objection was made to the competency as evidence of either the certificate of the fact or of the statement of plaintiff as a witness she was so appointed.

It appears that Mary B. Lowery, the assured, made two cash payments of $288.70 each, for the policy years of 1868-'69 and 1869-'70; also $13.48 interest on first of the two notes given, which carried the policy, according to the agreement, to September 15, 1870. She made no payment of cash premium after that date, but September, 1871, and also September, 1872, paid interest on the two notes, amounting each year to $29.96, though she received from the company $32.20 as surplus profit or dividend for each of the years 1871 and 1872.

Recovery is sought and judgment seems to have been rendered in this case upon authority principally of Northwestern Mutual Life Ins. Co. v. Fort's adm'r, 82 Ky., 269. In that case the policy differed from this only in respect to the time for which it ran, which was for the term of the natural life of the insured, and the amount of insurance $10,000. Then a default was made after payment of four annual cash premiums, and interest on four premium notes for four years.

It was held in that case, the action having been instituted recently after death of the assured, that as the annual profits or dividends to which he was entitled was clearly more than sufficient to meet annual accruing interest on the outstanding notes, which were retained by the company, there was, in legal contemplation, no default; but

Digitized by Google

that the personal representative was entitled to recover, in language of the policy, "as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default."

But this action was not commenced until more than ten years after death of the assured, when the right to bring it first accrued; and, consequently, not only the statute of limitation but laches is relied on as defense.

Section 18, article 4, chapter 71, General Statutes, provides that "when a cause of action has arisen in another State or country between residents of such State or country, or between them and residents of another State or country, and by the laws of the State or country where the cause of action accrued, an action can not be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this State."

It seems to be conceded that there exists a statutory bar to maintaining this action in the State of Wisconsin; but it has been more than once held by this court that an action may be maintained in this State on policies of life insurance, by service of process on an agent here, although the principal office of the company may be in another State. So that if this action, when commenced, was not barred by the Alabama statute of limitation, there was no statute barring it in this State.

It is true the period in which the action could have been brought in Alabama is ten years, but it appears appellant did not, after the right of action accrued, have any officer or agent in Alabama upon whom a summons could be served; which fact, according to the law of that State, had the effect to suspend running of the statute of limitation, consequently the section of General Statutes quoted presents no obstacle to maintaining the action here.

But it seems to us, independent of express statutory provision on the subject, there has been such laches on the part of the plaintiff as not only raises the presumption of abandonment of the right to sue on the policy, but as would render it inequitable and unjust to enforce payment of any part of the sum claimed. For, although it was impracticable, as alleged, to maintain an action in the State of Alabama, there was no reason why it might not have been brought in this State just as well in May, 1878, as in October, 1888.

The theory upon which recovery might have been had after death of the assured is that, although she had defaulted in payment of both annual premiums and interest on outstanding notes, she was entitled to a sufficient amount of annual dividends or profits to meet the accruing interest, and that the notes could be paid by deducting amount thereof from the sum sued for. But the amount of such annual profit or dividend due and distributed to each policy holder must be ascertained and determined according to the actual business and resources of the company at the time; and as the plaintiff in this case did not, in a reasonable time after her cause of action accrued, sue for the amount now claimed to be due, the company had a right to presume it never would be done, and, therefore, proceeded to adjust its accounts of profit and dividends, without reference to the claim of the plaintiff. In fact she had notice, very soon after death of the assured, that the company would not allow or pay any part of her demand.

The defendant, as its name indicates, is a mutual insurance company, distributing profit or dividends in cash annually to its policy holders, and must have a reasonably certain and reliable basis upon which to calculate and determine the amount due and payable to

Digitized by Google

them; and, therefore, to permit any person, whose life is assured for a term of years, or a representative of such person, to delay presenting a claim or suing for amount of insurance money for such length of time as to create a reasonable presumption the claim had been waived or abandoned, would necessarily result in deranging the business of the company, endangering its existence and also prejudice the interest of other policy holders.

It seems to us that the long delay of the plaintiff to prosecute this action must be regarded as equivalent to a waiver or abandonment of her claim, and, consequently, a judgment in her favor can not be rendered without permitting her to take advantage of her own gross negligence, to the prejudice of the defendant and its other policy holders.

Wherefore, the judgment is reversed for dismissal of the action.

PHŒNIX INS. CO., OF BROOKLYN, N. Y., V. COOMES.

(*Filed Jan.* 12, 1893—*Not to be reported.*)

1. *Insurance—Failure of the insured to furnish proof of loss—Waiver*—The defendant waived its right to complain because of the plaintiff's failure to furnish proof of loss by its failure to demurrer to his petition or to raise such question by its answer.

2. *Same*—The failure of the insured to *forthwith* give notice of the loss, as required by the policy, did not forfeit his rights thereunder; it is sufficient if such notice, with proof of loss, is given within a reasonable time.

3. *Same—Alteration of building*—A change made by the owner in the building insured by tearing away an old ell and erecting a new one in its stead, which was known to the agent of the insurance company and approved by him, did not operate as a forfeiture of the policy.

4. *Title to property insured—Material representations*—The failure of the owner of the insured buildings to disclose the existence of a lien for $600 upon the 140 acres of land upon which they stood was not the concealment of a material fact and did not operate to render the policy void, it being evident that such lien was not in any degree material to the risk and was not made for the purpose of deceiving or defrauding the insurance company.

Weir, Weir & Walker for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

This is an action against the Phœnix Insurance Co. by the appellee to recover the value of property insured by reason of its destruction by fire. The company filed its answer, alleging, by way of defense, affirmative matter, upon which an issue was joined, and the law and facts having been submitted to the court, a judgment was rendered for the plaintiff.

The policy provides that in case of loss the insured *shall forthwith give notice in writing to the company.* The notice was not forthwith given, or any excuse made for not giving it, when the fire took place on the 13th of November, and proof of loss was not presented until the 10th of January following. There was no demurrer to the petition, and no such issue raised by the answer, but an issue formed that tested alone the merits of the defense, and, therefore, the question as to notice waived; and if not, in the case of Insurance Co. v.

Digitized by Google

Downs, 12 KY. LAW REP., 115, it was held that proof of loss was a condition precedent to the condition of the liability, and if the failure to give the notice had been placed in issue, the presentation of the proofs of loss within a reasonable time would have been sufficient.

The company relies on a change made in the buildings by the owner after the insurance that increased the risk, and claims exemption from liability on that account, when the proof shows that the manner of the change of the building was made known to the agent of the company, and he approved it—and this was to tear down or remove the ell and erect a new one in its stead, covering the new ell with tin instead of shingles.

The agent made an endorsement on the policy that the insured could make repairs, evidently for the purpose of assuring the owner that the repairs might be made as suggested by him.

The buildings stood upon a tract of 140 acres of land, owned by the appellee, with a lien for the purchase money, amounting to $600. The question being asked by the agent, "if there was any mortgage on the property," the owner responded "*No*;" and it is claimed that the failure to state that a lien existed for the $600 made void the insurance.

It is evident that if the fact of the lien had been disclosed it would not have been material to the risk, and that any prudent agent or company would have made the insurance; and, presenting the question to the owner as found in the application as to all liens or incumbrances, a failure to notify the company of the lien for $600 would not have forfeited the policy, as it was not material to the risk. (Kenton Insurance Co. v. Wigginton, 891 Ky., 330.)

There must be a want of good faith in such representation, and it is, when the nature of the lien is such as that an ordinarily prudent agent would not, under the circumstances, have insured, that the policy will be held void.

In fact the agent in this case seems to have written answers to all the questions upon his own knowledge, and the court has so found, as a matter of fact, except as to the lien, and then the only question asked the plaintiff was: "Is there a mortgage on the land?" This the court also found as a fact; but, as already said, if the lien had been disclosed the contract of insurance would have been entered into.

The appellant knew that this building had been changed, and had the power, if it saw proper, to cancel the policy at any time, by reason of an express stipulation to that effect; but instead of doing so prepared to reduce the rate of insurance upon property that had increased in value by reason of the repairs, and the probability of its being destroyed by fire lessened by the improvements made.

There was no fraud or concealment of facts shown to exist, with a view of practicing deception on the company, but the insurance effected by an agent who knew the value of the property, although he valued the land at a much higher price than the owner would if called on to make the valuation.

The inducement to preserve the property was greater on the part of the owner after he had improved it than before. The burning of the houses left the lien-holder more land than would satisfy the lien, and the insured, from all the facts in the case, acted in the best of faith, and neither he nor the company's agent have wronged the company, and the latter ought not, under the circumstances, to be released from its undertaking.

Judgment below affirmed.

Digitized by Google

SPURLOCK V. COMMONWEALTH.

(*Filed Jan.* 26, 1893—*Not to be reported.*)

1. *Criminal law—Evidence*—On appellant's trial for murder, evidence concerning offenses committed by a certain clan previous to the assassination of decedent, and concerning other persons that had been shot and wounded or killed by such clan, was incompetent and prejudiced to appellant's rights.

The testimony of a witness that he heard a gun fired about a mile from where the deceased was killed, and that *he reckoned* that it was shot at the deceased, was incompetent and calculated to divert the mind of the jury from the real issue in the case.

2. *Same*—The court properly refused to allow defendant the benefit of the testimony of the persons in whose company he was seen armed on the morning of the crime, it being evident that the life of decedent was taken in pursuance of a conspiracy.

James D. Black for appellant.

Wm. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was convicted of murder and sentenced to the State prison for life. The instructions given are not objectionable, but there is much conflicting evidence as to the guilt of the accused. The deceased was shot by some one or more persons who had secreted themselves in bushes along or near the pathway that led from his home.

The killing is said to have resulted from the relation of certain clans of marauders and murderers to each other existing in the county of Harlan. These clans were hostile to each other and roamed through the country ready at any time to take the lives of those who disapproved of their savage and brutal deeds. Whether this appellant belonged to the one clan or the other is not necessary for this court to determine. He was arraigned and placed on trial for the murder of Caywood, and for this offense he could be tried under the indictment and for no other; and, therefore, all the evidence as to the offenses certain murderous clans had previously committed was incompetent, or that other men had been shot and killed or wounded, should have been excluded from the jury; also the fact that the county judge of Harlan had armed men to protect the county seat against an invasion from the armed force of one Howard.

The testimony of Don Stewart to the effect that he heard a gun fired about one mile from where the deceased was killed, and he *reckoned* that it was shot at Stephen Caywood, all such testimony was incompetent, and was calculated to divert the mind of the jury from the real issue in the case and produce a conviction on account of the many acts of lawlessness that have been committed in the county of Harlan.

If the accused was guilty of assasinating the deceased, or aiding others in committing the dastardly deed, there is no punishment too severe for him, but the rule of law and evidence that applies to all men charged with crime must control the trial of the accused and the evidence must be confined to the plea of not guilty. We are not disposed to adjudge that the court erred in denying the right of the accused to avail himself of the testimony of those with whom he

Digitized by Google

was seen armed on the morning of the murder. There is enough testimony on the part of the Commonwealth to show a conspiracy to take the life of Caywood by those who were seen armed at or near the place of the killing, and the only question is, "was the accused one of the number, and, there being conflicting testimony on this point, it was with the jury to pass on the question; but when the court gave such a wide range to the State in the effort to show the deplorable condition of affairs in Harlan, we can not say that the accused was not prejudiced by it, and for that reason we must adjudge the appellant entitled to a new trial.

Judgment reversed and remanded with directions to grant a new trial and for proceedings consistent with this opinion.

OSBORNE'S ADM'X V. MONKS, &C.

(*Filed Jan.* 26, 1893—*Not to be reported.*)

1. *Purchase of railroad by directors—Fraud*—The history of the railroad, incorporated in 1852, by the State of Texas, as the "Texas Western Railroad Company," and which, being hopelessly insolvent, was sold to satisfy certain execution debts in 1868, and purchased by appellees, some of whom were preferred lien holders and directors of the road, shows that they were guilty of no fraud, actual or constructive, against the right of the common stockholders, and no liability as for fraud exists on their part to such stockholders.

2. *Same—Trusts*—The general rule is that where a trustee or director deals for his own benefit, with the subject of the trust, his acts may be declared void at the instance of the beneficiaries or corporation that he represents, but this rule does not prevent a director or a stockholder of a corporation from loaning it money and from securing his loan by mortgage or otherwise, or from enforcing his lien or collecting his debt when it falls due. He is, in this respect, in the same attitude as any other creditor, but being entrusted with certain duties as a director, he must do nothing that would tend to injure the corporation or its credit for the purpose of obtaining the corporate property for himself at a sacrifice. Where the creditor is also a director of the corporation, he is held to a higher degree of good faith in dealing with it than other creditors.

In this case the director loaned the railroad money in good faith, and in like good faith and fair dealing was compelled to unite with certain other creditors and purchase the road at a judicial sale. The purchase having proved profitable, he can not be held liable as a trustee to the stockholders of the corporation for the profits he realized.

Bullitt, Bullitt & Harris and Wm. Lindsay for appellant.

Brown, Humphrey and Davie for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The history of what is known as the Southern Pacific Railroad Company prior to and at the date of its purchase by the appellees is in substance this: The legislature of the state of Texas in the year 1852, incorporated the "Texas Western Railroad Company" for the construction of a railway from the eastern border of the state to El Paso, on the western line.

In August, 1856, the name of the road was changed to the "Southern Pacific Railroad Company." The state gave to any company

Digitized by Google

constructing a railroad sixteen sections for each mile of road when completed, and this corporation had its charter amended so as to conform to the provisions of this beneficent legislation.

The corporation had but little capital; the land granted was of but little value at that time, and the title only vested as each mile of the road was finished. It attempted to raise money by issuing paid-up stock, the shares being $100 each, that were sold at $5 a share. The corporation, from the sale of this stock and what credit it could get, built a road the distance of twenty-one miles, beginning at Marshal, Texas, and ending near the Louisiana line. It had no connection with any other railroad, and, before reaching a navigable stream, had to construct as long a line as had been completed. In 1859 the stock, at $5 for every hundred, had been sold until it amounted to nearly $3,000,000. It was at that time insolvent, with a considerable debt hanging over it. The road was sold under execution in September, 1859, and purchased by one Richardson for $10,000, and his bid transferred to one Fowlkes. After this sale, the road having been purchased for the benefit of the company, it was reorganized, and the shares sold, as before, for $5. The company failing to pay its debts by this second effort to raise money, the road was again sold in September, 1861, and purchased by H. S. Frickerson for $7,500. Under this last purchase an effort was made to again reorganize and to let in the old stockholders who would add $1 to their original purchase of stock, making $6 instead of $5 for each share of $100, and this effort made but little success.

In the year 1856 there was a surplus in the treasury of the state of Texas of what was known as the school fund, and the legislature authorized the loan of this money to the railroad corporation, the sum loaned to constitute a lien on the entire road and its property. In the year 1862 the corporation obtained, by way of loan, $150,000 of this school fund from the state, to bear six per cent. interest, payable in gold.

The record shows that after the close of the war, and in the year 1866, this road had a debt upon it for about one-half million of dollars, and, if Wasson is to be believed, and we see no reason for discrediting him, with no means of paying this indebtedness. The road was out of repair and the entire enterprise wrecked.

The company had, the year before, in 1865, leased a part of an unfinished road running from Shreveport towards Marshall, and, by its terms, obligated the corporation to unite this road with theirs and complete it, fully equipped, by the 1st of August, 1866, or forfeit the lease. There was no money to finish this road, and Wasson, the vice-president, attempted to raise another dollar on each share of the old stock, and called a stockholders' meeting for that purpose, but failed to raise the money. He had, under an authority from the corporation, tried to sell or obtain a loan of money in New Orleans on the sale of second mortgage bonds at sixty-six and two-thirds cents on the dollar and failed, and finally he obtained from these defendants, who were business men residing in the city of Louisville, the sum of $100,000 for $150,000 in bonds secured by a second mortgage, and, of course, inferior to the lien of the state of Texas for its loan of $150,000.

It is evident that these defendants, when they loaned this money, believed and were assured that this loan would complete the unfinished road and place the company out of debt, except as to the first mortgage. This statement, however, turned out to be deceptive, and the company had to borrow the additional sum of $10,000 from one Johnson, and finally borrowed $15,000 of two of these defend-

Digitized by Google

ants, and, while this enabled them to complete the contract of leasing, the road was still in debt, with no running equipments and no credit.

Two of these defendants, Hall and Cobb, were elected directors in April, 1866, but, as the proof shows, took no part in the management of the road, and were only present at the one meeting. Cobb was not reelected in 1867, but Hall was reelected, and was at a meeting of the directors in March, 1868, not long before the sale was made, from which this action originated.

It is not pretended that this road ever paid any dividend, and in 1869 it was out of repair and in no condition to yield anything, but required a large expenditure of means to make it a paying road in addition to a debt then hanging over it of $700,000 or $800,000. These facts are substantiated by eight or ten reputable business men, and many of them interested in the prosperity of the road. They are, in fact, conceded by the plaintiffs except as to the value of the road and its management. Its income, as reported to the comptroller of the state, is not correct, as the proof clearly shows, and those in charge were evidently trying to hide from public view the insolvency of the corporation and its helpless condition.

The road had perhaps been badly managed, but, with the means at hand as the basis for building it, nothing else should have been expected. In the year 1867, the creditors of the road brought suit and levied on the Louisiana part of the road and creditors levied also on the Texas part of the road. When this was done it is apparent that Wasson, Scott and others were making every effort possible to delay the sale of the road, and one of them, by paying $2,000, succeeded in staying the sale for three months. In February, 1868, a stockholders' meeting was called to meet at Marshall, Texas, on the 30th of March following to devise the means of saving the road. Circulars were sent, as the proof shows, to every stockholder, stating the pecuniary condition of the corporation; that a sale was inevitable unless the stockholders again came to the relief of the corporation.

The meeting was held on the 31st of March, a quorum of the stockholders being present, and they refused or declined to give any further aid. R. B. Hall, one of the defendants and a director, was at the meeting and represented the Louisville mortgage creditors, he having loaned on the faith of this mortgage his own means for the preservation of this road. He then proposed that if the stockholders would raise enough money to pay off the execution debts he, in behalf of the Louisville bondholders, would convert the mortgage debt into stock, give up their priority, and come in on the footing of other stockholders; and still nothing was accomplished or done to avert the sale except a resolution asking that the sale be postponed, and this was, of course, refused by the creditors. At the sale of the Louisiana end of the road it was agreed that the road should be bid in for those creditors and for the Louisville bondholders, these defendants, and the same agreement as to the Texas part of the road. It was the only means that the defendants had of saving their loan, and to stand by and permit a part of the road to be sold without becoming interested in some way simply meant a loss of their entire investment.

The whole road was sold subject to the Texas lien and that of the defendants, amounting to nearly $400,000; and when every reasonable effort had been made by these defendants and the members of the old board to induce the stockholders to do that which the defendants did, or to pay off these creditors, and the defendants would

Digitized by Google

release their lien and take their loan as stock. When the creditors began to sue it was but natural that the corporation should enter its appearance to claims that were just so as to have the entire matter settled and give to just claimants an opportunity to come in with other creditors.

Looking to the entire testimony connected with the condition of this road, no one could have been willing to have assumed the control of this corporate property and pay off its indebtedness but those who were driven to such a course as the only means of saving their debts. In fact, the weight of the testimony shows that the purchasers paid full value for the road, subject to the liens upon it, and that the land grant by the state of Texas, and the subsequent extension of the road by the new corporation, and its sale in March, 1872, to the Texas Pacific Railroad Company, opened the eyes of the stockholders, or some of them, to the fact that they had made a mistake in not further aiding the road in the payment of its debts.

After the new company was organized in May, 1868, and formed solely of those who had lien claims at the date of the purchase, these defendants were willing and offered time and again to sell their interest for less than it cost them. Meetings were held in Louisville and New York, after this purchase by the defendants, for the purpose of trying to get some relief, but the stockholders failed to assert any right or make any proposition that was just and equitable to these defendants, and not until this suit was instituted in the year 1873 was this charge of fraud on the part of Hall, consisting of declarations made by him at the sale and at other places to deter bidding, which, when examined with the conflicting testimony, would forbid the conclusion that Hall was attempting to defraud those whose interests were identical with his, and who, in conjunction with the directory, had used every means to retain the railroad property for the benefit of the old stockholders.

After these defendants had extended the road, under the new organization, by their individual credit to the amount of several hundred thousand dollars and obtained valuable grants of land from the state of Texas, enabling them to sell their franchise for a large sum, depending, however, upon the value of this land grant, then this action was instituted in the Louisville Chancery Court in the year 1873 by a single stockholder, Osborn, owning six shares of old stock, in which it is charged, first, that Hall, the purchaser, being a director, was guilty of actual fraud in procuring the sale and by investing himself with title as purchaser; and, secondly, that, being a director and making the purchase, he held the road as trustee for the old corporation.

We have already, by a statement of the prominent facts in this case, determined, in effect, that no actual fraud existed, and, in addition to these facts, it may be remarked as a little singular that, with a quorum of stockholders at the meeting in Marshall, Texas, for the purpose of preventing this sale, at which Hall became the purchaser for himself and defendants, that no stockholder had discovered this fraud, and that those who lived near the construction of this road and in a state where it is located and where all the evidence existed and the condition of the road well known, should remain silent and intrust the preparation and conduct of the suit to the small stockholders in Louisville, where stock is owned to the extent of several hundred thousand dollars, if there great wrongs had been perpetrated by these defendants, or that the trustees or directors of the old corporation should be ignored by this appellant

Digitized by Google

or they remain silent if the beneficiaries of the trust confided to them were being defrauded out of their stock.

It is certainly persuasive that the acts of Hall were in the best of faith, and, as we think, carried with them no badge of fraud, else men of such high repute would not have stood by and permitted their own interests to be sacrificed when every opportunity was afforded them to prevent it; but, waiving the question as to the right of action being in this stockholder, we have no hesitation in concluding that no actual fraud existed or was practiced by Hall or any of the defendants.

The stock in the old corporation amounted to over $1,000,000, and the representative of six shares of this stock is complaining for all the rest, and many of them, if not all, cognizant of the condition of the corporation, and that a sale could be and had been made depriving them of all further interests in the franchise, and conceding, when the old road has been converted by its extension into a new road and the old corporation dissolved, that one individual stockholder should be heard in his own behalf upon a proper state of case, we think in this case there is no reason for giving relief on the ground of actual fraud, as none exists.

As said by the Supreme court, in the case of Dimpfell v. Ohio Railway Co., 110 U. S., 209, when an individual stockholder sought to set aside or annul certain bonds executed by the railway company on a part of its then road known as the Springfield division, "We are not informed of any appeal by them to the directors to stay these bonds in this respect, nor of any representation of the want of power to make the purchase and issue the bonds. A stockholder must make a better showing of wrongs he has suffered and of efforts to obtain relief against them, etc. It is not enough that there may be a doubt as to the authority of the directors or as to the wisdom of their proceedings," etc. In this case, after the lapse of four or five years, and when these defendants had advanced $100,000 to relieve the road from financial trouble, and had offered to make a sacrifice of their entire loan by taking it in stock if the stockholders would pay off these debts, it is too late for a stockholder to complain of fraud when circumstances have changed and the purchasers of the road, by their individual effort and credit, have given it value. Besides, two sales had already been made, and the numerous stockholders showed no disposition to avoid the sale of the franchise; and if acquiescence for five years is not sufficient to defeat the recovery, it is a fact indicating clearly their purpose to abandon the enterprise.

The plea as to ignorance of facts connected with the sale can afford no excuse; that, when attempted to be established, is repelled by testimony of a convincing character. Burkhart, who was familiar with the organization from the beginning, and who seems from the proof to have been endeavoring to speculate in his own interest, must have known the material facts connected with this controversy, and his own testimony establishes no right in the old company.

The remaining question in this case is as to the right of the plaintiff to avoid the sale or to make the defendants responsible for the profits, for the reason that Hall, the purchaser, was a director of the corporation at the time the purchase was made for himself and his codefendants. It is well settled that where a director or trustee deals with the subject of the trust his acts, as a general thing, will be declared void at the instance of the beneficiaries of the corporation he represents; but this rule does

Digitized by Google

not prevent a director or stockholder in a corporation from loaning the corporation money, and from securing the loan by mortgage or otherwise, nor from enforcing his lien or collecting his debt when due. He is like any other creditor, but, being intrusted as creditor and director, he must do nothing that would tend to injure the corporation by making false statements or representations that are untrue with a view of getting the property at a sacrifice. He is held to a higher degree of good faith than a creditor who has no interest in the corporation. This is about the only difference. In this case the necessity for the loan existed, and so pressing was the condition of affairs that the road would have been sold at once but for the loan. It relieved the corporation for the time being, and still other loans were made by the defendants to again relieve the corporation from pecuniary trouble, and the stockholders, indifferent to these creditors and unwilling to increase their stock for even $1 on the share, stood by and permitted these sales, and compelling Hall to look to his own conduct for the security of his debt. This he had the right to do, and there is no pretense that Hall connived at these suits or was instrumental in having the road sold, but on the contrary these defendants regarded their loan as gone, and made every effort to induce the stockholders to hold on to the road by paying off an indebtedness that did not exceed (leaving out the mortgage to the state of Texas) $150,000.

In the case of the Levin Lick Oil Company v. Marbery, 91 U. S., —, Mr. Justice Miller reviews the doctrine in regard to the liability of a director who deals with a corporation, and holds that if he be a sole director he must exercise the best of faith towards the corporation. In other words, if he becomes a party to a contract with his corporation "his candor and fair dealing is increased in the precise degree that his representative character is given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent." Measuring the obligation of Hall to his corporation by this standard, we see no reason for finding any liability on him or his codefendants. He was not at a meeting of the board of directors but once, and then for the purpose of saving the road if possible. He lived in Louisville, Ky., and the board held its meetings in Texas; and good fortune only saved him and his codefendants from the same wreck that destroyed the old corporation, and, upon a careful review of this entire record, we are satisfied that no fraud, actual or constructive, exists in this case, and, therefore, the finding by the chancellor below must be affirmed.

OHIO VALLEY RAILWAY CO. V. WATSON'S ADM'R.

(*Filed Jan.* 31, 1893.)

1. *Neglect—Railroads—Evidence concerning the unsafe condition of the roadbed near* as well as at the place of an accident, which rusulted from the derailment of a train alleged to have been caused by such defective roadbed, is competent where the evidence is conflicting as to the condition of the road at the point of the accident. Although defective rails or cross-ties 100 feet from the place of the accident could not have caused it, still the evidence concerning the roadbed at such distance to some extent corroborates the statements of one party or the other as to the condition of the road where the derailment occurred.

Digitized by Google

Evidence relating to rotten cross-ties within 100 feet of the place of the derailment was competent in this case; but such evidence relative to the condition of the roadbed at a much greater distance, such as a mile, would be incompetent.

2. *Same*—Even if such evidence as to cross-ties 100 feet distant from the place of derailment was incompetent evidence, the railroad could not complain of its introduction by the plaintiff after it had first offered testimony of its employes and agents as to the condition of its roadbed at such points.

3. *Same—Defective roadbed*—While a railroad company is not an insurer of its passengers against all accidents, it is liable for injuries to them resulting from an unsafe and defective roadbed that, by the exercise of proper care, could have been guarded against or repaired.

4. *One taking passage on a freight train assumes the additional risks of accident*, if any, that are necessarily incident to a passage in such train in excess of those incurred on a passenger train on the same road.

But the railroad owes a passenger on a freight train the same duty, as to keeping the roadbed in safe condition, that can be demanded of it by one on a passenger train.

J. F. Clay and Henry Hughes and Yeaman & Lockett for appellant.

John Young Brown and Edward W. Hines for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

In March of the year 1899 the plaintiff's intestate, James A. Watson, wanted passage on a special freight train belonging to the Ohio Valley Railway Company from the town of Morganfield to Corydon, Kentucky. Those in charge of the train refused first to let him travel upon it, but, being informed by him that his father was dying and that he was anxious to be with him before his death, the superintendent of the road at that point consented he should go, and upon his paying the regular passenger fare he started on his journey. Before reaching Corydon the caboose in which he was riding left the track and was dragged several hundred feet over the cross-ties and finally thrown off the track upon Watson, killing him instantly.

This action was instituted by his personal representative, alleging that Watson lost his life by the gross and willful neglect of the company. There are no particular acts of negligence alleged in the petition, but an answer was filed denying any neglect, and averring that the car was thrown from the track by inevitable casualty and without fault on the part of the defendant, and further, when the intestate saw the danger he negligently leaped or attempted to leap from the car when the circumstances transpiring were not such as to impress an ordinarily prudent man with the necessity of attempting to leave the car, and that his own neglect lost him his life. A reply was filed negativing the averments of the answer, and the cause heard by a jury that returned a verdict for $6,250 in damages.

On the trial of the cause the railroad company claimed the burden of proof and was adjudged entitled to open and close the argument, to which the plaintiff excepted, but as a recovery was had the question raised below is not here for decision.

The railroad company having claimed the burden proceeded with its testimony in relation to the condition of the railway track at the place where the accident occurred, and a number of witnesses familiar with the track and its condition testified that the cross-ties were

Digitized by Google

sound and the road in excellent repair; engineers, roadmaster, as well as others not connected with the road, spoke of the road as being in excellent repair, both at and near the place where the derailment took place; also that the cars were moving at the ordinary rate of speed for a freight train when the accident happened. The defective condition of the railway track and its ties and the great speed of the train seem from the testimony to have constituted the neglect causing the death of Watson, and the testimony was confined to those acts of negligence.

When the defense closed the case the plaintiff's testimony showed, and that by a number of witnesses, the bad condition of the track, the decayed appearance of the cross-ties and its apparent unsafe condition.

This unsafe or defective condition was not only made to appear at the place of the accident, but for several hundred feet on each side of it, beginning at the point where the derailing first occurred. It was objected below, and made a ground of reversal in this court, that the court erred in permitting the plaintiff to prove the defective condition of the road at any other point than that of the accident, and while we are satisfied proof of its condition in close proximity to the place of the injury would have been competent, after showing the decayed ties at the place, still the appellant opened the door to this character of testimony by first proving the condition of the road, not only at the place of the injury, but along the entire track in and about the place of the injury.

A railway is not an insurer against all accidents, but where the injury results from a defect that, by the exercise of proper care, could have been provided against by the company, it then becomes liable. The jury were so told in an instruction that could not have been misunderstood. But where the injury results from rotten ties, and the contention is that they are sound, we are not prepared to say, the testimony being conflicting, that proof as to its defective condition on account of rotten ties near to as well as at the place of the accident would be incompetent. It is true that a rotten tie 100 feet distant from when the train was derailed could not have caused the accident, but when one side, the plaintiff, shows that the ties were rotten at the place, and the defendant that they were sound, the defective or sound condition of the ties within 100 feet on each side of the place of the accident, or for a further distance, would, to some extent, corroborate the statements of the one side or the other.

In Vicksburg, &c., Railroad Company v. Putnam, reported in 118 United States, 545, the Supreme Court, through Mr. Justice Gray, said: "There being evidence tending to show the accident was caused by a worn-out rail, it was within the discretion of the court to admit evidence that the general condition of that portion of the road which included the place where the accident occurred had long been bad, etc. * * * Such evidence had some tendency to prove both that a worn-out rail was the cause of the accident and the defendant had neglected to repair the defect."

A similar question was raised in the case of Lidekum v. The W., St. L. & P. Ry. Co., 93 Missouri, 400, in which the Supreme Court held "the condition of the roadbed, at the place or in the immediate vicinity of the accident, may be shown."

The opinion of this court, in the case of L. & N. R. R. v. Fox, reported in 11 Bush, 495, is not opposed to the admission of this character of testimony, as it was there held "the portions of the track to which the evidence related were too remote from the scene of the accident to have contributed to it."

Digitized by Google

If, therefore, the appellee had offered evidence conducing to show that parts of the road, a mile away or a greater distance, had defective ties upon it, the court should have excluded it from the jury; but when you bring the condition of the ties in as close proximity to the place of the injury as was done in this case, the testimony was competent for the reasons already stated.

The court told the jury "that in taking passage on a freight train the intestate took upon himself the additional risks, if any, in excess of the risks incident to a passage on the same road in a passenger train."

This, we think, is good law, and it would not have been proper to have told the jury that the risk of losing his life or of being injured was greater on the one than on the other. The jury knew that the comfort in traveling was not the same, and, from the instructions, the passenger, when being transported, assumed the risk necessarily incident to the mode of travel he had adopted. While derailment is more liable to happen on heavy freight trains than on passenger trains, the passenger assumes no greater risk as to the condition of the cross-ties or the condition of the road for the safety of trains moving upon it.

As said by the Supreme Court, in Indianapolis & St. L. R. R. Co. v. Hurt, 93 U. S., 291, "life and limb are as valuable, and there is the same right to safety in the caboose as in the palace car." The highest degree of care and diligence is required for the safety of the passenger on either the one train or the other, and proper vigilance means the exercise of such care, as, when exercised by prudent men in the management and supervision of the road and the train, would prevent any such accidents.

The speed with which the train was moving was, if evidence for the plaintiff be true, dangerous to those upon it, and while the preponderance of the evidence on the issue as to the momentum of travel may be with the appellant, still there was sufficient proof on the part of the plaintiff to justify the court in instructing the jury on that branch of the case. We might add that the weight of the testimony on both issues was with the defendant, and still there was much evidence for the plaintiff on the issue as to the defective condition of the rails, and of such a character as must end the litigation where the law has been properly given, and that the instructions were as favorable for the defense as could well have been given can not be doubted.

The judgment below is, therefore, affirmed.

TERRILL V. TOWN OF BLOOMFIELD, &C.

(*Filed March* 18, 1893—*Not to be reported.*)

John D. Wickliffe for appellant.

John A. Fulton for appellee.

Appeal from Nelson Circuit Court.

*Judge Pryor delivered the following response to petition for rehearing:

If it be true, as insisted upon by the appellant, that the plat itself is sufficient evidence of the location of these streets and alleys sought

* For opinion in this case see *ante*, 577.

Digitized by Google

to be opened, a conclusion in which we are not disposed to concur, still it appears from the answer of the lot owners, who now have the possession of what is claimed to be the streets of the town, that this possession has been continued and adverse by an actual possession and enclosure for a period of over half a century anterior to the bringing of this action, and, if so, no recovery can be had. The case was submitted on the pleadings, and a judgment necessarily followed, as there was no denial of this adverse holding by the appellees and their vendors. The town, through its council or board of trustees, did authorize the opening of the streets, and, after doing so, very properly declined to enforce the ordinance, if this adverse holding by the lot owners was an admitted fact. It stands admitted by the record, and no judgment should be rendered against the town for failing to do that which the pleadings in this case show they had no right to do.

The law relied on by the plaintiff as to the right of the property owner, abutting on the streets of a town, to the use of those streets is not questioned, but in this case no streets were ever laid off or used in any way by the town, and only exist on the plat as recorded. If the statute of limitations had not been pleaded, and the locality of the streets established, showing that they were located by the plat on the ground in possession of the defendant, the chancellor would direct them opened, as there seems to have been no objection to the manner of the proceeding; but when the statute is interposed, showing an adverse holding much larger than the statutory bar, it ends the controversy. There can be no question but that prior to the act of 1873 the statute could have been pleaded in a case of this sort in the same manner that it could have been pleaded between natural powers.

The General Statutes provide that no adverse holdings shall begin until the occupant notifies the town or city authorities of his purpose to hold and claim as against the town or city, but the plea well shows that the possession under this adverse claim had ripened into a title long before the statute of 1873 was enacted.

A town or city could be barred from a recovery prior to the act referred to in the same manner that an individual claimant could have been, as has been adjudged in several cases. (Dudly v. Frankfort, 12 B. M., 610; Rowan's ex'or v. Portland, 8 B. M., 232.)

The petition is, therefore, overruled.

KENTUCKY SUPERIOR COURT.

SNYDER, &C. V. FIDELITY TRUST & SAFETY VAULT CO.

(*Filed Jan.* 18, 1893.)

1. *Liability of guardian for costs*—A guardian who brings or prosecutes an action for his ward is liable for the costs which accrue during his conduct of the action unless, by an order of court, he be allowed to sue in *forma pauperis*. And this rule applies also to the costs on a cross petition filed by a guardian.

2. *Allowance to guardian ad litem*—It is the duty of the court to allow to a guardian *ad litem* a reasonable fee for his services to be paid by the plaintiff

Digitized by Google

and taxed as costs. And where an infant is made a defendant to an original petition and also to a cross petition in the same action, and the same person is appointed guardian *ad litem* for him, both on the original petition and on the cross petition, the guardian *ad litem* is entitled not only to an allowance against the plaintiff in the original petition for his services in preparing and presenting the infant's defense thereto, but also to an allowance against the plaintiff in the cross petition for his services on the cross action.

Willson & Thum for appellants.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Presiding Judge Yost.

Solomon Froman died in Jefferson county, leaving a large and valuable property, and his executor brought a suit seeking a construction of his will and a settlement of his estate.

In this action an infant, Laura Goss, to whom the decedent had devised a house and lot worth about $500, was a party defendant, and Burton Vance was appointed her guardian *ad litem*. During its pendency a claim to the whole estate was made by Solomon White Froman, an infant, and his guardian, the Fidelity Trust and Safety Vault Company, filed an answer setting up this claim and its basis, which pleading was made a cross petition against all of the decedent's heirs and devisees, including the infant, Laura Goss. Upon the filing of this paper a summons was issued against and served upon her, and the same attorney was, by another order of the court, appointed her guardian *ad litem* to prepare and present her defense against this cross action, who, during the whole progress of the case in the court below and the Court of Appeals, represented her interests ably and well.

Solomon White Froman's claim was defeated, and on the return of the mandate of the Court of Appeals the chancellor allowed Mr. Vance a fee for his services as such guardian *ad litem* on the original petition $100 in the court below and $100 in the Court of Appeals and overruled his motion for an allowance of $1,000 for his services in the cross petition against the Fidelity Trust and Safety Vault Company, guardian of the infant, Solomon White Froman. From the order refusing this latter allowance he prosecutes this appeal. The court erred in refusing to make the guardian *ad litem* a suitable allowance for his services on the cross action. A summons on the cross petition was issued and served on Laura Goss in order to bring her before the court on the issues in that pleading made, and the appointment of a guardian *ad litem* then followed as a matter of law. That it was the same attorney who, by appointment of the court, represented the same infant on the original petition, does not change the fact that he was entitled to a fee. He was acting in a double capacity and was entitled to a double allowance.

Solomon White Froman was the *unsuccessful* party in the litigation growing out of the filing of his cross petition by his guardian, and the guardian is, under the law, responsible for the fees of the guardian *ad litem*. A guardian who brings or prosecutes an action for his ward is liable for the costs which accrue during his conduct of the action, unless he be allowed to sue in *forma pauperis* by an order of the court. (Subsection 2, section 37, Civil Code.) And it is the duty of the court to allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiffs and taxed in the costs. (Subsection 4, section 37, Civil Code.)

Digitized by Google

Here the appellee was the guardian of the plaintiff in the cross action, did not sue in *forma pauperis* and was the *unsuccessful* party.

The question is, what is a reasonable allowance? The interest of Mr. Vance's client amounted, as we have said, to only about $500. The real value of his services, which the proof and the record on the original appeal show, were most industriously and skillfully performed, far exceed that amount, but it seems to us that he should be allowed a sum *commensurate*, not with the value of his services, but with the value of the interests of the party by him represented.

One hundred dollars in the lower court and one hundred in the Court of Appeals we regard as a reasonable allowance under the circumstances, and the judgment is, therefore, reversed, with instructions to the court below to make him this allowance against the appellee, and for further proceedings consistent with this opinion.

TRADERS DEPOSIT BANK v. CHILES, THOMPSON & CO.

(*Filed Jan.* 18, 1893.)

1. *Negotiable instruments—Assignment upon separate paper*—To make the assignor of a promissory note liable as indorser of a bill of exchange, upon the ground that the note has been indorsed to and discounted by an incorporated bank at which it is made payable, the indorsement must be upon the instrument itself, or on a piece of paper so attached to the original instrument as in effect to become part thereof or be incorporated with it. An assignment upon a separate and distinct paper does not amount to an indorsement.

2. *Same*—In an action by a bank seeking to hold the defendants liable as indorsers, an allegation in the petition that plaintiff has taken all negotible papers offered to it for discount by defendants with the understanding and agreement that it should, at all times, be held harmless from the default of other parties to the paper discounted by it for defendants, and that they would, in all such cases, be responsible as indorsers on same, and that this agreement included the note sued on, amounts to no more than the allegation of an agreement to be answerable as indorsers usually are—that is, in event that by due diligence and the pursuit of the maker to insolvency, the debt can not be collected.

O'Rear & Bigstaff for appellant.

Cornelison & McKee for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Brent.

The petition and amendments in this case set out that the plaintiff is a bank incorporated by the law of Kentucky; that on May 1, 1890, C. Starratt executed his note for $110.75, payable at ninety days to defendant, Maples, at plaintiff's banking house in Mt. Sterling; that Maples indorsed and assigned it to defendants, Thompson, Chiles & Co.; that on May 31, 1890, the defendants, Chiles, Thompson & Co., a firm trading under said style, composed of the defendants, L. T. Chiles, C. G. Thompson and C. S. Thompson, did, in the regular course of business of plaintiff's bank, and for value received, to-wit: $108.75, which money said Chiles, Thompson & Co. got the benefit of, and which was paid them by plaintiff, discount said note to plaintiff bank, which is now the holder and owner thereof; and said defen-

Digitized by Google

dant, Chiles, Thompson & Co., by writing filed in the first amended petition and marked "L. T. C.," and which is referred to and made part hereof and which writing is executed by defendant, L. T. Chiles, member of defendant firm of Chiles, Thompson & Co., and is signed Chiles, Thompson & Co. by said defendant, assigned, transferred and indorsed said note discounted to plaintiff bank; that defendant, Chiles, Thompson & Co., agreed to be bound as indorsers of said note, but by oversight and mistake failed and neglected to sign their names as indorsers on the back of said note, and by the writing marked "L. T. C.," as aforesaid, they undertook and did indorse said note on said separate paper, thereby becoming and being bound as indorsers of said note.

"Plaintiff says further that said defendants, Chiles, Thompson & Co., are regular customers of plaintiff bank and have been dealing and depositing with said bank since its organization, and during said time this bank has taken all negotiable paper offered for discount through it by defendants, Chiles, Thompson & Co., with the understanding and agreement that plaintiff should at all times be held harmless from the default or non-payment by other parties of any paper discounted to it by said Chiles, Thompson & Co., and that they would in all such cases be responsible as indorsers on same; and that said agreement and understanding included the note sued on herein. That at the time of said discounting the defendants, Maple and Chiles, Thompson & Co , waived the protest of said note, and on August 1, 1890, and August 4, 1890, plaintiff presented said note during regular business hours at said Traders and Deposit Bank, and demanded payment of the same, which was refused; that no part of said note has ever been paid.

"Wherefore, plaintiff prays judgment that said mistake be corrected, and for its debt of $110.75 and 6 per cent. interest thereon from August 4, 1390, until paid; for its costs herein expended, and for all appropriate special and general relief."

The exhibit marked "L. T. C.," referred to, is as follows:

TRADERS DEPOSIT BANK, MT. STERLING, KY.

Deposited by Chiles, Thompson & Co.

May 31st, 1890—	
Currency	$105 00
Specie	2 50
Checks—J. P. Copher	52 32
L. C. Davis	1 89
E. T. Reis	17 60

And so on, crediting Chiles, Thompson & Co. with checks deposited, some twenty, and ending thus:

S. M. Maple note	$305 80
Starratt and Maples	110 75
	1,417 05
Less discount on Starratt note	2 00
	$1,415 05

Plaintiff also filed, after this, a separate amendment, as follows:

"Plaintiff, by leave of court, amends its petition herein for the third time and states that C. Starratt, the maker of said note sued on, was not sued herein because on the 14th day of October, 1890,

Digitized by Google

prior to the filing of plaintiff's petition herein, there was an order of injunction duly made in the Montgomery Circuit Court in the case of Fitzpatrick, assignee in trust for C. Starratt, plaintiff, v. Traders Deposit Bank and other defendants, enjoining defendants, of whom plaintiff is one, from prosecuting suits against plaintiff, Fitzpatrick, assignor of C. Starratt, except in said action."

The note mentioned in the pleading was filed as part of the petition.

To this petition and its amendments, as set out above, a general demurrer was sustained, and plaintiff, refusing to plead further, prayed an appeal to this court.

Evidently the plaintiff intended to set out facts which show the defendants liable, as assignors, by indorsement, and as there is no attempt to allege a prosecution of the maker of the note to insolvency, nor to show any diligence in pursuing its remedies against him, counsel for appellant were of opinion that the facts set out are such as show that the note was indorsed to and discounted by an incorporated bank, and so put on the footing of a foreign bill of exchange. It seems to us clear that while the allegations show the note was discounted, they fail to show it ever was indorsed to the bank. Plaintiff states that by the separate writing marked "L. T. C.," Chiles, Thompson & Co. "assigned, transferred and *indorsed* said note * * * * * to plaintiff bank." It does not state by what words or in what way the writing effected this indorsement, and the exhibit does not enlighten us. If it was possible for a separate writing to effect this and constitute an indorsement, the petition itself should have set out how this was done. In fact it could not be so done, nor, except under circumstances set out hereinafter, could the endorsement be on a separate paper. "The indorsement must be placed on the instrument itself."

"As a general rule the legal title to a negotiable paper, payable to order, passes, according to the law merchant, only by the payee's indorsement on the security itself. The established exception to this rule is, when the indorsement is made on a piece of paper so attached to the original instrument as in effect to become part thereof or be incorporated with it. This addition is called, in the adjudged cases and elementary treatises, an allonge. The device had its origin in cases where the back of the instrument had been covered with indorsements or writing, leaving no room for further indorsements thereon. But neither the general doctrines of commercial law nor any established exception thereto make words of mere assignment and transfer of such paper, contained in a separate instrument executed for a wholly different and distinct purpose, equivalent to an indorsement within the rule which admits the payor to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he had against the original payee." (By Mr. Justice Harlan, in Osgood v. Artt, 17 Cent. L. J., 191; Lawson, Rights and Remedies, volume 4, section 1563, and note 8.) And if the law requires the indorsement to be on the security simply to cut off the equities, certainly its requirements ought not to be relaxed when, as in this case, the indorsement would, by putting the note on the footing of a bill of exchange, not only cut off the equities but enlarge or alter the responsibilities of the indorsers.

But plaintiff insists that even if there was no indorsement, defendants are still liable, and that that part of his petition which alleges that it has taken all negotiable paper offered for discount to it by C., T. & Co., with the understanding and agreement that it should, at all times, be held harmless from the default of other parties to the

Digitized by Google

paper discounted by it for Chiles, Thompson & Co., and that they would, in all such cases, be responsible as indorsers on same, and that the aforesaid agreement and understanding included the note sued on, sets out a good cause of action. In the first place this part of the pleading is mere narrative and not traversable allegation, and in the next place, as a promise to be held as indorsed is not an indorsement, construing it against the rule as strongly as we can in plaintiff's favor, it would not amount to more than an agreement, to be answerable as indorsers usually are; that is, in event that by due diligence and the pursuit of the maker to insolvency, the debt can not be collected. And this agreement, presumptorily verbal, is without any alleged consideration.

Judgment affirmed.

SUPERIOR COURT ABSTRACTS.

GAINES v. FITCH.

Filed January 18, 1893. Appeal from Jefferson Court of Common Pleas Opinion of the court by Judge Brent, affirming.

1. *Statute of frauds—Pleading*—An answer denying the execution of a contract sued on raises an issue as to whether it is evidenced as the statute of frauds requires.

2. *Same*—Where a parol contract for the sale of land has been perfected by the execution and delivery of a deed which has been accepted by the vendee, the statute of frauds no longer applies.

3. *Consideration for contract--Pleading*--The proper mode of raising the question of consideration in a suit upon a simple contract where no consideration is presumed is by demurrer to the petition. Still, where no consideration is stated, or where that stated is clearly insufficient, the defendant may either demur or support a writ of error. But after verdict a defective statement will be aided if, by a reasonable construction of the whole declaration, it sufficiently appears that there was a consideration capable of supporting the premise.

4. *Same*—Where one who had retained a lien on a tract of land to secure himself against loss by reason of a mortgage on land which he had received in exchange therefor, agreed with the owner of the land on which he held the lien that if she would sell the land and discharge the mortgage on his land he would pay her $100, the promise to pay the money was supported by a sufficient consideration, and, the land having been sold and the mortgage discharged pursuant to agreement, an action lies to recover the $100.

5. *A married woman who has been empowered by decree of court to trade in her own name* and to sue and be sued may sue alone as if she were an unmarried woman. Section 34 of the Civil Code, which specifies the actions in which married women may sue alone, was not intended to apply to a married woman who has had the powers of a single woman conferred upon her by decree of court.

O'Neal, Phelps & Pryor for appellant; B. F. Camp for appellee.

HEADLY v. GOUGH.

Filed February 1, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Brent, affirming.

Digitized by Google

1. *Landlord and tenant—Verbal subletting*—Where one who was in possession of land under a lease for a term of three years sublet the premises by verbal agreement for the last two years of the term, the subtenant agreeing to discharge the notes executed for the rent of those two years, each payable in advance, a promise by him to pay the second note, made after it fell due, and after he had entered upon the last year of the term, was a valid new contract supported by his possession and continued right to remain during that year, and was not within the statute of frauds.

2. *Reply lodged in record treated as filed*—Although the reply was merely lodged in the papers and not indorsed filed, yet as it was treated as part of the pleadings on the trial of the case, and was recognized as such by an order that its allegations be considered as controverted, this court is justified in considering it a part of the record.

Wilfred Carrico for appellant; Karn & Hays for appellee.

McLellan Stone Company v. Barlow.

Filed January 25, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Fellow servants*—One who was employed by a stone company to haul stone from its quarry to the railroad, where, with his assistance, it was loaded on cars by means of a derrick, was, in the unloading of the stone, a fellow servant with one who stood on the car and received and measured the stone, and can not, therefore, recover of the employer for an injury received through the negligence of the servant on the car, two being co-equals and not superior or subordinate the one to the other. And the fact that the teamster was the owner of the team with which he did the hauling, and was paid both for the services of himself and team does not alter the rule.

2. *Master and servant—Negligence*—Even conceding that the servant on the car was the superior, the fact that he suggested that the teamster should turn his wagon so as to unload from the wrong side, thus increasing his danger, does not make the master liable, it appearing that the teamster was not compelled to act upon the suggestion, but chose to do so with knowledge of the danger, rather than wait for other wagons to be unloaded, which he was told he would have to do if he did not turn the wagon as suggested.

Wright & McElroy, Cox & Mansfield and Edward W. Hines for appellant; Sims & Covington and W. E. Settle for appellee.

McJohnston & Co. v. Armstong, &c.

Filed January 25, 1893. Appeal from Christian Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Assignment by operation of law—Attachment*—Though a debtor at the time he makes a sale to a creditor in satisfaction of his debt may intend to cheat and defraud his other creditors, the act of preference may at the same time operate under the statute as an assignment for the benefit of all his creditors. If the act be of this two-fold character, and one creditor attaches, and subsequently, but within the six months prescribed by the statute, other creditors assail it as a preference within the meaning of the statute, the result as between the attaching creditor and the other creditors will be the discharge of the attachment, and the transfer of the property of the common debtor in trust for the benefit of all his creditors.

2. *Final order*—A judgment of the court in consolidated attachment suits adjudging that the several plaintiffs were entitled to priority in the order in which their attachment had come to the officer's hands and ordering the attached property to be sold, but expressly providing that the proceeds should be held subject to the further order of the court, was not a final order determining the rights of the respective parties to the proceeds

Digitized by Google

of the attached property. But even if it was it can not effect the rights of creditors who were not parties to those actions, and who are now attacking as a preference under the statute the fraudulent transfer of property which was made the ground of the attachments.

3. *Infancy a personal plea*—If the fact that a debtor was an infant at the time he preferred a creditor constitutes a defense to an action to have the act of preference declared to operate as an assignment under the statute, the debtor himself is the only person who will be permitted to make the defense, and if he desires to do so he must present the question by his pleadings. An attaching creditor has no right to make the question for him.

Joe McCarroll for appellant; Wood & Bell, E. P. Campbell and Petree & Dumer for appellees.

LOUISVILLE & NASHVILLE RAILROAD CO. v. GOODIN'S EX'ORS.

Filed January 25, 1893. Appeal from Bell Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Railroads—Destruction of spring—Damages—In this action against a railroad company to recover damages for the destruction of plaintiff's spring, the defendant having by a contract whereby plaintiff granted to it an unconditional right of way over his land, obligated itself not to damage the spring, the defendant was not prejudiced by an instruction telling the jury that "if the use of the spring can be restored by plaintiff without entering on defendant's right of way for that purpose" they will find for plaintiff such sum as from the evidence "will be the cost of restoring the use of the water." Nor was defendant entitled to an instruction in the same language omitting the words "without entering on defendant's right of way for that purpose." It must be presumed that the ditches and drains which produced the injury were necessary to the construction and continued to be necessary for the maintenance of the road, and that any interference with them would be a violation of the unconditional grant of the right of way.

J. W. Alcorn for appellant; T. N. Lindsey for appellee.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. MONTGOMERY.

Filed January 25, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Railroads—Presumption of negligence overcome*—In this action against a railroad company to recover damages for injuries to plaintiff's horse, which was found lying near defendant's road in a crippled condition, there being no direct testimony to show what train, if by any, the horse was injured, and the defendant having introduced all its employes who were in the management and control of any of its trains which passed over the road during the night on which the horse was injured, and each of these unimpeached witnesses having testified that he was in his proper place and in the discharge of his duties and knew of no horse or other stock being struck by his train at that place or elsewhere during the night, the *prima facie* case of plaintiff was overcome.

2. *Same—Amended petition—Election*—The plaintiff having instituted his action in tort against the railroad company for the injuries done to his property, an amended petition alleging that after the bringing of the suit the company had compromised plaintiff's claim and agreed to pay him $75, for which amount he asked judgment, set up an entirely new cause of action, and the court erred in permitting it to be filed. But the pleading having been filed the court should have sustained defendant's motion to require plaintiff to elect which cause of action he would prosecute.

3. *Evidence*—Testimony as to the effort to settle the case made between plaintiff and defendant's attorney was incompetent and prejudicial.

W. H. Marriott and Wilson & Sprigg for appellant; James Montgomery for appellee.

Digitized by Google

MORGAN v. MORGAN, &c.

Filed January 25, 1893. Appeal from Leslie Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

A debtor's absence from the State suspends the running of the statute of limitation, although he may have property in the State which could be subjected by attachment.

J. M. Bicknell and D. B. Logan for appellant; A. K. Cook for appellees.

ARTERBURN v. BULLITT.

Filed January 25, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

Landlord and tenant—Construction of lease—Appellee leased to S. and A. a tract of land "for a term commencing January 1, 1887, and continuing one year," they agreeing to pay therefor the sum of $200. It was further stipulated that as S. "was put into possession of said premises on October 1, 1886, and is now in possession thereof, it is hereby agreed that he shall hold the same until January 1, 1887, and shall pay for rent accrued up to that date the sum of $50, less $10 for repairs." In this action by appellee to recover the rent, *Held*—That A. is not bound for any greater sum than $200, and it was error to render judgment against him for $240. For the use of the land prior to January 1, 1887, S. alone agreed to pay.

D. M. Rodman for appellant; T. L. Burnett for appellee.

DANIEL v. ROBINSON.

Filed January 25, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

A party will not be granted a new trial upon the ground that he was prevented by sickness from being present at the trial unless he can show that he was substantially injured by not being present.

D. M. Rodman for appellant; Strother & Gordon for appellee.

TURNER AND WIFE v. MOBERLY'S ADM'R.

Filed February 1, 1893. Appeal from Madison Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Private entertainment—Implied contract—By reason of the provisions of section 1, article 3, chapter 106, General Statutes, no person other than the keeper of a tavern or house of private entertainment can recover for the board of another unless a promise to pay therefor be established, but there may be an implied contract to pay for "nursing, washing, feeding stock," etc. Therefore, in this case, in which a claim was asserted against the estate of a decedent for "boarding, washing, nursing and feeding stock," the court erred in dismissing the entire claim upon the ground that there could be no recovery in the absence of an express promise to pay, as that is true only in the item of board.

C. F. Burnam for appellant; A. R. Burnam for appellee.

MATTHEWS' EX'TX v. WOHL, &c.

Filed February 1, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Contract to provide for one by will*—In this action against the personal representative of a decedent to recover the value of plaintiff's services as general domestic in the decedent's home, the plaintiff alleging that she performed the service under a contract, whereby the decedent agreed to compensate her by making provision for her in his will, which he had failed to do, the evidence is sufficient to support a verdict for plaintiff.

Digitized by Google

2. *Limitation*—Under the instructions of the court, which were not objected to and must, therefore, be regarded as the law of the case, the plaintiff's cause of action arose when she was notified by the testator that he did not intend to provide for her by his will, and, as such notice was given, if at all, less than five years before the action was instituted, the jury properly found that limitation did not bar the recovery.

3. *Allegations of answer admitted for failure to reply*—The defendant, having alleged in his answer that plaintiff had sold and received the proceeds of milk, butter, etc., produced on the testator's place, and had thus been compensated in full for her services, the plaintiff's allegation in her reply that she had paid over to the decedent "every cent that she received in that behalf" was admitted by the failure of defendant to deny it, and, therefore, the question of payment was not in issue.

Montgomery Merritt for appellant; W. P. McClain and Edward W. Hines for appellees.

HELFRICH SAW AND PLANING MILL CO. V. RENDER.

Filed February 1, 1893. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Sufficiency of evidence to support verdict—In this action to recover the price of saw logs which plaintiff had delivered to defendant under a contract between them, and which defendant had refused to accept, the evidence was sufficient to authorize the jury to find that the logs were merchantable, which was the only issue in the case, and, therefore, a verdict for plaintiff will not be disturbed, although this court might have rendered a different judgment, the jury being the judges of the weight of the testimony.

Guffy & Ringo and S. E. Hill for appellant; J. E. Rowe for appellee.

MAYSVILLE & BIG SANDY RAILROAD CO. V. WOODS.

Filed February 1, 1893. Appeal from Mason Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *In an action against a railroad company to recover damages for injury to abutting property* resulting from the unreasonable obstruction of a street along which the road is constructed and operated, it was error to allow plaintiff to prove the value of the property just before it was generally known that the road was to be built on that street and then its value just after the road was so located and constructed without directing the minds of the witnesses to the fact that they were to speak of such difference in value, if any, as was due to the obstruction of plaintiff's ingress and egress by reason of the location, construction and operation of the road; but as there is nothing to indicate that the witnesses did not know what causes of depreciation they were to consider, this court will not assume for the purpose of reversing that they were mistaken as to that matter. To reverse, the prejudice to appellant should be as clearly apparent as the error itself.

2. *While one of the instructions taken alone is liable to the objection that it virtually tells the jury* that, independent of any unreasonable obstruction to plaintiff's right of ingress and egress, they may give her damages for any depreciation in value of her property caused by the location and operation of the railroad on the street, yet when taken into connection with the other instructions the jury must have understood that they could not give damages for any depreciation in value other than such as resulted from an obstruction of plaintiff's right of ingress and egress, and, therefore, the error was not prejudicial.

Wadsworth & Son and Cochran & Son for appellant; E. L. Worthington for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. MARCH 15, 1893. No. 18

KENTUCKY COURT OF APPEALS.

CLEMENS V. SPEED.

(*Filed June* 9, 1892.)

Party walls—Easements—Lateral support—Neither of the owners of adjacent houses, with continuous front and rear walls, and having a common party wall, and each owning to the center of the wall, has a right to the lateral support of his house by the adjoining house. And either party may remove his own house without being liable to any damage resulting therefrom to his neighbor, provided he first gives his neighbor due notice of his intention to tear away his house, and does so in a skillful and careful manner, without removing any part of the party wall.

Brown, Humphrey & Davie, O'Neal, Phelps & Pryor and Robt. J. Elliott for appellant.

B. F. Buckner and Byron Bacon for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

The appellant, Clemens, and the appellee, Fanny Speed, owned adjacent storehouses on Fifth street, in the city of Louisville, with a common or party wall between them. The lots formerly belonged to Wm. Croghan, and the houses were erected some sixty years ago. There is some evidence tending to show that the Clemens house was built first, but we will assume it to be true, as the appellant contends, that Croghan erected a double house, with continuous front and rear walls, and a common wall between, and then disposed of it, one party getting one-half, to the center of this wall, and another party the other half of it. In time, and after many transfers, the parties to this contest became the respective owners, and, in 1886, the appellee, wishing to tear down her house and erect a larger and expensive one, more suitable to the locality, which had greatly improved within the few previous years, and had become a part of the center of the business portion of the city, made various proposals to the appellant, of a liberal

Digitized by Google

character, as to the party wall between them, and which stood equally upon the land of each of them. They were all declined, however. and the appellee then notified the appellant that after twenty days she would tear down her building and excavate for the cellar and begin the erection of a new six-story building, and that the appellant must co-operate with her in protecting the party wall and his house. This he declined to do, and in turn notified her that whatever she did must be at her peril.

The appellee's building was dilapidated and in ruinous condition; so much so that it was untenantable, and the city authorities were about to condemn it. She employed a skillful and competent architect and builders and workmen of the same character, by whom the old building was taken down, and a fine, new one erected.

She did not take away any of the party wall or build to it. Upon the contrary, she cut the walls of her old house from it and erected a wall of her own eleven inches from it, and upon her own lot. This distance between them was required in order to build a foundation for the proposed new building sufficient to support it; and, in order that it might be so, it was necessary to go lower than the foundation of the thirteen-inch party wall. To keep it from falling, and to protect it, the workmen of the appellee underpinned and shored it up.

All this was properly done, as the weight of the evidence shows, and we must so assume, because this is an ordinary action; the law and facts were, by consent, submitted to the court below, and he so found. The verity of his finding of facts can not be questioned.

The object of this action is to recover damages for alleged injury to the appellant's building, consisting, in the main, of cracks in the walls of his house, which so weakened it that it had to be repaired, and which, as is claimed, were caused by removal of appellee's old building. The evidence is quite conflicting as to whether any injury whatever accrued to it from the taking down of appellee's old house, and the erection of the new one; but, if so, the question arises, is she responsible for it?

It is claimed the appellant was entitled to the lateral support afforded to his house by that of the appellee; that there was an existing easement in his behalf, in this respect, and that he is, therefore, entitled to recover for any damage resulting to his house from the taking down by the appellee of her old house and the erection of the new one.

Counsel for the appellant assert that if A owns a lot, and builds thereon a double house, with continuous front and back walls, and a party wall between, and then sells half the lot, to the center of the party wall, with all appurtenances, there passes to the vendee, and all subsequent vendees, as against the vendee of the other half, an existing easement in the form of a right to reciprocal support from the building of the latter.

It must be borne in mind, in considering this case, that the appellee removed no part of the party wall, and did not build to it; and, that in removing her old building and erecting the new one, including all that was done in the way of underpinning and shoring up the party wall, the work was prudently and carefully done by competent workmen.

It is well settled that the owner of land adjacent to another can not remove the earth upon his own land so as to withdraw the support of his neighbor's soil. If he attempts to do so he may be enjoined, or, if done, he is responsible in damages. This right is *ex jure naturae*, but it applies only to land in its natural estate. By

Digitized by Google

both the ancient and present common law, A can not dig a pit upon his land so near the edge of it that B's land will tumble into it; but this rule does not apply where B has burdened his land with artificial weight, as by a building. It is strictly confined to cases where he has not thus increased the lateral pressure. The adjoining owner can not, by changing the natural condition of his land, take away his neighbor's right to the use he could have made of it in the absence of such change. He can not load down his own soil so as to require the support of his neighbor's. In such a case, the owner of the improved land can only hold the adjoining owner liable for a negligent use of his property, or, when there is a failure to apprise him of the intended use, and it is reasonably certain injury will result to him by reason of it.

In this case, the appellee merely made use of her own property. She notified the appellant of her intention, and used reasonable care in the execution of it.

Kent says: "If the owner of a house in a compact town finds it necessary to pull it down, and remove the foundation of his building, and he gives notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he removes his own with reasonable and ordinary care." (3 Kent, 437.)

It is said, however, that a right may be acquired, in the form of an easement, to support from an adjoining building; that the right of each owner in the use of his own property is then so far qualified that he can not take away this support, however prudent and careful he may act in doing so, without furnishing absolute protection in some way, and that this right of the adjoining owner is absolute in its character.

We can not assent to such a doctrine. It would be a rule at war with reason and justice. It would make the owner an insurer of his neighbor's house in case he desired to take down his own, or was compelled to remove it, owing to its condition. It would make him liable for all damage, however carefully he may have acted. It would, in great measure, prevent all improvement. Whatever may be the English doctrine, such a rule has not been and should not be adopted in a changing, growing country like this one, any more than the doctrine of ancient lights, which has been rejected.

If A and B buy adjoining houses, and that of A is supported by a wall altogether upon B's land, and belonging to him, an easement as to such support may exist or arise in A's favor. B purchases with a knowledge of it, and takes any existing burden. This was the case in Henry v. Koch, &c., 80 Ky., 391, but this one is quite different.

It is difficult to see how an easement or prescriptive right can be acquired to the lateral support of another's building, when that of each owner is altogether upon his own land. Each has a right to build, and the one can not prevent the other from deriving the benefit of such support. It can not be said it has existed with his consent, and that a grant and right to the use is to be presumed from lapse of time, because the owner of the alleged servient estate has had no right in the meantime to prevent such a benefit. He can not, with any effect, raise his voice against it. It must result, or he can not use his own property and have a building of his own. A right by prescription results from acquiescence; this is its basis; and, it seems to us, none is to be implied where the adverse party has no right and can invoke no remedy to prevent it. There is no encroachment upon his rights; no adverse user, and nothing being done to enable him to resort to a legal remedy. The other party can

Digitized by Google

not properly be said to be enjoying something so as to invest him with the legal right to such enjoyment, when no power exists to prevent it.

A man improves his property, knowing there must be changes in the improvement adjoining it, and it would be a harsh and unjust rule if he could improve as he chooses, and tie his neighbor down from doing so, however careful he may act.

If the latter proposes to remove his building, and injury is likely to result therefrom to the building of his neighbor, he must notify him of his intention, that he may look to his own protection; and, in making the removal or erecting a new building, he must use reasonable care and precaution to protect that neighbor; but, if all this is done, and yet injury results, it is *damnum absque injuria*, and no action will lie.

Judgment affirmed.

EVANS, &C. V. EVANS.

(*Filed Nov.* 26, 1892.)

1. *Pleadings*—An answer is insufficient which states that the defendant denies each averment of the petition. Each allegation of the petition must be specifically denied, otherwise they are considered as confessed.

2. *Action for alimony and divorce*—An agreement by the wife, for a valuable consideration, not to sue her husband for maintenance for a year from the date of the contract, is void as against public policy; and the wife may, nevertheless, maintain her action for alimony and divorce within the year.

But the consideration received by the wife from her husband, by such agreement, will be charged to the wife in estimating what allowance should be made to her for alimony.

3. *Same—Filing of amended answer*—The chancellor did not abuse the discretion relative thereto in refusing to permit the husband, six months after the issues in the action against him for divorce and alimony were made up, to file an amended answer, alleging adultery on the part of the wife, and seeking a divorce from her, it appearing, from the husband's affidavit, filed with the amended answer, that he knew of the alleged infidelity of his wife at the time his original answer was filed, but did not then allege it in said answer because he did not (as he alleged) know at that time that he could prove such fact.

4. *Appeals—Divorce—Alimony*—While this court has no revisory power over a judgment of divorce, yet, in determining whether alimony was properly allowed, it may consider all the evidence relative to the alleged cause of divorce.

5. *Divorce—Grounds for—Abandonment*—Abandonment by one party, without fault of the complaining party, for a year before the filing of the action for divorce *a vinculo*, is necessary, but a divorce *a mensa* may be granted, although the abandonment has not continued for *a year* next before the filing of the suit.

A husband is considered as having abandoned his wife when he refused to recognize or cohabit with her as such, although he may continue to reside in the same house and under the same roof with her.

6. *Same—Evidence of reputation—Adultery* on the part of a husband or wife can not be proven by the general reputation of the party for chastity. Character is not so involved in an action for divorce, even when the allegation is adultery, as to render evidence of general reputation competent.

Nor can evidence of the reputation of a wife for violent temper be admitted as competent.

7. *Evidence*—The evidence of a witness who appears willingly in a husband's behalf, and not in response to a subpœna or attachment served upon

Digitized by Google

him, for the purpose of testifying to acts of adultery between himself and the wife, ought to be regarded with great suspicion, and the chancellor had the right to disregard it.

8. *The alimony allowed the wife in this case was reasonable.*

9. *Fraudulent conveyances—Evidence*—The evidence shows that the conveyance by the husband to the woman with whom, it is alleged, he is living in adultery, was without consideration, and in fraud of his wife's rights, and was properly cancelled as void.

G. W. McClure and Wm. Lindsay for appellants.

W. O. Bradley and John W. Brown for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Chief Justice Holt.

This case presents a sad domestic history. The appellee, E. J. Evans, on June 25, 1889, sued her husband, the appellant, A. H. Evans, for a divorce *a mensa et thoro* and alimony. They had lived together for nearly thirty years, and had a numerous family of children. The ground of action, as stated in the petition, is the abandonment by the husband of the wife, without fault on her part, for a year next before the bringing of the suit, and his living in adultery during that time with the appellant, Lucinda Loving, who was also made a defendant, it being alleged that the husband had caused his land to be conveyed to her, without consideration, and in fraud of the rights of the wife.

The answer of the appellant, Loving, merely says that she denies each averment of the petition relative to her. It, under section 126 of the Civil Code, which requires a specific denial, constitutes no answer whatever.

That of the husband, however, sufficiently traverses the petition; and, in a second paragraph, he avers that the wife agreed with him, in writing, on February 4, 1889, in consideration of three hundred dollars, paid to her by him, not to sue him for maintenance within one year. A demurrer was properly sustained to this part of the answer.

By the common law, every contract between husband and wife was void for want of parties. Articles of separation, with an adequate allowance to the wife for her support, made through the instrumentality of a trustee for her, have, however, been upheld; and, generally, if a contract between husband and wife merely be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity. It has been said by this court that, while a contract made between them, when living in amity, for the payment of a certain sum by the husband to the wife, in view of a future separation, would be void, as against public policy, yet this would not be so if made on account of previous separation, or in contemplation of immediate separation. (Loud v. Loud, &c., 4 Bush, 453.) In other words, some contracts between them are enforced in equity; not because of the agreement merely, but because the transaction being just and reasonable, the wife has no equity outside of it.

Here the claim of the wife for alimony is met by the plea that she agreed, for a valuable consideration, not to sue for it for a year. Such a contract should not be upheld. It is in violation of public policy. It is inconsistent with the full course of justice. It is not reasonable and just to the wife. The husband, during the period covered by the contract, might dispose of his entire estate. It

Digitized by Google

would likely work a defeat of justice, and render the innocent and unoffending wife a pauper. It does not fully protect her rights, and should not, therefore, be enforced. (Brown on Divorce and Alimony, page 270.)

Seeking equity, however, she must, of course, render it; and she would, therefore, be chargeable with whatever she may have received under the contract.

In this instance nothing was allowed her until a year had expired from the receipt by her of the three hundred dollars.

More than six months after the filing of his answer, and when that length of time had expired after the pleadings in the case had been completed, the husband offered to file an amended answer, setting up adultery by the wife, and asking an absolute divorce from her.

He presented with it an affidavit stating that when he filed his answer he knew the facts stated in the amended answer, but did not then know that he could prove them, and had only recently learned that he could do so. It seems probable, if he then knew his wife had committed adultery, that he would also have known by whom he could prove it; and, in view of the late day when the amendment was presented, and his knowledge of the matter stated in it when he filed his answer, we can not, to say the least, hold that the chancellor, in rejecting it, abused that discretion which our practice gives him as to the filing of amended pleadings.

This court has no revisory power over a judgment of divorce, but, in determining whether alimony has been properly allowed, it will enter into a consideration of the entire case. It is said that the averments of the petition are not proven; that it avers an abandonment for a year, while the evidence shows that the husband left the wife but about four months before the bringing of the action.

An abandonment for a year, without fault upon the part of the complaining party, is ground, under our statute, for an absolute divorce; but this action is for one *a mensâ et thoro*, and our statute provides: "Judgment for separation or divorce from bed and board may be rendered for any of the causes which allow divorce, *or for such other cause as the court, in its discretion, may deem sufficient.*" The evidence, in our opinion, shows an abandonment by the husband for a year. It is true he continued to live at the same place where his wife resided until about four months before the institution of her suit; but the testimony shows that for a year or more he had refused to recognize her as his wife, or to live and cohabit with her. This amounted to an abandonment, although they slept beneath the same roof.

He says he left her because of her ungovernable temper and abuse of him; but the quarrels evidently arose because of his attentions to his co-respondent. They tend strongly to show an improper intimacy between her and the husband. His conduct was of such a character as gave the wife just cause of complaint, and he is, therefore, the offending party. He was, at least, most certainly guilty of such conduct and abandonment as warranted the lower court in the exercise of a sound legal discretion in finding sufficient cause for a divorce from bed and board.

While the court did not allow the husband to set up the plea of adultery by the wife, yet the testimony relative to it is to be considered upon the question of alimony. The only evidence in this respect which we regard as worthy of any consideration is that of one witness, who testifies, in substance, that the wife offended with him. So far as this record shows, he was an entirely willing wit-

Digitized by Google

ness. He does not appear to have been attached and made to testify. It is not even shown that he was subpœnaed as a witness. He was entirely willing to not only destroy the wife, affix a stain to her children and family, but also to testify to conduct degrading to and highly blamable in himself. Such evidence is justly subject to suspicion. It comes in doubtful form. The lower court doubtless knew the parties, and he disregarded it. Under the circumstances, his conclusion upon this question of fact ought not to be disturbed. He granted the divorce from bed and board; allowed the wife an attorney's fee, which appears to be reasonable, and twenty-five dollars per month as alimony *pendente lite* after the expiration of the twelve months covered by the agreement between the parties; also five hundred dollars as permanent alimony, and subjected so much of the land as might be necessary to the payment of these sums. In view of the husband's circumstances and condition in life, these allowances of temporary and permanent alimony were reasonable.

It is evident the conveyance of the land to Lucinda Loving was fraudulent. It was worth from two to three thousand dollars. The year before its conveyance to her, she gave in scarcely no property for taxation, while the next year her estate, considering her evident condition in life, grew amazingly. It is significant that she does not testify. The deed to her was acknowledged March 2, 1890, but not recorded until nearly six months thereafter.

Moreover, it appears a rule against the husband for failure to pay the *pendente lite* allowances, and the case upon the merits were heard together; he was a witness in his own behalf to punge himself of the contempt for failure to pay, and admitted that he paid over a thousand dollars of the purchase money for the land.

The testimony as to the general reputation of the wife as to being high tempered was incompetent. The general reputation of either party for good or bad temper can not be shown in a divorce suit. (Brown on Divorce and Alimony, page 126.) Complaint is also made because the testimony relative to the general reputation of the wife for unchastity was excluded. In civil actions evidence of general reputation is not admissible, unless the proceedings be such as to put the character of the party directly in issue. The charge was adultery by her. She should not be convicted of such an act upon presumption. It was not a proceeding which put her general character in issue, and the admission of such evidence, for the purpose of raising a presumption of her guilt, would lead to more of uncertainty and disadvantage than benefit in the administration of justice. (Humphrey v. Humphrey, 7 Conn., 116; Berdell v. Berdell, 80 Ill., 604; Washburn v. Washburn, 5 N. H., 195.)

No exception appears to have been taken, however, to the exclusion of this evidence, and error, if any, was therefore waived. (Civil Code, section 589; Terrill, &c., v. Jennings, &c., 1 Met., 450.) We have considered it because counsel have discussed it at length.

An order of continuance in the case adjudges that "the costs of this case" shall be paid by the husband.

An order of allowance of alimony, pending the suit, recites that it is to be paid to Mrs. Evans by "the plaintiff." It is evident that in both instances there was a clerical mistake. The meaning is plain. In the one case it was the cost of the continuance, and in the other it plainly meant that the husband was to pay the allowance. Beside, he was, in fact, liable for all the costs of the action, and the final judgment reads correctly as to the payment of the alimony.

In our opinion, the court correctly found that the wife was the party offended against, and the judgment is affirmed.

Digitized by Google

L. & N. R. R. Co. v. Hurst's Adm'r.

(*Filed Dec.* 15, 1892—*Not to be reported.*)

1. *Railroads—Fellow servants*—A switchman belonging to what is known as a switching crew of a railroad is not the fellow servant of the foreman or the engineer of such crew. And if the fireman is discharging the engineer's duties, the switchman is not his fellow employe.

2. *Willful neglect—Peremptory instuction*—A switchman, being ordered to uncouple one car from a train so as to leave it on a certain track, signalled the engineer to back the train so that he might obey the order and went between the cars, which were slowly backed for that purpose. While so between the cars he slipped, but in the act of falling caught the break-beam of a car and, holding to it, was dragged a distance of forty feet before being run over and killed. His cries for assistance as soon as he fell were heard by bystanders, but the train men were very slow in discovering his perilous position. The foreman finally discovered the switchman's danger and signalled the engineer to stop the train, and the railroad contends it was stopped immediately. The foreman in giving the danger signal had first to signal the fireman, who in turn signalled the engineer. Plaintiff's evidence and the circumstances conduced to show that the train, after being stopped, was moved forward by the engineer, which caused the decedent's death. *Held*—

First. That it was negligence of itself for the engineer to place himself in such position that a danger signal could not be seen by him, so that it was necessary to first signal the fireman, who repeated the sighal to the engineer, when it was known that the switchman had gone between the cars to uncouple them.

Second. This negligence of the engineer, added to the tardiness of the train men in discovering decedent's perilous position, and the forward movement of the train after the danger signal was given, was sufficient evidence to authorize a verdict for willful neglect, and the motion for a peremptory instruction was properly refused.

3. *Same—Contributory neglect—Instructions*—When the court has instructed the jury that plaintiff can not recover unless he shows, by a preponderance of the evidence, that decedent's death resulted from defendant's willful neglect, and has properly defined willful neglect, it is proper to further instruct the jury that contributory neglect is no defense to the action if decedent's death was caused by such willful neglect.

4. *Instructions—Practice*—After the jury had retired they returned into court and asked: "Is it in proof that the railroad company's foreman should look after the men and see that they did not get hurt, or is it the law?" And the court responded in writing that the jury "must decide the case upon the testimony heard by them, and the law as contained in the instructions, given by the court." *Held*—That no other response or instruction was required by any of the facts connected with this case.

5. *Argument of counsel—Practice*—When the counsel for one litigant, in his argument, perverts the law and advises the jury to disregard the instructions, the court should, on the request of the other party, put a stop to such argument.

Lyttleton, Cooke and Wm. Lindsay for appellant.

O'Neal, Phelps & Pryor for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The only question in this case, or the one requiring the greatest consideration, arises from the evidence upon the motion to instruct the jury as in case of a nonsuit.

Digitized by Google

The action was instituted under chapter 57 of the General Statutes by the personal representative of Daniel Hurst, in which it is alleged that Hurst lost his life by reason of the willful negligence of the appellant by its agents or servants.

The deceased was in the employe of the appellant, and was a switchman belonging to what is known as a *switching crew*. The train of the appellant contained a number of cars that extended almost from Preston street on the west to Jackson street on the east. A man by the name of Henon, who was the switch foreman, had ordered the deceased to uncouple one car from another so as to leave the rear car on the side track. Hurst, in obedience to the order of his superior, gave the engineer, or those in charge of the train, the signal for backing the train in order that the order given him might be obeyed. The cars moved back slowly, and Hurst went in between the rear car and the one next to it to uncouple them, and after being between the cars, or as he attempted to go in between them, his foot slipped and in the act of falling he caught hold of the break beam of the car near the ground and was dragged a distance of forty feet. He cried out for assistance and his cries were heard by the bystanders but not so readily by those in charge of the train or by the *switch foreman*. When the *foreman* did discover the man's peril he at once signaled those in charge of the engine to stop it, and, as the appellant contends, it was stopped instantly. The train was moving at a snail's pace, and some little time intervened between the time his foot slipped and the time the cars ran over him. It was usual and customary, as proof shows, to uncouple cars as they moved slowly, and that it was the duty of the deceased to obey the orders of his superior.

The employment is undoubtedly one of great peril, but the appellee, knowing the character of duty required of him, assumed the risks attending the employment when he entered appellant's services, and if he lost his life by his own neglect the company is not responsible.

It appears that the foreman, when giving the danger signal, had to give it first to the fireman and the fireman to the engineer, as it is shown the engineer was in such a position as he could not see the deceased, or even the foreman. Why this case was so does not appear.

The deceased had given the engineer notice when he went in to uncouple the cars, and no notice had been given the engineer that he had performed this duty, but on the contrary it is manifest that if this train had been properly managed by the engineer or by the fireman, who assumed to act as the engineer, the man's life might have been saved. The idea of placing one in such a perilous position, and then leave the fireman to notify the engineer when the danger was over or when danger existed, is not, to say the least of it, extraordinary care.

The man was seen being dragged along by four or five persons not in the employment of the company, and one of them rode or ran from the place of the accident to the engineer to notify him of the man's danger, and the employes of the appellant seem to have been the last to discover the peril.

Conceding, however, there was no willful neglect arising from this indifference on the part of the employes, still the evidence before the jury justified a finding of willful neglect on the part of the engineer after *the danger* signal had been given. Counsel for the appellant assumes that the witnesses for the plaintiff were ignorant, confused and unable to make an intelligent statement of the facts.

Digitized by Google

This was a question, however, for the jury, and the character of these statements will not authorize this court to say that they were not entitled to creedit.

It is plain from the proof, and as a matter of common judgment, that when the danger signal was given it was the duty of the engineer, or the fireman acting for him, to at once stop the train. This the witnesses for the appellant swear was done, and that the death of the intestate was caused by his foot hanging in some way on the track.

On the other hand the witnesses for the appellee state that when the signal was given to stop the train, the train moved forward and ran over the deceased, *doubling him up*, to use their expression, and causing his death. It is plain if the train had continued to back or had stopped the deceased would have been saved, but when the engineer began to move the train forward the death of the man was inevitable. He had gone between these cars in obedience to orders, as was his duty; had not come out or given any signal that he was out of danger, and yet, if the witnesses of the appellee are to be believed, the engineer was playing with his train, moving first east and then west, with perfect indifference as to the perilous position of the deceased. He knew the deceased was between the cars, or, if not, ought to have known it, but from the theory of the appellant had placed himself in a position where he could not see the unfortunate man, placing the duty on the fireman of notifying him what orders to obey.

One or two persons ran across the street, seeing the danger before the man was killed, and witnesses who are entirely disinterested in this litigation show by their testimony that those in charge of the train were guilty of the highest degree of neglect.

As the manager of this train and the switch foreman were located, it was necessary for the *foreman* to first notify the *fireman* of the danger, and the latter to communicate that fact to the engineer before the engineer could stop the train, and this of itself was negligence when they all knew the deceased was attempting to uncouple the cars, and added to this the fact of the forward movement of the train by the engineer when he did get notice, this verdict is proper if the witnesses for the appellee are to be believed, or, in other words, it is not against the evidence. It is shown by the the testimony that it was the duty of the engineer to stop the train at once when getting notice of the danger. This he did, if the witnesses for the appellant are not mistaken as to what transpired; but tnat he failed to do so, as shown by the testimony for the appellee, is apparent, and, in fact, the manner of the killing, or the circumstances connected with it, indicate that the forward movement of the train caused the injury. The motion to find for the defendant was properly overruled.

It is made a ground for reversal that the court failed or refused to discharge the jury, or to further instruct the jury, after they had retired and then returned from their room, in response to this interrogatory propounded by the jury to the court: "Is it in proof that the railroad company's foreman should look after the men and see that they did not get hurt, or is it the law?"

The court responded in writing: "In reference to the question by the jury the court says the jury must decide the case upon the testimony heard by them, and the law as contained in the instructions given by the court."

The defendant excepted to this response by the court, and the jury, retiring to their rooms and failing to agree, were permitted to ad-

Digitized by Google

journ with the proper admonition until the next day. On the return of the jury the defendant, by counsel, moved the court to instruct the jury "that in considering the evidence they shall consider the same and reach their conclusions in rendering their verdict according to their own recollection of the statements of the witnesses, and they should be guided by the instructions in the language in which they are written," etc.

The court refused this motion. It seems to have been based upon the remarks made by counsel for the plaintiff in his closing argument to the jury as to the meaning of *willful neglect*, in which he took occasion to say that "he (counsel) did not believe the defendant's employes intended to injure the intestate."

We see no cause for reversal on this ground. The court had already told the jury in response to the written interrogatory the day before that they must be guided by the evidence and the instructions given by the court, and it is to be presumed that the jury had intelligence enough to know their duty in this regard without being told by the court, even if the argument made by counsel was objectionable.

If counsel for the plaintiff perverted the law and advised the jury to disregard the instructions it was the duty of the court to stop him at the instance of his adversary, and for such a palpable violation of his duty as an attorney the court should check counsel in order to maintain its own respect, but no such case is presented here. The employes may not have intended to injure the deceased, and we have no idea the engineer was aware of the great peril he was in, and still the neglect may have been of such a character as to indicate recklessness and an utter indifference for the safety of his subordinates.

We perceive no objection to the instructions. Willful neglect was defined in the language of this court and the jury told that no recovery could be had unless the death of the intestate was caused by the willful neglect of the conductor or foreman in charge of the train, and that the burden of proof was on the plaintiff to show, by a preponderance of the evidence, that the death of Hurst was caused by the willful neglect of the employes.

There was a qualification to instruction number 3 which first told the jury that if the death of Hurst was caused by his own negligence and not the willful neglect of the employes, then the law is for the defendant. "But if the jury shall believe, from the evidence, that the defendant or its agents above named were guilty of willful neglect, and the death of Hurst was caused thereby, they ought not to find against the plaintiff, although they may believe, from the evidence, he contributed to the injury by his failure to exercise such care for his own safety as ordinarily prudent persons usually observe under similar circumstances."

This court has often held that contributory neglect is no defense where willful neglect is established, and the jury was told more than once that willful neglect must be shown or no recovery could be had, and the instructions stated what was the law of the case and nothing more.

Instruction number 2, asked by the defense, was a mere reference to the facts as proven by the appellant and was properly refused. The other instructions had in effect been given.

Was the company guilty of willful neglect? That is the only issue in this case, and the jury being the sole judge of the facts, and the testimony conducing to establish willful neglect, we will not disturb the finding.

Digitized by Google

It is well settled that this intestate was a subordinate to the foreman, the engineer and, one might add, to the fireman in this case. The case of L. & N. R. R. Co. v. Moore, 83 Ky., 675, relied on by counsel, it seems to us is authority against the company. There it was held that if it was the custom of the company to permit the fireman upon its trains to act as engineer in coupling and "switching trains, he is, when so acting, to all interests and purposes, the engineer of its train, and not the equal fellow servant of the brakeman, and the rule of *respondeat superior* applies when a brakeman is injured by his negligence."

So in this case the fireman was acting as the engineer, or, if not, the highest degree of neglect on the part of the engineer consisted in placing himself where he could not see the signal and leaving the fireman to act for him, or, if not to act for him, to give notice when action on the part of the engineer was necessary. We see no reason for reversing this judgment.

Judgment affirmed.

ASHLAND COAL & IRON RY. CO. V. MCKENZIE, &C.

(*Filed Jan.* 26, 1893—*Not to be reported.*)

Fraudulent conveyance—Evidence—The bookkeeper and cashier of appellant during several years made false entries on its books, whereby credits for cash payments were given to a firm of which he was a member for debts due appellant. In this manner he defrauded appellant out of over $18,000. During the time he was committing this fraud he purchased and paid for a house and lot for his mother, whose agent he was. In this action by appellant, to set aside the conveyance of the house and lot to the mother on the ground that it was paid for by its money: *Held*—That the burden is on appellant to show that its funds paid for the property in controversy, and since it appears that the son, as agent of the mother, had sufficient assets belonging to her to pay for the property, and it is not shown that any of the appellant's money was used for this purpose, its petition was properly dismissed.

R. C. Burns, Moore & Everett and Wm. Lindsay for appellant.

Thos. Y. Hargis for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, since May 19. 1880, under the corporate name of the Ashland Coal and Iron Railway Company, and formerly from January 26, 1865, under the name of "The Lexington & Big Sandy Railroad Company, Eastern Division," has been engaged in the vicinity of Ashland, Ky., in constructing railroads, in operating same by the transportation of freight and passengers, in the business of mining, transporting and selling coal, and also manufacturing and selling iron.

In the year 1870 the defendant, Chas. D. McKenzie, became one of its employes in a subordinate position, afterwards assistant bookkeeper, and in 1877 became its principal bookkeeper and cashier, and so continued until about July 17, 1886, and as such received and disbursed very large sums of money belonging to the appellant.

Digitized by Google

During this time, beginning in about 1880 and continuing until the date last named, the defendant was further extensively engaged in partnership with one B. C. Hyman in the coal business, under the firm name of McKenzie & Hyman. This firm bought large quantities of coal from the appellant, supplying its workmen therewith and selling out the same on credit and otherwise, though they were required to make monthly settlements with the appellant for their purchases.

Of this firm also defendant, Chas. D., was the bookkeeper, cashier and manager, Hyman appearing to have done the manual labor. During these years the defendant, Chas. D., had lived in Ashland with his mother, the appellee, Rachael D. McKenzie, first in rented property and then, in 1882, in a house and lot in said city conveyed by one Miss Case to appellee by deed of May, 1882. The mother (appellee) had some real estate in Newport, Ky., some lands in Indiana and some funds arising from an insurance policy, the rents and profits from which amounted to a considerable sum, and these sums and this business was also in charge of the defendant, Charles D. Thus was he trusted, apparently without the slightest oversight, with the keeping of these heavy accounts of the railway company, the partnership business so interwoven with it, the estate of his mother, and handled and disbursed large sums of money from all these sources.

He lived in good repute and without reproach, is convicted of no bad habits, was industrious and apparently economical and honest. On July 17, 1886, he disappeared, and two days later the following letter was received from him:

"19 JULY, 1886.

"*John Means, Esq., President A. C. & I. Ry. Co., Ashland Kentucky:*

"If you have not yet discovered the cause, this will explain my absence. My accounts are short, as near as I can now tell, about $18,400.00.

"Take trial balance, see e. w. adds	$8,400
Ledger 'C,' office	2,000
Bills Rec.	2,000
Coal	3,000
Road reps.	1,000
Transportation	2,000

"The journals are all right. The cashbooks, too, except credits to McKenzie & Hyman. *I credited them with cash they never deposited.*

"I began this thing about the last of '79 or '80 by crediting them with cash and making good the amount before the end of the next month. We were carrying big cash balances then and a few extra hundreds were not noticed. Collections became harder to make, our books got behind, I would not make out accounts promptly. I was working hard then at the office, and between the work and the worry from my wrong doings I was not fit to work on McK. & H.'s books at night, although I tried hard at times. I soon grew desperate, but still hoped some how to make it good. * * * * You will find *McK. & H.'s* books in a terrible condition."

He suggests that the affairs of the firm be put in the hands of a receiver, offers to devote himself to making restitution by straightening out these firm books, and encloses a memorandum of his individual property.

Digitized by Google

On January 14th, after these occurrences, the appellant, the Ashland Coal & Iron Railway Company, instituted this action in equity in the Boyd Circuit Court to set aside the deed of May 1, 1882, from Helen M. Case, &c., to the appellee, Rachael D. McKenzie, as fraudulent and void, and seeking to subject the same to the payment and satisfaction of her son's defalcation, alleging that the property had been paid for and improved with the money of appellant, and which had been fraudulently taken by said Chas. D. and converted to his own use, and, in fact, invested in said property.

The appellee denied the statements of the petition, and claimed to have bought the property and made the improvements thereon with her own means.

The chancellor, after fully hearing the case, dismissed the petition as to her, and from that judgment the railway company has appealed.

It is manifest that the defendant, Chas. D., in order to prop up the tottering fortunes of the firm of McKenzie & Hyman when, as he writes, he found collections hard to make, grossly falsified the books he had in charge, crediting that firm with large sums as paid in, when, in fact, no such collections had actually been made in their behalf.

This necessitated falsification of the company's books in other particulars, and it is evident that at the time of his flight in July, '86, his shortage, or that of his firm, was something about as he stated it in his letter, but to what extent, if any, he actually abstracted the funds of the company, save to transfer them to the credit of his firm, is not apparent.

If the firm of McKenzie & Hyman lost this money in the regular course of its extensive business by loose methods of trade, or by the fluctuations of the market, by bad debts, etc., then the crime of the agent consisted in making these false entries on the books in his charge, by which the credit of the firm was maintained at the expense of the company and not in actually stealing the money.

These entries are, in the main, made on the books to the advantage and credit of the firm, who, in default of their monthly payments for large purchases of coal, were thus given false credits as if from collections made in the usual course of trade, and to the extent that such credits would swell the cash of the company, false and reduced entries of deposits were required to be likewise entered on the books in order to balance the accounts.

It is not material that this was not wholly the method adopted. It sufficiently discredits the theory that the appellant's money was actually abstracted and invested in this property, if such a method was certainly in part and probably in whole the one pursued.

The plaintiff having alleged and the defendant having denied that the property was bought with the company's money, the burden rests on the plaintiff to establish what it alleges.

It is urged, however, that the appellee was not financially able to buy and improve this property.

The evidence discloses that in February, 1879, she got $4,800 by reason of the death of one Strange, on whose life her husband had held a policy of insurance. $3,400 of this was loaned to the appellant by defendant, Chas. D., for his mother, and the notes of the company, properly executed to her by the president of the company, are exhibited in the record. They were found among the papers of the cashier of the company, and were presumably collected by him, as he had been directed to do, and paid on the investment in question.

Digitized by Google

From the same source, in '84 or '85, she got some $1,100, which was refunded to her by her nephew, who had claimed a portion of this insurance fund of $6,000, but who had become convinced he was not entitled to it and refunded it to her.

Her sister, Mrs. Gaylord, was rich and furnished her from $1,571 to $4,200 per year as she needed it. She got $400 or $500 from a building association, which she first loaned to Mr. Gaylord but afterwards placed in the hands of her son to loan or invest.

The rents of the Newport property brought her at the start $720 per year for two or three years, growing somewhat less per year until 1884 she got only $300. There was also some revenue derived from the Indiana lands, probably $100 or more per year.

Her son lodged and boarded with her and contributed from his salary largely to her support. She was industrious and economical, and from her garden and orchard sold fruit, berries, etc., to the extent of from $200 to $300 per year.

There must have come to her hands and that of her son for her from 1879 to 1886, outside of his board money and what Mrs. Gaylord furnished her, and the garden and orchard products, from which sources she could have supported herself reasonably well, the sum of from $1,200 to $1,400. The house and lot cost $7,000 and the improvements about $1,300, * * * but "during all these years," say appellant's counsel of this trusted agent, "he was systematically robbing his employer, and, no doubt, just as systematically squandering the moneys entrusted to him by his confiding mother."

But he is not shown to have squandered these means (notes) which, with interest, would amount to some $4,000 at the time of this investment, in July, '82. Shortly afterwards he got $1,100 from his cousin, the nephew of his mother, and these sums go largely to make up the required amount.

If he squandered the moneys, both of the company and of his mother, as contended, it would be difficult for a court to say whose money it was that was put in the house, and the appellant must not win on an admitted uncertainty. The mother was "conscious," it is true; so was the appellant. She was paid by an open investment of her funds in a house and lot in the immediate vicinity of the appellant's president and business manager. By him she was visited in her home and complimented for her business thrift and economy. She rested unsuspiciously and undisturbed for more than five years after this conveyance of record, and we think the plaintiff has failed to show itself entitled to the relief sought, and, therefore, affirm the judgment of the lower court.

JONES, &C. V. MIRACLE.

(*Filed Jan.* 28, 1893.)

Claimant of land under tax title—Burden of proof—It is well settled that a sheriff's authority to sell property for taxes is altogether statutory, and that such a sale will confer no title upon the purchaser unless the statutory provisions relating thereto have been strictly complied with; and where one asserts title to any property under such a sale and purchase he must allege and prove that all the statutory steps necessary to a valid sale were taken. The burden of proof, to show strict compliance with the statute, is upon the claimant as well when he is defending his possession of land against the taxpayer's claim, by a derivation of title under a tax sale, as when he, as plaintiff, seeks to recover the land from the delinquent taxpayer.

Digitized by Google

Weller & Hays for appellants.

Unthank & Holt for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Lewis.

Robert A. Miracle died intestate and owner of a tract of land containing 500 acres that descended to his widow and five children, and this action was brought in 1892 by appellant, Lewis Jones, claiming an undivided fifth of the land in virtue of a purchase in 1886 from one of the heirs-at-law and by two other heirs against John A Miracle and Mary Miracle, his wife, neither of them, however, being an heir of decedent, Robert A., but claiming the whole tract under purchase at sale for taxes in 1883, and also claiming an undivided fifth by purchase, in 1886, from one of the heirs. A. Slusher, claiming a moiety by purchase from another one of the heirs, was made defendant, but he does not appear to have filed an answer.

It is alleged in the petition that the defendant is claiming the entire tract under a deed executed to him not until 1889, although it is recited therein the land was sold November 12, 1883, and then purchased at the inadequate price of $3.50; that the tract of land was listed for taxes in the name of Sarah Miracle, widow of Robert A., but the sheriff did not, before making the levy, tender to her a receipt as the law required, though she was a resident of the county in which the land lies; that the sheriff failed to advertise the time and place of said sale at the courthouse door, and failed to return a report in writing to the county clerk showing when, where and for what price said land was sold, giving a description of the land sold, and that such report was not recorded and indexed by the county clerk. It is further alleged that John A. Miracle, the pretendd purchaser, did not file with the county clerk said sheriff's certificat of his purchase.

The defendants do not in their answer state affirmatively that any one of the specific duties prescribed by statute in such case and enumerated in the petition were performed by either the sheriff or the purchaser, but state, in general terms, that said sale was conducted in proper form, as the deed of conveyance by the sheriff sets forth, and traverse or attempt to traverse the statements of the petition by simply denying the alleged failure to perform the statutory requirements.

No evidence was offered by either party to show whether the sheriff did or not sell the land in the manner required by law, except the deed made by him in 1889, long after his term of office had ended; and the only recital in that is that the land was listed for taxes for the year 1883 in the name of Sarah Miracle; that she, having no personal property out of which the tax could be made, the land was levied on, and, after advertising as the law directs, was sold, when John A. Miracle became the purchaser at $3.50, tax due and cost of sale.

The lower court, assuming, we suppose, that the burden of showing non-performance by the sheriff of the statutory duties required in such case was upon the plaintiff, dismissed the action denying any relief, although one of the plaintiffs was at the date of the sale and is now an infant.

It has been distinctly held by this court that the power to sell property for taxes is altogether statutory and must be strictly pursued; and when a party is setting up claim to property, in virtue of purchase

Digitized by Google

by him at such sale, he must aver by pleading and show by testimony that the statutory steps necessary to a valid sale were taken. (Smith v. Ryan, 11 KY. LAW REP., 128.)

In the case of Durritt v. Stewart, *ibid.* 172, it was said to be well settled that a sale of property for taxes is void unless each legal step that the law requires, in order to subject it to sale, has been complied with. Moreover, it was held, in McGuiar v. Henry, 84 Ky, 1, that it was not in power of the legislative department to make a tax deed conclusive evidence of a complete title. It is true the party claiming under purchase at tax sale was, in the cases cited, plaintiff, seeking recovery against the original owner, while in this case his attitude is that of defendant. But it seems to us there is no reason for placing the burden upon the taxpayer and original owner in any case; but, on the contrary, a person claiming under a tax deed should be required to show, in order to resist recovery by the taxpayer and owner, that he has a valid title, acquired by strict compliance with statutory requirements. For otherwise, while the purchaser at a tax sale is always in a position to be reimbursed and placed in *statu quo*, owners of land, sometimes nonresident, or laboring under disability of coverture, infancy or lunacy, are liable to have their property sacrificed or lost by irregular or fraudulent conduct of the officer or purchaser. And no better illustration of the injustice and impropriety of accepting and treating a tax deed as conclusive in favor of the purchaser could be afforded than is done in this case. Here the owner of a large body of land has died, leaving a widow and children, some of whom are infants. And though it does not appear that the widow had been appointed administratrix, or otherwise authorized or required to pay taxes on the estate of her husband, or that even any part of the land had been allotted to her as dower, yet the whole tract was listed for taxation in her name; and without any demand on the personal representative of the decedent, if there was one, or notice to any of the heirs at law, the land was sold for the insignificent sum of $3.50, and the purchaser has been adjudged entitled to the entire tract, without showing or attempting to show a compliance, by either himself or the sheriff, with the indispensable requirements of the statute.

It may, by reason of lapse of time or death, be impossible for a claimant under purchase at tax sale to show the receipt was presented by the sheriff to the person from whom the tax was due, or that the sale was duly advertised. But the sheriff was, in this case, required by statute to make, in writing, and file with the county clerk, a report of such sale, showing all the steps taken, with reference thereto; and in case of his failure to do so the purchaser was authorized to file with the county clerk the sheriff's certificate of purchase. If the sheriff or purchaser had complied with such requirement, it would have been in power of the defendants in this case to show the fact, and, in our opinion, they ought to have been required to do so. Instead, according to the judgment appealed from, defendant, John A. Miracle, is permitted to hold 500 acres of land without any affirmative allegation by him of compliance with the statute, or any evidence thereof except a meagre and unsatisfactory recital in a deed made six years after the pretended sale by a person not then in office.

We do not decide whether the land was legally and properly listed in the name of and the taxes payable by Sarah Miracle, because it does not clearly appear whether she was in posession of the land, nor whether there was at the time a personal representative of the decedent, Robert A. Miracle. Nor is it necessary to determine

Digitized by Google

whether Sarah Miracle, the infant plaintiff, was entitled to redeem the entire land or only her undivided moiety. For we are satisfied, as the record stands, that the plaintiffs are entitled, as prayed for, to a division of the land among the five children, or their assigns, of the decedent, Robert A. Miracle, notwithstanding the tax deed of John A. Miracle, and the judgment is reversed, with directions for such division to be made, upon condition of payment to John A. Miracle of his purchase money with statutatory interest.

WOLLUMS V. HORSLEY.

(*Filed Dec.* 13, 1892.)

Specific execution of a contract—The right to the specific execution of a contract does not rest as a matter of absolute right in either party to it, but is to be determined by the court in the exercise of a sound discretion, and may be refused by it because of the existence of circumstances that would not be sufficient to defeat a recovery at law for its breach. It is well settled an application for specific performance is addressed to the court's sound discretion and will not be granted unless the contract is made according to legal requirements; is certain, reasonable, equitable, mutual, on sufficient consideration, consistant with public policy and free from gross misapprehension, fraud, surprise or mistake.

The contract in this case, by which the plaintiff purchased from defendant all the mineral rights in a tract of land at 40 cents per acre, when almost the entire actual value of the land, which was $15 per acre, consisted of such rights, was made under such circumstances as to the condition of the parties, as to render its specific enforcement inequitable and unjust.

W. M. Beckner for appellant.

Helm & Bruce for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

In August, 1887, the appellant, John Wollums, was living upon his mountain farm, of about two hundred acres, in Bell county. He was then about sixty years old, uneducated, afflicted with disease, disabling him from work, owned no other land and but very little personal property. He knew but little of what was going on in the business world, owing to his situation and circumstances in life. He moved in a small circle.

At this time the appellee, W. J. Horsley, who was then a man of large and varied experience in business, who was then buying mineral rights in that locality by the thousands of acres, and who was evidently familiar with all that was then going on and near at hand in the way of business and development in that section, through his agent entered into a contract with the appellant, which was signed by the latter only, by which he sold to Horsley all the oils, gasses and minerals in his land, with customary mining privileges, for forty cents per acre, and obligated himself to convey the same by general warranty deed free of dower claim or other incumbrance when the purchase money was paid, to-wit: One-half in three months and the balance in four months from the first payment, or as soon as the deed should be made, $3 of it, however, being then paid.

It is suggestive upon the question of the then value of the pur-

Digitized by Google

chase, and, as regarded by Horsley, that his agent, who made it, was to get $80 for his pay, or as much as Wollums was to receive for all he sold, and also that this agent does not testify in the case. The purchase money was not paid, as stipulated, but the reason given is that it was a sale of the minerals by the acre and the quantity of land was not known and Wollums refused to survey it. Nothing appears to have transpired between the parties until the summer after the trade, when Horsley demanded a deed. He says he sent his agent to do so before that time, but it does not appear that he did so.

In December, 1888, this suit was brought for a specific performance of the contract.

The main defense is that it was procured through undue advantage and under such circumstances that in equity its performance should not be decreed.

The answer also sets up inability to convey with contingent right of dower relinquished, as the wife refused to unite in the deed, but it is alleged and not denied that the husband induced this refusal by her and the appellee offered to accept a conveyance without her relinquishment, a proper reduction of the purchase money being allowed. (Pomeroy on Contracts, section 438.)

The specific execution of the contract was ordered. Considering all the circumstances and the rule applicable in such a case, the judgment should not be upheld.

There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically the party is left to his remedy at law.

Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice, or under all the circumstances be inequitable, will it be rendered. In other words a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree where the plaintiff will not always be allowed relief upon the same evidence.

A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance.

Story says: "Courts of equity will not proceed to decree a specific performance where the contract is founded in fraud, imposition, mistake, undue advantage or gross misapprehension; or where, from a change of circumstances, or otherwise, it would be unconscientious to enforce it." (2 Story's Equity, sec. 750.)

Kent also says: "It is a rule in equity that all the material facts must be known to both parties, to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance." (2 Kent, page 491.)

It was held in Patterson v. Bloomer, 95 Am. Decisions, page 218, and the same rule has been announced in other cases, that an application for specific performance is addressed to the court's sound discretion, and will not be granted unless the contract is made accord-

Digitized by Google

ing to legal requirements; is certain, reasonable, equitable, mutual on sufficient consideration, consistent with public policy, and is free from gross misapprehension, fraud, surprise or mistake.

The appellee testifies that he did not know anything as to the mineral value of this land when the contract was made; but it is evident he had a thorough knowledge of the value in this respect of lands generally in that section, and of the developments then in progress or near at hand.

All this was unknown to the appellant. It is evident his land was valuable almost altogether in a mineral point of view. While it is not shown what it was worth at the date of the contract, yet it is proven to have been worth, in April, 1889, $15.00 an acre, and that this value arises almost altogether from its mineral worth; and yet the appellee is asking the enforcement of a contract by means of which he seeks to obtain all the oil, gas and mineral, and the virtual control of the land at forty cents an acre. The interest he claims under the contract is substantially the value of the land.

Equity should not help out such a harsh bargain.

The appellee shows pretty plainly by his own testimony that when the contract was made he was advised of the probability of the building of a railroad in that locality in the near future. His agent, when the trade was made, assured the appellant that he would never be bothered by the contract during his lifetime. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue, and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension.

The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in any third party.

A court of equity should, therefore, refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest; and when this is done his petition should be dismissed.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

HERD V. CIST, &C.

(*Filed Jan.* 5, 1893—*Not to be reported.*)

1. *Void warning order—Judgment*—A warning order, requiring a nonresident defendant to appear at a term of court commencing less than sixty days after its entry, is void and does not bring the defendant before the court, even though an attorney is appointed by the court to defend for him.

A judgment against such nonresident defendant, who has not been served with any process except through such void warning order, is absolutely void, and an order for the sale of land, upon which it is alleged a lien exists, to satisfy the debt sued for, is void and passes no title.

2. *Same—Appeals*—When the judgment rendered on such void warning order directs the sale of land that the nonresidents have conveyed to a third party, which land it is asserted is in lien to pay the debt claimed in the petition against the nonresidents, the claimant of the land under the conveyance of said nonresidents may object to such judgment as void on appeal, even though the nonresidents have not appeared and do not appeal.

W. P. D. Bush, John L. Scott and J. M. Beatty for appellant.

D. W. Lindsey for appellees.

Digitized by Google

Appeal from Lee Circuit Court.

Opinion of the court by Judge Pryor.

In this case a reargument was ordered, and the questions made on the last hearing necessitates the withdrawal of the opinion of affirmance and a reversal of the judgment.

The land of the appellant, Mrs. Herd, was sold to satisfy a lien asserted on the land by the appellee against the parties from whom she derived title. These original vendors were nonresidents, and were warned to appear at a term of the court beginning less than sixty days from the entry of the warning order. They owed the debt to the appellees, and Mrs. Herd's land was being sold to satisfy that debt because of the alleged lien upon it, asserted by Huntingdon, the assignor of Cist. It was, therefore, not only proper, but necessary, to have the nonresidents before the court.

The warning order being void, the appearance by an attorney, under the appointment of the court, was also void, and the effect of the proceeding was to render a judgment against the nonresidents for a debt alleged to be a lien on the land, when they were not in court, either by actual or constructive service.

It is true the nonresidents are not appealing, and Mrs. Herd, only, is complaining of the judgment. This she has the right to do because the debt, as against the nonresidents, could not be asserted and judgment obtained without giving them a hearing and the land of the appellant sold to satisfy it. This point was not made when the case was originally decided, and it is not to be expected where parties litigant are in this court represented by counsel that the record will be examined with a view of ascertaining whether process was or not served in the court below; and, while the case was not in a condition to try, in so far as the appellant was concerned, when submitted below, still, if the parties had been before the court, an affirmance would have resulted.

It must be understood, however, that the opinion originally rendered is now out of the case, and, on its return, the parties may be allowed to amend their pleadings and take proof as if the case had never been heard, the nonresident defendants being first brought before the court.

Reversed and remanded for proceedings consistent with this opinion.

KENTUCKY NATIONAL BANK, &C. V. STONE, &C.

(*Filed Jan.* 10, 1893.)

Assignment for creditors—Attorney's fees—Where an estate is conveyed for the benefit of the grantor's creditors to a trustee, who is an attorney at law, such trustee can not be allowed out of the estate a reasonable attorney's fee for professional services rendered to himself, even though the deed of assignment provides for the payment of a reasonable attorney's fee. His commission as assignee is all that can be allowed to the trustee.

Geo. B. Eastin for appellant.

W. A. Sudduth for appellee.

Appeal from Louisville Law and Equity Court.

Digitized by Google

Opinion of the court by Chief Justice Bennett.

In 1886 Wm. Cromey, by a written assignment, duly recorded, assigned to the appellee all of his estate, which consisted of personalty, for the equal benefit of his creditors, which trust was accepted. Thereafter, the appellee, acting as his own attorney, filed his suit in the Law and Equity Court, Louisville, Ky., to have a settlement of the trust and the trust funds distributed among the creditors. The assets reported for distribution were $3,883.43 The court ordered the distribution, and the commissioner allowed the appellee five per cent. commissions on the amount that came to his hands, which amounted to $194.17, and $125.00 attorney's fee for bringing the suit and conducting it. The appellee also presented another claim, amounting to $1,100.00, for services as attorney rendered for Wm. Cromey in a case of the trustees of John Bull against him to compel him to pay over money which he had received as former trustee. The appellee was not proceeded against as trustee in said action, but was employed by Cromey in said action before his assignment, and continued his services under said employment after the assignment to the end of the litigation. The appellee asked that said claim be allowed as a preferred claim. The court, upon final hearing, allowed the appellee the gross sum of $1,200.00 as commissions and attorney's fees. The appellants, as creditors, have appealed, and the grounds urged here, among others, are that the appellee, as trustee, had no right to an attorney's fee and to charge and appropriate fees to himself in the double capacity of trustee and attorney, the capacity as attorney and trustee being inconsistent. The appellee contends, first, that the two capacities are not inconsistent; and, second, that the deed of assignment authorizes it.

As to the first proposition, it is, as we understand it, settled that a trustee will not be permitted to charge attorney's fees for legal services rendered to himself as trustee; because, to allow the trustee to charge himself with attorney's fees for services that he, as attorney, renders to himself as trustee, places him, as trustee, in a position that is inconsistent with his duties as trustee, which position he ought not to be permitted to occupy, for the same reason that he ought not to be permitted to purchase at his own sale or do any other act that would tempt him to abuse his trust duties. If required to employ a third person to act for him as attorney in matters appertaining to his trust duties, he would proceed, in all probability, to do so prudently, with an eye single to the best interests of the trust estate; but to allow him to employ himself as attorney, and charge fees for it, would tempt him beyond what a trustee ought to be required to bear in handling the trust estate; for as layman trustee he would be ignorant of even the most common duties and would feel compelled to consult himself, as attorney, in regard to them in order to increase his compensation.

The foregoing views are sustained by the following authorities:

Judge Walworth, in the case *in re* Bank v. Niagara, 6 Page, N. Y., 213, says: "The receiver was not entitled to charge for extra counsel fees to himself in addition to the legal taxable costs in suits prosecuted or defended by him as attorney or solicitor, nor was he entitled to any allowance, in the character of counsel, for himself or his coreceiver in relation to any other matter. The employment of counsel, and the payment of a proper allowance for such services, when necessary, requires the exercise of a sound discretion on the part of receivers or the trustees of the fund out of which such services are to be paid. It would, therefore, be as unsafe to allow a re-

Digitized by Google

ceiver or other trustee to contract with and pay himself for such extra services as it would be to allow him to become the purchaser of the trust property, which it is his duty to sell to the best advantage for the benefit of the estate. If he employs third persons as counsel, and when he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger that the estate entrusted to his care will be charged with counsel fees which might safely have been dispensed with."

Also, in the case of State v. Butler, 15 Lea (Tenn.), 118, the court quoted the foregoing language and approved of it, and added: "The particular case before us is one in which these words have peculiar force, as it presented a fruitful source of temptation to contests of every kind, which it would not be proper to impose upon the receiver. The temptation to earn fees as counsel was liable to warp his judgment, and is more than human nature ought to be required to meet in the execution of so important a trust." Other cases of the same import might be referred to but it is unnecessary.

As to the second proposition: The deed of assignment provides that, after paying the expenses of executing the trust, including commissions and reasonable attorney's fees, out of the trust funds, the balance shall be equally distributed among the creditors. The appellee contends that said provision authorizes the assignee to employ himself as attorney and pay himself, as attorney, out of the trust fund. As to the meaning of the clause, "a reasonable attorney's fee," it must be interpreted to mean such attorney's fees as the trustee is allowed by law to charge. And, as we have shown that the trustee is not allowed to charge for his own services as attorney, it follows that the clause refers to such attorney's fees as the law allows to be charged in such cases. For the deed of assignment to allow the assignee to render professional services for himself and charge extra therefor would be a fraud upon the creditors of the assignor, for it would tempt the assignee, and would, in fact, authorize him, to withdraw funds that ought to go to the equal benefit of creditors, and appropriate the same to his own use as attorney without reference to the fact as to whether such professional services were needed; he, as trustee, would be entirely ignorant of his duties, but as attorney he would be most wise and would have to be consulted upon all occasions—the most trivial—in order to increase his own emoluments. (See Reacock, &c. v. Durand, &c., 42 Ill., 232-3.) Therefore, instead of the said clause conferring valid authority upon the assignee to charge for the services rendered by himself as attorney, it seems that the clause would have the tendency to render the assignment invalid.

The conclusion is that the appellee had no right to make extra charge for professional services rendered the trust estate by himself, and that the only charge for services that he is entitled to make is not exceeding five per cent. for his services as assignee.

The appellee is a practitioner of this court, and is known to each member to be a gentleman and incapable of doing, knowingly, a personal or professional wrong; nor is any wrong imputed to him in this case, nor does any appear. But the foregoing principles are based upon public policy that applies to all persons similarly situated.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

Digitized by Google

BOGARD, &C. V. O'BRIEN, &C.

(*Filed Jan.* 14, 1893—*Not to be reported.*)

1. *Dedication of alley—Evidence*—The evidence shows that an alley of a city has been open as such to public use for such a length of time that no one can be found who remembers that it has ever been closed; that the city officials for many years have controlled it; that in 1872 the city had a map of the town published, in which this alley is included as a public street, and that the abutting lot owners, who are now denying that this way is a public alley, hold under deeds in which it is so described, and have executed deeds of conveyance so describing and recognizing it. This evidence is sufficient to show a dedication, adverse use and acceptance of it as a public street.

2. *Lien on abutting property for paving of streets—Publication of ordinance*—One asserting a lien on abutting property for the improvement of a street of a city, under a contract with the city, must show that all the provisions of the city charter, in regard to the steps that are to be taken before the contract for such work is let, have been strictly complied with; compliance with such provisions of the charter is a condition precedent to the creation of the lien.

When the charter requires all such ordinances to be published before the contract for the improvement is let, and such an ordinance concerning the paving of a certain street is published, and afterwards amended so as to require certain stone to be eight inches on top, instead of six inches, the amendment is so immaterial as not to create a new ordinance, and a new publication is not necessary.

3. *Same*—An ordinance which requires certain steps to be taken before the city council shall, by ordinance, *establish* or *change* the grade of a street, does not apply to an ordinance for the paving of a street which does not change or alter the grade except to the extent that the new paving material necessarily raises it.

4. *Same—The acceptance of the improvement by the city* is conclusive evidence against the abutting lot owners that the contractor performed the work in compliance with his contract, in the absence of an allegation of fraud.

E. W. Bagby and W. D. Greer for appellants.

Robert L. Reeves and J. W. Bloomfield for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellee, O'Brien, under a contract with the city of Paducah, made certain improvements on an alleyway in the city, running parallel with Broadway and connecting Second and Third streets therein.

After an apportionment, by the city engineer, of the cost of the work among the various owners of property abutting on the alley, as provided by the charter of the city, the contractor instituted this action for their proportionate share of the cost against the appellants, who owned a lot abutting thereon, and who resisted payment on the following grounds: 1. That the way in question was not a public alley, and, therefore, not under the control and supervision of the city.

The testimony establishes that the alley has been open for general travel for many years, and, indeed, no witness has been found who can say when it was not open its entire length, save at one time, some ten or fifteen years ago, one end was closed at nights to prevent persons from "littering it," and save there was a bridgeway some four feet in width connecting two business houses on the oppo-

Digitized by Google

site side of the alley, and which was some twelve or fifteen feet overhead, and in no way interfered with the use of the alley; and this was removed a few years ago.

Wheeler, who has been policeman and street inspector in the city at various times since 1856, cleaned the alley frequently, and treated it as he did other public alleys and streets of the city under his oversight as an officer.

Hopkins says it has been opened and used as a public thoroughfare by the general public for twenty-four years to his knowledge.

Patterson knew the alley was open for public travel in 1860 and 1861, when he left the city, and since 1872, when he returned, it has remained open and in use by the public.

Cherry knows it to have been open for travel nineteen years.

The declaration of several of the lot owners thereon is shown to have been to the effect that it was a public alley, and the claim of none is asserted to the contrary, save the appellants, and that since this work began.

So much as establishing adverse user.

Moreover, the city, by an ordinance passed in 1872, adopted a map, prepared by one Harrington, civil engineer, in which the streets and alleys are set out, and this includes and shows up the alley in question.

Besides all which the deed of the appellants for their abutting property, and the one they have recently made to their vendee, Thompson, calls for this alley as one of its boundary lines.

We think, therefore, that the acts of the lot owners along the alleyway, the use made of it by the general public, and the control taken of it and the recognition given it by the city, clearly constitute a dedication, adverse user and acceptance, and that it is a public and not a private alley.

The appellants also resist payment of the assessment because the ordinance directing this improvement was not published as required by the city charter.

It appears that the original ordinance, with the proposals for letting the work, was properly published, but that at a subsequent meeting of the council an amendment was adopted, and a change made in the size of some of the stones composing the pavement.

We fully recognize the principles contended for in the numerous cases cited "that the provisions in a city charter in regard to steps required before the contract for grading, etc., is let are conditions precedent, and every requirement must be strictly complied with," etc. In this case, however, the change made was insignificant; the original read, "and also that a row on each outer portion of alley of good square-topped limestone rock be placed, the stone to be about six inches square at top and one foot long, * * * to shield the abutting brick walls from abuse by wagon hubs, etc." The amendment provided that these stones should be *eight* inches square on top. We think this change was not sufficiently material to require the republication of the ordinance as amended, and another letting of the work.

Again, it is urged that under ordinance No. 43 of the city, providing that "the grade of a street or alley may be established by ordinance or resolution of the council after it shall have been reported by the city engineer with a profile founded on actual survey, and after it has been referred to and reported on by a committee. Changes in grades already established shall not be made, except on a like report of the engineer and reference to and report by a committee of the council." And that this was not done in this case.

Digitized by Google

In this improvement, we think, no new grade was established or change made; the pavement was laid on the bed of the alley as it existed when the work begun. This made the alley somewhat higher, it is true, by the depth of the new work, but we do not think this is the character of change of grade contemplated by the ordinance.

But, say the appellants, the work was not done according to the contract made between the city and appellees. The proof, however, discloses no substantial difference, and the acceptance of the work by the city council, in the absence of any fraud, is conclusive on this point.

It is contended, further, that under an act amending the city charter in May, 1888, the appellants had the right to have such improvement made in front of their property; and they had, if as provided in said amendment they had notified the mayor of their desire so to do, and entered into an agreement to do the work. The publication of the letting, etc., gave them due notice; at least it was the notice provided for by law, and they evinced no desire to avail themselves of this right, and can not now complain on this behalf.

Perceiving no error in the judgment of the chancellor in subjecting the property to the satisfaction of the assessment sued for, the same is affirmed.

RAINS V. RAINS.

(*Filed Jan.* 14, 1893—*Not to be reported.*)

Location of boundary—In a controversy between the vendor of a tract of land and his vendee, as to the location of the division line between the tract conveyed and an adjoining tract subsequently purchased by the vendor, the only issue is as to the location of such line as it is described in the deed from the vendor to the vendee. The location of such line, according to the patent and deeds under which the vendor holds his subsequently acquired tract, is not involved.

The evidence supports the finding of the chancellor as to the location of the boundary in this case.

Lester & King for appellant.

K. D. Perkins for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is a controversy between the vendor, appellant, of a tract of land and his vendee, appellee, as to the true location of the dividing line between it and an adjoining tract subsequently purchased by and now owned by the former.

In such case the only possible question is as to the line described in the deed from appellant to appellee, without any regard whatever as to where the division line may be as described in the patent and deed under which appellant now claims.

According to his deed to appellee, as well as the one to him from his immediate vendor, a "double locust" is called for, the identity and location of which is put beyond question. The course therefrom is "thence leaving said line, a supposed north course down the main branch to where the line of the above mentioned fifty-acre

Digitized by Google

survey crosses said branch." It may be that in adopting the "double locust" as a corner the vendor of appellant, and also appellant himself, supposed it was opposite the head of the branch, which rises on the side of a mountain, along top of which the original line ran. But it is here shown to be a few poles west of the point opposite the mouth of the branch. Consequently, the only way to run the division line is to extend it in a straight line to the next corner, about which there is no dispute, and that is where the fifty-acre patent line crosses the branch. It is true that line would not be with meanders of the branch, but it is only a short distance from it, and not only follows the general direction of it, but does run a north course.

We think the lower court properly fixed that line and the judgment is affirmed.

GRIGSBY, &C. V. COMBS.

(*Filed Jan.* 19, 1893—*Not to be reported.*)

Statute of frauds—A verbal agreement entered into between the owners of adjoining tracts of land, fixing the division line between their lands, so as to avoid apprehended litigation, is valid and enforceable and not within the statute of frauds.

John L. Scott for appellants.

Thomas H. Hines for appellee.

Appeal from Perry Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

Benjamin Grigsby, the patentee of a tract of land containing about 850 acres, and Andrew Combs, the patentee of an adjoining tract containing about 1,400 acres, lived on their respective lands, on Lot and Second creeks, in Perry county, Ky., Grigsby's lands lying substantially on Lot's creek and Combs' on Second creek.

Upwards of thirty years before the institution of this suit, which is an action *quia timet* and to restrain trespass, brought by Richard Combs, the grantee of the patentee, Andrew Combs, against the grantees—the children and grandchildren of the patentee, Benjamin Grigsby—the two patentees, it is alleged, in order to settle any dispute as to their co-terminous boundaries and evident conflict of patents, and to avoid apprehended litigation, agreed that the true division line between their respective lands should be "the top or ridge of the mountain between Lot and Second creeks."

The questions presented on this appeal are, first, as a matter of *fact*, was there an agreement between the two patentees so establishing the true line? Secondly, as a matter of *law*, can such an agreement, admittedly, not reduced to writing, be upheld as not being within the statute of frauds?

The chancellor decided both questions affirmatively, and adjudged that "the true line between the two tracts was the top of the mountain between Lots creek and Second creek."

We think the proof sufficiently establishes the agreement as to the line and locates it as adjudged by the lower court. In addition to the testimony of a number of witnesses who prove the agreement between the original owners and patentees, the ancestor of the defendants, by deeds to them of his lands, in 1874 (Feb. 19th and Feb.

Digitized by Google

20th), only calls "to the top of the ridge, thence running with the dividing ridge between Lots creek and Second creek." It is fairly to be presumed that while the ancestor of the defendants was thus dividing his estate he would not thus have limited his grants save for his alleged agreement; and this act seems in approval and ratification of such an agreement, and establishes a renunciation of any claim to land lying beyond the ridge on his neighbor's side of the creek.

But it is insisted by appellants that this arrangement between the patentees was merely in the nature of a swap of lands—it being conceded that the calls of each patent ran over and beyond the ridge from the patentees' main tract on to his neighbor's side, and that this "swap" can not be maintained because of the statute of frauds.

We are of opinion, however, that both in principle and by authority an agreement of this nature can be upheld. It is no more a swap of lands than results by reason of "agreed corners" between neighbors or "agreed division fences," and these amicable arrangements have been sanctioned by repeated adjudications. In Robinson, &c. v. Corn, 2 Bibb, 124, the contrary doctrine is seemingly announced, but the argument of the court in that case is directed solely against the sufficiency of the proof establishing the agreed line; "neither party," says the court, "seems to have acted under the faith of the supposed agreement, etc."

In Jamison, &c. v. Petit, 6 Bush, 669, Judge Robertson, following Brown v. Crow, Sneed, 108, says: "An oral agreement fixing a dividing line between adjoining lands of antagonist parties, not being within the statute of frauds and perjuries, may be enforced in equity." Moreover, in this case the plaintiff and his grantor have claimed and held to the top of the ridge adversely to appellees and all the world, and the grantor of the appellees and the appellees have acquiesced in their claim and holding, and for more than thirty years the patentee seemingly renounced by his deed of 1874 his own claim and holding beyond that line.

The case involves no question of the rights of the senior against the junior patentee, and no question of constructive possession as between conflicting patents.

Under the provisions of section 25 of the Civil Code, the court properly designated certain of the defendants to defend for all, and the facts being exhibited by affidavit, the defense so made was for the benefit of all the defendants, including nonresidents.

Wherefore, the judgment of the lower court is affirmed.

HADDEN V. MANNIN.

(*Filed Jan.* 21, 1893—*Not to be reported.*)

Ejectment—Pleadings—A petition alleges that plaintiff "is the owner of and entitled to the possession of the following boundary of land" (describing it), and "which contains about 60 acres." The defendants, by answer, "deny that plaintiff is the owner or entitled to the possession of the following-described boundary of land" (describing a different boundary) "containing about 100 acres," and "they say that if any of the land described in the petition is embraced within said boundary, that it is not the plaintiff's land." The reply avers that defendants are not the owners of the land mentioned in the petition, or any part of it. *Held*—That the pleadings formed no issue. The defendant must know and specifically aver

Digitized by Google

whether or not he claims the land described in the petition. In this case the court is unable to say that the judgment interferes with or includes any of defendant's land, and it must be affirmed.

Cope & Byrne for appellant.

Wood & Day for appellee.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Hazelrigg.

This was an action in ordinary, but in some way, not explained by the record, was placed on the equity docket, and the proof taken by deposition.

At the September term, 1891, of the court, the defendant's motion to continue the case, in order to retake the depositions of two witnesses, was overruled, to which they excepted, and the cause was submitted and heard by the court as if in equity.

The appellants have filed no brief, and the only exception taken by them to the action of the court was in overruling their motion for a continuance for the purpose of taking the proof indicated, and this, we think, if taken, could have availed them nothing.

The plaintiff must succeed on the pleadings. She avers that "she is the owner of and entitled to the possession of the following boundary of land," describing it, and which "contains about sixty acres."

The defendants, for answer, "deny that the plaintiff is the owner or entitled to the possession of the following-described boundary of land," describing it, "containing about one hundred acres," and "they say that if any of the land described in the petition is embraced within said boundary, that it is not the plaintiff's land."

The plaintiff replies by saying that the defendants are not the owners of the land mentioned in the petition, or any part of it.

The allegations, as we understand them, of the petition, answer and reply may all be true. There is no issue formed.

The necessary inference is that the defendant's one hundred acres do not embrace the sixty acres of plaintiff. The boundaries of the tracts described in the two pleadings are entirely dissimilar, and it was incumbent on the defendants to make the issue in plain and unequivocal language, and not hypothetically. As the parties sued, they must *know* whether the petition seeks to recover their land, and not leave it to the court to find it out.

The judgment complained of may not interfere with the defendant's land, and so far as the answer discloses, does not necessarily do so.

The judgment of the lower court must, therefore, be affirmed.

BAIRD V. BEALL, &C.

(*Filed Jan.* 31, 1893.—*Not to be reported.*)

Specific execution of contract—Mutual mistake—The vendee claims, under a written contract, specific execution of which he asks, to have bought about seven acres of land, at $40 per acre, from the vendor; the vendor claims to have sold about thirteen acres, at $40 per acre, under said contract, and, by cross action, asks enforcement of the contract as he understands it. The description of the land to be conveyed is ambiguous in the contract, and it

Digitized by Google

is evident there was a mutual mistake between the parties as to the number of acres bought and sold, therefore the decree of the chancellor rescinding the contract was proper.

S. R. Crewdson for appellant.

Geo. S. Hardy for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellees brought suit to compel the appellant to convey to them a certain lot of ground in Russellville, Ky., which contained, as they alleged, seven acres, two roods and fourteen poles of land, and relied on his written contract to that effect as showing their right to the specific conveyance prayed for.

The price named was $40 per acre, but the number of acres was not mentioned in the writing.

The appellant, by answer and counterclaim, admits the execution of the contract, but alleges that by its terms he sold and was to convey to the appellees, not the quantity above named, but thirteen acres, one rood and thirty-eight poles, and insists that the writing named calls for and embraces said quantity, and he asks that the appellees be compelled to accept his deed therefor and pay the price agreed on per acre for same.

Both parties ask that if the contract is not to be enforced as they repectively understand it and set it up in their respective pleadings, then that it be rescinded.

The chancellor rescinded it, and the vendor (appellant) complains because the contract, as he understood it, was not specifically enforced.

Manifestly the contract is ambiguous, or rather its descriptive part is a "misfit" when applied either to the lot which the appellant claims he sold, or to that which the appellees claim they bought, though it may be conceded that it more nearly and accurately describes the larger quantity, or that which the appellant claims he sold. We are of opinion that the vendor intended selling the whole of the land owned by him south of Barclay street, when projected as comtemplated, and that the appellees intended buying the whole of the land south of said projected street, *adjoining the Morton land*, as they understood the location and extent of that land.

The mistake as to what particular boundary of land was being contracted about was mutual.

The appellant should not be compelled to convey only the more valuable portion of his land at the stipulated price per acre, and the appellees should not be compelled to take the "knobs" or worthless portion thereof at a price at which they supposed they were getting only the valuable part of the land. Especially so, as the knobs were not under fence with the balance of the land, and, unless especially mentioned or pointed out, would not have been known as a part of the appellant's lands, and this he admits in his own deposition, and also admits that he did not mention or point out these outlying and uninclosed knobs as a part of the land he was selling the appellees. Under these circumstances, if this concealment was intended, it would amount to fraud, but without imputing such conduct to either party we think the mutuality of the mistake as to the quantity and location of the land is evident, and, therefore, affirm the judgment of the lower court rescinding the trade.

Digitized by Google

BREY V. BARBOUR, &C.

(*Filed Jan.* 14, 1893—*Not to be reported.*)

Mortgages—Statute of frauds—Property, devised to appellees, having been sold to satisfy a debt of testator, was purchased by the plaintiff creditor, M. Before confirmation of the report of the sale, M. found that the judgment and order of sale was void, and, by agreement between M. and the appellees, appellant paid a certain sum in satisfaction of M.'s debt, and took a transfer of his bid, with the further agreement between all the parties that the sale was to be confirmed and an absolute conveyance made to appellant to secure to him the sum he had paid M. for appellees. Such confirmation was had and an absolute deed made to appellant. *Held*—That appellees had the right to show such parol agreement with the appellant, which was not within the statute of frauds; the deed of appellant was, in fact, merely a mortgage, and a right to redeem it exists in appellees.

H. M. Haskins for appellant.

W. T. Owen for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Bennett.

Mrs. O'Bryan, a citizen of Louisville, Ky., died in that city. She left a will devising her estate to the appellees, which consisted mainly of a house and lot, worth about $800.00, situated in the city of Owensboro, Ky. Chris. Miller, being a creditor of Mrs. O'Bryan, instituted an action in equity in the Louisville Law and Equity Court for the purpose of having said house and lot subjected to the payment of his debt. Judgment was rendered in said action for the sale of said property to pay Miller's debt. The marshal of the city of Louisville sold it, pursuant to the judgment, and Miller purchased it at the price of $300.00. The most of the appellees were proceeded against in Miller's action as nonresidents of the State, when, in fact, they were residents of the State.

After the sale was made to Miller, but before it was confirmed, the appellees, learning for the first time of proceedings to subject their land to sale and its sale, set about to have the judgment and sale set aside upon the ground that they were not before the court and the judgment and sale were therefore void. Miller, hearing of this proposed proceeding, and doubtless realizing the truth of the appellees' contention, proposed to them that if they would give him the sum of $200.00 as a compromise, he would transfer his bid to them, to which they agreed; but they did not have the money, and Mr. Carrico, an attorney, who had money in his hands belonging to the appellant, as his agent, to loan out at his discretion, and who was also acting for the appellees as their attorney, agreed that he would loan the appellees the necessary money, as the agent of the appellant, to effect said agreement, and that Miller should transfer his bid to the appellant, and the deed should be made to him to secure the payment of the money. The transfer was made, and, after confirmation, the deed was made pursuant to the agreement, but the transfer and deed were, upon their face, absolute.

After a while the appellees sold the property for $800.00 and tendered the appellant the said $200.00, and interest, but he refused to take it upon the ground that, by reason of the transfer and deed, the property belonged to him absolutely.

The agreement indicated and the appellant's assent thereto is established. He contends, however, that the agreement is within the

Digitized by Google

statute of frauds and perjuries, and that he is not bound by it. Now, it is well settled that an absolute conveyance of real estate may be shown to be a mortgage, and it will be given that effect. Therefore, if Miller had given the appellant the transfer and deed, both, intending them to secure the payment of money loaned to Miller, there is no doubt that they would have been construed as a mortgage, and Miller's right to redeem would be beyond question. But, instead, he gave the same documents to the appellant as a mortgage to secure the payment of the debt of others, with the understanding and agreement that they might redeem. Such an agreement does not come within the statute of frauds because, in fact, there has been no sale of the land, but only a mortgage, a satisfaction of which may be controlled by an agreement in parol. Besides, the appellees were never legally divested of their title, and the arrangement, although verbal as to them, was simply to remove a cloud upon their title, and they ought to be allowed to redeem.

The judgment is affirmed.

GRIFFIN, &C. V. GRIFFIN.

(*Filed Jan.* 21, 1893—*Not to be reported.*)

Construction of devise—A testator, in consideration of love and affection for his brother James, devised real and personal property to his brother Charles "for the maintenance of my (his) said (brother) James during his life." Charles was appointed by the will executor, and the testator provided "he shall be required to pay all my indebtedness, and shall not be required to make any inventory or have any appraisement or any sale or give any bond as required by law, but shall act in the premises as though I was living and acting for myself." *Held*—That Charles took the estate for his own benefit, charged only with the debts of the testator and the support of James for his life; after the debts were paid, and James had died, Charles held the estate in fee for his own benefit.

Porter & McQuown for appellants.

Thomas H. Hines for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Hazelrigg.

The only question on this appeal is, what interest does Charles R. Griffin take under the following devise, viz.:

"2d. In consideration of the love and affection that I have toward my unfortunate brother, James M. Griffin, I give and bequeath all my interest in the land I own, and all the loose and personal property that I possess I give and bequeath to my brother, Charles R. Griffin, for the maintenance of my said (brother), James M., during his life.

"3d. I desire and do hereby appoint my brother, Charles R. Griffin, my sole executor to this, my last will and testament, and he shall be required to pay all my indebtedness, and shall not be required to make any inventory or have any appraisement or any sale or give any bond as required by law, but shall act in the premises as though I was living and acting for myself.

"This 6th day of Sept., 1879.

"(Signed) ELIJAH C. GRIFFIN."

Digitized by Google

It is contended by the appellants that Charles took the devised property in trust for James; that James was the beneficial owner thereof, and upon his death it passed by inheritance to his brothers and sisters.

The appellee insists that he took the estate, charged only with the debts of the testator and the support of James, and that upon James' death what was left after the discharge of these burdens imposed under the will belonged to him absolutely.

We think the appellee is right, and, having paid the debts of the testator and taken care of the brother, James M., until his death, which occurred some ten years after the death of Elijah C., he holds the estate absolutely.

It is as if the testator had said, "in consideration that Charles R. shall pay my debts and maintain my unfortunate brother, James M., during his life, for whom I express my love and affection, I give him my lands and personalty, and, therefore, he need return no inventory or have any appraisement or any sale or give any bond, but act in the premises, and own and control the property as I would do if living."

The devise and bequest is direct, and, save for the conditions imposed, was absolute.

The *use* of the property is not the thing given, but the property itself. The gift is after the fashion of a *quid pro quo* contract or bargain. "The property is yours; the price of it is the maintenance of my brother James, and the payment of my debts."

The judgment of the lower court construed the will in accordance with the foregoing views, and is *affirmed*.

HUFFMAN V. WILLIAMSON.

(*Filed Dec.* 17, 1892—*Not to be reported.*)

Division line—Adverse possession—Limitation—The location of the division line of the adjoining lots of appellant and appellee is in dispute. Each claims through the same remote vendor. Such vendor conveyed one lot to H, who, in 1880, conveyed to appellee. H testified that while in possession he did not claim any land outside of that called for in his conveyance. *Held*—That if the strip of ground in dispute was within the enclosure of H, but not embraced in his deed, his possession of it was not adverse, and appellee can not rely on the statute of limitation, unless such strip was within the deed to H, since he (appellee) has held possession only since 1880.

Thomas H. Hines, Alex. Lackey, J. W. Robinson and J. B. Auxier for appellant.

Wm. Lindsay for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Pryor.

Where is the true line between the lot of the appellant and that of the appellee is the sole question in this case. Each party claims under the title of one Ferrell, who was the immediate vendor of the appellant and the remote vendor of the appellee. Ferrell sold to Hamilton, and the latter sold to the appellee. Both parties claim to hold under conveyances, and whether appellee's deed embraces

Digitized by Google

the few inches of ground on which the foundation of the three-story brick building of the appellant stands is the question.

The corners are stones, planted in front and back, and where these stones are is, from the testimony, conflicting. Hamilton says he at no time claimed outside of his deed, and, from the testimony, seems to have recognized the fence, as built by the appellant, to be on the line; but whether so or not is a question for the jury.

The instruction in regard to limitation is erroneous. Hamilton's possession might have embraced the land in dispute, but he never claimed beyond the boundary of his deed; and unless the strip is within the boundary the appellee can not recover, as he has only had title since 1880, and is confined to the boundary of the deed made by Ferrell to Hamilton, and by Hamilton to himself.

The judgment is reversed and remanded, with directions to award a new trial and for proceedings consistent with this opinion.

BEAVER V. LANCASTER.

(*Filed Jan.* 31, 1893—*Not to be reported.*)

A widow may show by parol testimony that her husband was vested with a title in fee simple to land in which she is claiming dower, when it appears that the conveyance was made to the husband in about 1852, and that the land was sold to satisfy his debts in 1857, after which, in 1863, all the records of conveyances in the clerk's office of the county where the land lies were destroyed by fire, and the original deed to the husband not being in existence so far as the evidence shows.

The evidence herein satisfactorily shows that the husband did acquire a fee simple title to the land in 1852, which he held until 1857, when the land was sold to satisfy his debts; and the husband having died in 1890, the lower court properly allowed his widow dower therein.

Hugh P. Cooper for appellant.

J. P. Thompson for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

The evidence in this case, about which there seems to be no controversy, nor, probably, room for any, shows that in the year 1838 John Lancaster died, leaving one-half of about 900 acres of land to his son, W. D. Lancaster, who subsequently purchased from his brothers and sisters the other half. But about 1852 he sold to his brother, John Lancaster, that tract, receiving, as we will at present assume, in exchange and part consideration, a tract of about 238 acres, about 157 acres of which appellant, Beaver, now owns.

W. D. Lancaster died in 1890, and appellee, his widow, to whom he was married in 1838, brought this action, setting up claim to dower in the tract of 157 acres and asking judgment allotting it to her, which the lower court rendered.

In 1863 the courthouse of Marion county, where the land is situated, was burned and records of both clerks' offices destroyed. And the main question is whether the oral testimony by which appellee undertook to show her husband was seized of an estate in fee in the tract of 238 acres is competent and sufficient to authorize the judgment in her favor.

Digitized by Google

For the reason mentioned she could not produce record evidence of her husband's title; nor has she exhibited the original deed to him for the land, or proved directly by any witness there ever was in existence such deed or other documentary evidence on the subject. Nevertheless, she has shown satisfactorily, and we think by competent evidence, that her husband did have an estate of fee simple in the land.

She states on oath she never saw the original deed, and we are convinced, from the circumstances of this case, it is not in her power to produce the original evidence of title, if it ever existed. For her husband parted with whatever title he had, as well as possession, about the year 1857, and thereafter had neither possession of nor interest in the land. It was, therefore, competent for her to show the essential fact by oral testimony.

It fully appears that W. D. Lancaster, who was a stock trader as well as farmer, had become financially embarrassed in 1852 and was compelled to part with the tract of 900 acres owned by his father. But that tract, being of equal fertility and marketable value per acre, was worth, of course, a great deal more than the tract of 238 acres, then owned by John Lancaster. So that even if W. D. Lancaster was at the time financially embarrassed he still had ability to pay for the 238 acres, which we are satisfied he took from his brother, John Lancaster, in exchange for his own larger and much more valuable tract. It is shown that after removing to the 238-acre tract, W. D. Lancaster erected thereon a fine and costly dwelling house, besides other improvements; that he resided on and used it until 1857, and that it was finally sold to satisfy debts against him, the person under whom appellant claims being actually purchaser at that sale of 157 acres of the tract.

There is no evidence whatever that John Lancaster or any other person set up any claim to the 238 acres while in possession of W. D. Lancaster, or that there was any incumbrance whatever upon it. It is true the land was subjected and sold to pay debts of W. D. Lancaster, but it does not appear what were the nature of claims against it, who were his creditors, nor whether the land was sold under judgment of court or execution; for the record of the proceedings had was burned in 1863.

It seems to us the evidence makes it very clear that W. D. Lancaster did, in 1852, acquire from his brother, John Lancaster, complete title to the 238 acres, because his removal to it, the costly improvements put upon it by him, his undisputed possession and use of it for five years, and final sale of it to pay debts against him, can not be accounted for any other way.

Moreover, while W. D. Lancaster had, after 1857, no interest or object in preserving the evidence of his title, those who purchased the land did become interested in knowing whether he had a good title and preserving evidence of it. And, therefore, though appellant may not be able to produce the deed made to W. D. Lancaster, it is hard to believe he could not produce the deed made of the 157 acres to his vendor by or for W. D. Lancaster. And it is entirely reasonable to suppose if that deed was exhibited it would show W. D. Lancaster did have a fee simple title to the 238 acres of land, otherwise it would be exhibited.

It seems to us the evidence fully shows that appellee is entitled to dower in the land, and, therefore, the judgment is affirmed.

Digitized by Google

KENTUCKY SUPERIOR COURT.

MAYS, &C. V. SLEMMONS, &C.

(*Filed Jan.* 25, 1893.)

Elections—Failure to publish notice—Where a statute which provides for taking the sense of the voters of a defined boundary or district upon the proposition whether or not they will vote a tax upon the property in the district for a specified purpose, as for a graded school, requires that notice of the election shall be published in a newspaper for a certain time, and also by handbills, the failure to publish the notice in the newspaper for the prescribed time will invalidate the election, although notice may have been given by handbills as required, or the voters may otherwise have actual notice of the election and may attend and vote.

While in matters of this kind the courts are inclined to give the statute a liberal construction in aid of its benificent purposes, yet in the taking of private property for public uses, no matter how meritorious the object may be, the forms prescribed by the law must in their true spirit be followed.

Carroll & Jackson for appellants.

John D. Carroll for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Barbour.

Under the "act for the benefit of graded free schools in this Commonwealth" an election was held for the purpose of taking the *sense* of the legal white voters in a defined boundary in Henry county upon the proposition whether or not they would vote an annual tax of fifty cents on each $100 of property in the district, and a poll tax of $2 on each white male inhabitant over twenty-one years of age. The election having resulted in favor of the tax the appellees, who were taxpayers in the district, brought this action to enjoin the levy and collection of the tax, upon the ground that it was illegally imposed.

The principal contention of those resisting the tax is based upon the ground that the notice of the election was not published as required by the statute. If this construction is sustained it is unnecessary to notice the other questions which are raised.

Section 3 of the act provides that: "It shall be the duty of the officer, whose duty it may be to hold the election, to have the order of the judge of the county court published in some weekly or daily paper published in the county for at least two weeks before the election, and also to advertise the same by handbills, posted at five conspicuous places in said proposed district, for the same length of time. * * * Said officer shall have the advertisement inserted and notices herein provided for posted within ten days after he receives the order of the county judge, and at least twenty days before the election."

It is plain that the statute requires both the insertion in the newspaper and the posting to be made or done at least twenty days before the election. The election in question was held on May 2, 1891. There was a weekly newspaper published in the county in

Digitized by Google

which the publications could have been made as required by the act, and the notices were published in the paper—the first on the 16th and the second on the 23d of April. These were the only notices published in a newspaper.

The appellants in their answer, admitting these facts, say that the notices were posted in five conspicuous places in the district for at least twenty days, and that they were read and discussed by the people and voters of the district, and that on the day of the election 40 voters voted for the tax and only 13 against it; that there were only 3 other voters in the district and they had actual notice of the election, and if they had voted would have voted for the tax. For these reasons they insist that the failure to publish the notice in the newspaper the required length of time should not have the effect of invalidating the election.

In a text-book we find the rule thus stated: "While some kind of notice is required, it has been held that, although the notice is not given as required by law, yet if the voters have actual notice that the election is to be held, and they attend and vote, the election should be considered as a *de facto* election, and should not be set aside if regular in other respects."

An examination of the cases upon which the text is based will show that each case arose under a statute which itself fixed the time and place at which the election was to be held, yet required notice of it to be given by a designated officer. The weight of authority outside of this State in such cases is that the provision in regard to notice is merely directory, and a failure to follow it will not invalidate the election. This, we believe, is the extent to which the adjudged cases go, and the question has most frequently arisen in cases of elections to fill vacancies in public offices.

"In cases of general elections voters must take notice of the law, and the additional notice is merely to give greater publicity." The right to hold the election in such cases comes from the statute, and not from the notice to be given by the official. Where the election is to fill a vacancy in office the authorities are not in harmony upon the subject.

Some cases make a difference between general and special elections to office. In the former the requirement as to notice is held to be merely directory, and in the latter mandatory and essential to the validity of the election.

The reason for holding that a general election, the time and place of which have been fixed by law, is not to be held invalid because an officer has failed to give notice of it as directed, is that the popular will should not be defeated by his nonaction or misconduct. (Brock v. Commonwealth, 13 KY. LAW REP., 452, and cases there cited.)

But in a case where not only the notice of the election is required to be given by a designated officer, but the time of the election itself as well as the place is to be fixed by him or some other officer, and is not fixed by the statute, the provision requiring the notice is mandatory and the notice must be given with a scrupulous observance of all the statutory requisites. It can not be shortened a single day without rendering it ineffectual—the presumption being that the law has made it as short as was deemed consistent with the rights of the parties to be affected.

In Trustees Common School District v. Garvey, 80 Ky., 159, the court sustained the tax voted for school purposes upon the ground that the evidence showed that the notices of the election were given in compliance with the statute. The fair inference is that if the

Digitized by Google

notices had not been given as required by the law the court would have refused to sustain the tax.

In the case of the Commonwealth v. Barrett, 13 KY. LAW REP., 452, an act of the General Assembly made it unlawful for any person to have a barbed wire fence along the public roads of Carroll county after the 1st of January, 1891; but the law becoming effective was conditional upon its approval by a majority of the legal voters of the county, at the August election, 1890. The law also provided that the sheriff should, in three consecutive issues of the local newspaper, give a notice of the election and its object.

The sheriff did have published a notice filling all the requirements of the statute, but failed to sign it. The Court of Appeals, holding the election void, said: "The Legislature saw fit to select the voters of the locality to be affected by the law as the agency to determine when it should become operative. Others besides the voters might, and likely would, be affected by it. It, therefore, directed that the notice, in an official way, should be given by a county official of the time when the agency would act, and of the purpose of its action. The act shows that a notice, in addition to that given by the law, was contemplated. It seems to us that the Legislature intended that the giving of this additional notice should be a necessary condition to an action by the selected agency; and it was not intended to be merely directory to him, and, if not given, to be regarded merely as an irregularity, not affecting the validity of the agency's action; and that it is reasonable and conducive to fairness and safety to so hold. The noncompliance with the provisions of the act, which are positive in tone, requires us to hold that it never become effective."

We can see no distinction in principle between that and this case. In fact the objection to the election there was not near so serious as it is here. There the law fixed the time and places of holding the election, and the act made it the duty of the sheriff to give the notice; here, whether an election should be held, when it should be held, the place at which it was to be held, and the people and property to be affected by it, depended entirely upon the voluntary action of ten of the legal voters residing in the proposed district. The notice, therefore, become the jurisdictional fact—the right to hold the election comes not from the statute alone, but from the notice to be given by the official. But it is insisted that the failure to give the newspaper notice should not affect the question for the reason that every voter in the district had actual notice of the election, and all voted except three, and that the votes of these three, if they had voted against the tax, would not have altered the result —which means that in cases of this kind we are remitted to extrinsic evidence to determine a question affecting the rights of the citizen, instead of determining it upon the record, which the statute makes the only evidence. But a notice in cases of this kind is not solely for the purpose of bringing the voters to the polls. It is also given to afford those to be affected the time for discussion and consideration. Private property is to be taken for the benefit of the community. Others besides the voters will likely be affected; infants, women and persons not residing in the district may be required to share in the burden imposed for the benefit of the district and should be allowed an opportunity of discussing the propriety of imposing the tax. The appellants' argument is that no notice is necessary if a majority of all the voters in the district vote for the tax. The conclusion follows that if ten voters in the district procure an order from the county judge, and, without giving further notice, notify a majority of the individual voters, and they attend and vote

Digitized by Google

the tax, the election is legal. This is the announcement in a different form: That the majority can appropriate the property of the minority to a public use without their consent or the due process of law.

We are aware that in matters of this kind the courts are inclined to give the statute a liberal construction in aid of its benificent purposes. But we must not lose sight of the fact that in the taking of private property for public uses, no matter how meritorious the object may be, the forms prescribed by the law must in their true spirit be followed. Here the requirements of the law are simple; they can be as easily followed as disregarded, and it is far better that the public inconvenience growing out of the delay should be suffered than that the constitutional rights of the citizen should be imperiled.

The judgment is affirmed.

CENTRAL PASSENGER RAILWAY CO. V. CHATTERSON, &C.

(*Filed Feb.* 1, 1893.)

1. *Street railways—Duty as to persons driving on street*—While street railway companies have not, like steam railroad companies, the exclusive right to the use of their tracks, being used in common by their cars and the traveling public, yet the street cars have the right of way, and it is the duty of citizens, whether on foot or in vehicle, to give unmolested passage to the cars.

2. *Same—Contributory negligence*—Where persons returning in a carriage from a large gathering in the outskirts of the city, saw, as they were leaving, street cars standing on one of two tracks waiting to receive the crowd which was leaving, as they were, the other track, which was used only by cars coming from the city, not being obstructed, they were recklessly careless in leaving the safe, unobstructed way and crossing over onto the track which, as reasonable people, they must have known was being used or about to be used by the cars, without once looking back or taking any sort of precaution for their own safety, and a collision having occurred, in an action by them against the street railway company to receive damages for the injuries received, the court should have instructed the jury that they were guilty of contributory negligence, leaving it to the jury to say whether, after plaintiffs had by their negligence placed themselves in a perilous position, the employes in the control of the car saw or could, by the exercise of ordinary care, have seen the peril, and with the means at their hands have avoided the collision.

3. *Same*—It is the duty of the motorman or other person in control of a street car to keep a lookout to avoid injuring persons or vehicles on the track in front of his car, and by sounding his gong or in some other way to give them timely warning of his approach. A street railway company is liable not only for injuring those whom its employes might have avoided injurying after their peril was seen, but for carelessly injurying those whose peril they ought to have seen, the citizen not being a trespasser in using the street.

4. *Contributory negligence* being relied on as a defense, it was error to instruct the jury that though plaintiffs were negligent they should find for them unless their negligence "caused" the injury. The court should have told the jury that though the defendant was negligent, yet if the plaintiffs or their servant were also negligent, and but for their negligence the injury would not have occurred, they could not recover.

5. *Same*—The negligence of the servant employed by the husband to drive him and his wife is to be imputed to the wife as well as to the husband.

Digitized by Google

6. *Instructions to jury*—The mere fact that an instruction is based upon a hypothetical state of facts authorized by the evidence does not render it liable to the objection that it gives undue prominence to part of the evidence.

7. *Punitive damages*—As there is nothing in the evidence tending to show gross negligence on the part of defendant's employes, the court should not have given an instruction authorizing punitive damages in the event the jury believed the defendant was guilty of gross negligence.

Humphrie & Davie for appellant.

Stone & Sudduth, O'Neal, Phelps & Pryor, M. O'Doherty and R. C. Davis for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Barbour.

On the night of October 1st, 1891, as Mr. and Mrs. Chatterson were returning from the ball given by the "Satellites of Mercury" at the "Auditorium" in Louisville, their carriage driven by their servant collided with one of appellant's electric street cars and Mrs. Chatterson was thrown from the carriage and seriously injured.

To recover for this injury they instituted this action against the appellant, charging that the collision was the result of the gross negligence of its employes, and having recovered a verdict and judgment for $2,500 the appellant has appealed to this court.

Mr. Chatterson and his wife left the "Auditorium" about 11 o'clock, when a great many other persons were also leaving. There were two railway tracks on Fourth street, in front of the Auditorium, which was on the west side of the street. The west track was for the cars coming from the city, and the east track was for the cars returning to the city. Mr. Chatterson and his wife got into their carriage at the door of the "Auditorium," and as they did so they saw several cars on the east track near the door of the "Auditorium" receiving passengers to be carried into the city. They drove north on Fourth street in the same direction these cars would go, and after leaving the "Auditorium" passed a car standing on the east track filled with passengers.

Mrs. Chatterson, giving her version of the collision, says: "We started down the western track and passed a car standing on the eastern track. There we crossed the eastern rail of the western track and went between the tracks for a short distance. Then we crossed the western rail of the eastern track and went on the track upon which the car was standing, and then turned to cross the extreme eastern rail.

"The rails were very high there, and we only slid and as we turned to cross, or after we had crossed the western rail of the eastern track, we suddenly became aware that a car was coming and coming at a terrific speed. I had only time to say, the car's coming, and Mr. Chatterson said, 'drive down the track as fast as you can,' thinking to distance the car, as he knew he could not cross. We were standing directly upon the track and he never made a single attempt to stop that car and there was not a bell rung."

Charlie Hughes, the driver of the carriage, says: "I drove northward on the west side of the street about twenty-five feet, I reckon. We started off between the two tracks, then I drove up a piece and straddled the first rail of the right-hand track coming in. I drove on a piece and was thinking of crossing and Mr. Chatterson told me to drive across. It was very rough along there, so in driving along

Digitized by Google

Mr. Chatterson says, 'lookout.' I looked back and a car was coming and he said, 'drive down the track.' I was in the act—the team was nearly in this shape then—and he says, 'drive down the track.' And I aimed to drive right back down in the track, and the car struck the hind wheel. I drove about thirty feet or such a matter straddle the west rail of the east track before I started to cross. I do not remember of any notice of the car's approach; don't remember of hearing anything only Mr. Chatterson's 'halloo.'" Upon cross examination he said the car hit the carriage just as he looked around. We have recited the material part of the plaintiff's evidence bearing on the question of negligence. For the defendant there were five or six witnesses who say they saw the whole occurrence, and their evidence is materially different from that of Mr. Chatterson and the driver. These witnesses state that after the car started from the "Auditorium" they went north about two hundred feet when the car was stopped by a horse on the track and delayed a few minutes while the horse was gotten off. The car was started again, and was going at about the usual speed of a mule car when it collided with Mr. Chatterson's carriage. They saw the carriage before the collision driving on the west track a safe distance from the car, and where, if it had remained, a collision with the car would have been impossible, when suddenly the driver attempted to cross right in front of the car. They say that the motorman did all in his power to check the car as soon as the danger to the carriage was seen, and that the car was stopped within a very short distance—within twenty or twenty-four feet. The motorman says that going at the speed he was he could have stopped the car, and did stop it, within a distance of ten feet.

The court, as we will hereafter show, properly refused to instruct the jury to find for the defendant at the conclusion of the plaintiffs' evidence. The chief objection to the instructions given by the court is that they did not correctly present to the jury the law of contributory negligence. The objection, we think, is good. The instructions are liable to the same objections which this court sustained to instructions in the case of Speed v. Carpenter. The term contributory negligence necessarilly presupposes negligence upon the part of both parties, and but for which there would have been no injury. But the court, in its series of instructions upon the question of the plaintiffs' negligence, in effect told the jury that though the plaintiffs were negligent, yet they should find for them unless their negligence "caused" the injury, thus ignoring or rather eliminating from the instructions the idea of the concurring acts of negligence. As said in Speed v. Carpenter, *ante*, 271, the word "caused" as used meant "wholly caused," and, under the peculiar facts of the case, was calculated to mislead the jury. The court should have given the simple instruction so often approved by this and the Appellate Court, and have told the jury that though the defendant was negligent, yet if the plaintiffs or their servant were also negligent, and but for their negligence the collision would not have occurred, they could not recover.

Instruction No. 1, asked for by the plaintiff, was drawn in apt language, and was a clear presentation of the law, with the exception that it was misleading in confining the negligence upon the part of the plaintiffs to that of Mrs. Chatterson alone. Clearly the negligence of the servant employed by her husband to drive them is to be imputed to her as well as to him. We hardly think an argument is needed on this proposition.

Digitized by Google

Instructions Nos. 1, 14 and 15, asked for by the defendant, should have been given. The objection that they give undue prominence to part of the evidence is not well taken. An instruction necessarily has to be based upon a hypothetical state of facts authorized by evidence. This much we have said in view of a retrial of the case, when possibly other evidence may be introduced. But from the evidence before us it seems that the plaintiffs were clearly guilty of contributory negligence, and the court should have so told the jury. The relative duties of street car companies and citizens have never been defined in this State; but we think they have been so plainly and correctly stated by the Supreme Court of Pennsylvania, in the case of Erishman v. East Harrisburg City Railway, 24 Atlantic Reporter, 596, that we adopt the rule laid down by that court without qualification.

The court said: "There is this distinction to be observed between steam railroads and street railways. In the case of the former they have the exclusive right to the use of their tracks at all times and for all purposes except at road crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. While this common use is conceded and is unavoidable in towns and cities, the railway companies and the public have no equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, from the fact that the car can not turn out or leave its track; and secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part at least, that they are a public accommodation. The convenience of an individual who seeks to cross one of the tracks must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle."

Now, the plaintiffs, when they got in their carriage to go home, knew that there was a large crowd at the "Auditorium," many of whom were going home at the same time they were, and that a good part of them would go upon the cars; the cars were in position waiting to receive them. No cars were then coming out—at least, none were in sight. The west track of the railway was unobstructed. The street was crowded with hacks and other vehicles. Under these circumstances the plaintiffs were, in our opinion, recklessly careless in leaving a safe, unobstructed way, and crossing over onto a track which, as reasonable people, they must have known was being used or about to be used by the cars, without once looking back or taking any sort of precaution for their own safety.

At the same time it was the duty of the motorman to keep a lookout to avoid injuring persons or vehicles on the track in front of his car, and by sounding his gong or in some other way to give them timely warning of his approach. The motorman says, going at the rate of speed he was going at the time, he could have stopped the car within ten feet. Mr. Chatterson's carriage, if his driver is to be believed, had been running in front of the car on the west rail of the track the car was on for thirty feet. Upon these facts it was for the jury to say whether, after the plaintiffs had by their negligence placed themselves in a perilous position, the employes in the control and management of the car saw or could, by the exercise of ordinary care, have seen the peril, and, with the means at their command, could have avoided the collision. If they could have done

Digitized by Google

this the company is liable. The citizen in using the street was not a trespasser, as would be the case of one using the track of a steam railroad when it had the exclusive right to the use; and the employes of the street railway are not only liable for injuring those whom they see are in peril and could, by reasonable care, avoid injuring, but for carelessly injuring those whose peril they ought to see. The fourth instruction given by the court embraces this idea and is unobjectionable.

We fail to see anything in the evidence tending to show gross negligence on the part of the defendant's employes, and the court should not have given the instructions authorizing punitive damages in the event the jury believed the defendant was guilty of gross negligence.

For the reasons given we are of opinion that the judgment is erroneous, and it is, therefore, reversed, and the cause is remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

Carson, &c. v. Jones, &c.

Filed February 1, 1893. Appeal from Adair Circuit Court. Opinion of the court by Judge Brent, affirming.

Husband and wife—Feme sole—Rights of husband's creditors—Where the husband has accumulated money in a business carried on in the name of the wife, who has been empowered to trade as a *feme sole*, he alone giving his time and attention to the business, if the wife can in any case shield the profits of the business from the claims of the husband's creditors, it is only where, with some degree of certainty, she traces her money into the business, which she has failed to do in this case.

H. C. Baker for appellants; Montgomery & Jones for appellees.

Gregory v. Louisville & Nashville R. R. Co.

Filed February 1, 1893. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

1. *Guardian and ward—Right of action for loss of ward's services*—A guardian has not the father's right to the services of the ward, and can not maintain an action for the loss of such services.

2. *Same*—As the guardian is not chargeable with the ward's support except out of the ward's estate, if he incurs expense for nursing and medical attention to the ward it is an expense voluntarily assumed by him, and he can not recover therefor against one through whose wrongful act the nursing and medical attention were rendered necessary. If they were necessaries he is entitled to be reimbursed out of the estate of the infant, who is at last the loser, and who, if any one, is entitled to recover of the wrongdoer.

John T. Hays for appellant; Wm. Lindsay for appellee.

Herndon v. Waters' ex'or.

Filed February 1, 1893. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Digitized by Google

1. *Appeals—Bill of exceptions*—A judgment sustaining an attachment can not be disturbed in the absence of a bill of exceptions containing the evidence upon which the lower court acted.

2. *Under the exemption law* in force when the debt sued on was created (General Statutes, ed. 1873, chapter 38, article 13, section 6,) the crops exempt are only such as are suitable for breadstuffs and animal food, and do not embrace a crop of tobacco.

Wm. Beard for appellant; Martin & Stamp for appellee.

STOVALL v. STOVALL'S ADM'R.

Filed February 1, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Advancements*—Notes executed by an heir to his ancestor, although on their face evidencing indebtedness, may be treated by the parties as advancements, or, if questioned, may be shown by extrinsic evidence to have been advancements.

2. *Necessity for process on amended petition*—In an action by an administrator for the settlement and distribution of his intestate's estate, an heir having been summoned in the original petition to participate in the settlement of his father's estate and share in its distribution, after being charged with certain notes which he had executed to his father, an amended petition alleging that the notes are due the intestate, and praying for personal judgment against the heir thereon, stated a new cause of action, and personal judgment rendered upon the notes without process on the amended petition having been served on the heir, was void and should, upon motion, have been set aside. While it is true that where the facts alleged in the petition show that a party is entitled to the relief which he asks by an amendment, the amendment asking the relief does not present a new cause of action, yet that is not the case here, the plaintiff having by the amendment assumed a position inconsistent with that taken by him in the original petition.

D. M. Rodman for appellant; D. C. Haycroft and Hobson & O'Meara for appellee.

L. & N. R. R. Co. v. MCCLOSKEY.

Filed February 1, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Railroads—Negligent killing of stock on track*—In this action against a railroad company to recover the value of a mule which the petition alleges the defendant negligently run over and killed, as the answer not only denies negligence but denies that plaintiff was the owner of the mule, or that it was killed by defendant's train, the burden of proof was on plaintiff, and he was entitled to the concluding argument to the jury.

2. *Same—Evidence*—The statement of plaintiff in his testimony that he saw the tracks of the mule coming on the railroad at a certain point, that a colored man showed him the place, could not have prejudiced defendant, as the material fact plaintiff was testifying to was the place where he saw the tracks of the mule going on to the railroad, and whether some one else showed him the tracks or he found them out for himself was not material.

3. *Same—Instruction to jury*—The defendant having introduced in evidence a letter, signed by a firm composed of plaintiff and his son, in which they spoke of the mule as their mule, and asked the company to settle for it, an instruction telling the jury that the letter was competent only for the purpose of contradicting the plaintiff, if prejudicial to any one was prejudicial to the plaintiff, as it was calculated to impress the jury with the idea that there was a conflict between the letter and the plaintiff's statement in his testimony that he was the sole owner of the mule.

John S. Kelly for appellant; Geo. S. Fulton for appellee.

JOHNSON v. WILSON & MUIR.

Filed February 1, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

Digitized by Google

1. *Assignments by operation of law—Subsequent creditors*—Even if a creditor whose debt was created after an act of preference by an insolvent debtor can not originate proceedings to have the act declared to operate as an assignment for the benefit of creditors (a question not decided), the fact that the debt of the plaintiff in this case is evidenced by note subsequent in date to the preferences complained of coes not render the petition bad on demurrer, it being alleged that this note "was executed in renewal in part payment of another note" owing him by the debtor, "which had been outstanding for more than a year prior to said date." And even if this allegation was not sufficiently specific it was cured by an amended petition specifically describing the old debt; and as this amendment did not state a new cause of action, but merely perfected a good cause of action defectively stated, it is immaterial that it was not filed until after the expiration of six months from the preferences complained of.

2. *Same*—Even though a subsequent creditor could not alone have maintained the action, he was properly joined as a coplaintiff, as he will be entitled to share in the proceeds of the property, if the acts complained of shall be declared to operate as an assignment.

3. *Same*—Where an insolvent debtor transfers his property or pays money to one of his creditors the presumption arises that the transfer or payment was made with the design to prefer, but the presumption is not conclusive, and if it appears that the transfer or payment was made in the usual course of business and that there was no thought of giving an advantage or preference the presumption is repelled.

An extensive farmer and trader borrowed money from a bank with which to carry on his business, depositing in the bank the proceeds of his farm produce and stock as he would make sales and applying his deposits to the payment of his notes as they matured. At the same time he checked upon his deposits to pay other debts as they matured and were demanded of him, the bank always honoring his checks. *Held*—That although he was insolvent, payments made by him to the bank under such circumstances and in the usual way did not operate as an assignment under the statute.

J. W. S. Clements for appellant; John D. Wickliffe for appellees.

GARDNER, &c. v. RICHARDSON, &c.

Filed February 1, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

Appellate practice—Attachments—Several attachment suits against the same defendant having been heard together and all the attachments discharged, upon this appeal by certain of the plaintiffs the transcript filed upon the appeal of another plaintiff can not be treated as a part of this record, in the absence of which there is nothing before the court but a copy of the judgment. But if the transcript referred to could be considered it would avail appellants nothing, as none of their pleadings are copied in the transcript and, therefore, this court can not say the lower court erred in discharging their attachments. The court can not assume because the judgment was reversed as to one of the plaintiffs that it was erroneous as to all.

James Montgomery for appellants; J. C. Poston and J. P. Hobson for appellees.

STEPHENS v. RICE, &c.

Filed February 8, 1893. Appeal from Kenton Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. *Negligence of trustee—Compensation for services*—In this action by the committee of an imbecile for the settlement of the trust estate, as it appears that the plaintiff, for eighteen months after the estate came into his hands, made no investigation as to its condition, and in that time paid a number of creditors in full, the estate turning out to be insolvent and some of the creditors having suffered loss by overpayment to others, the committee will not be heard to complain of the smallness of the allowance made to him for

Digitized by Google

his services, even though the creditors who have suffered loss through his negligence, or he for them, could by proper proceedings recover of the creditors who were overpaid.

2. *Error waived by failure to complain on former appeal*—As the ruling of the lower court rejected an amended petition by which plaintiff sought to require certain creditors he had paid in full to refund could have been reviewed on a former appeal prosecuted by a creditor, and the question was not then made, it will not now be considered, especially as the court does not deem it important in the determination of the main question.

J. F. & C. H. Fisk for appellant; O'Hara & Bryan for appellees.

BAILEY, &c. v. ROBINSON & CO.

Filed February 8, 1893. Appeal from Knott Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Payment of execution by check on bank*—If a sheriff receives choses in action or property in satisfaction of a debt in his hands for collection it is not a payment, and the debtor is neither protected nor released thereby.

2. *A bank check is not a payment of a pre-existing debt until cashed.* Ordinarily it is not a means of payment, and the debt will not be extinguished unless the check be paid, or unless the drawer be released by some laches of the holder. But where a sheriff received from an execution defendant a bank check for the amount of the execution, and after the check had been paid to him by the bank, indorsed the execution "satisfied," there was as much a payment by the defendant as if he had handed the sheriff the money.

3. *The transfer of the amount of the check to the credit of the sheriff on the books of the bank was a payment to him* of that amount so soon as he accepted it as such; and the fact that a check drawn by him on the fund in favor of the attorney for the plaintiffs in the execution was not honored by the bank, furnished no reason for quashing the return on the execution. Unless the attorney has been guilty of such laches as to release the sheriff, the latter is still liable to the plaintiffs.

J. A. Violett for appellants; D. W. Lindsey for appellees.

L. & N. R. R. CO. v HERD.

Filed February 8, 1893. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *The application of the remedy of specific performance* rests in a great manner in the discretion of the court; but if the case meets all the requirements and conditions for granting the relief, the decree so ordering is as much a matter of course as a judgment for damages.

2. *Same*—While the courts will not require the performance of a contract in favor of a plaintiff who has not performed, or is not in a condition to perform, his part of it, yet they have no right, either in the way of a compromise or as a penalty, to formulate an entirely new contract between the parties and against the objection of either or both of them adjudge its specific performance.

In this action to enforce a contract between the plaintiff and defendant, by which each agreed to erect and maintain one-half of a division fence, the evidence was sufficient to authorize the court to find that the plaintiff had not performed its part of the contract, and would have justified the court in refusing specific performance upon that ground; but it was error to require the plaintiff, by way of compensation to defendant for the inferior quality of the fence plaintiff had built, to build a part of the fence defendant undertook by the contract to build.

W. J. Lisle for appellant; S. A. Russell for appellee.

WINTER v. MULLINS, &c.

Filed February 8, 1893. Appeal from Pendleton Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Digitized by Google

Fraud—Judgment sustained by evidence—In this action upon a promissory note the evidence sustains the defense of the sureties that their signatures were obtained to the note by fraud and misrepresentation of plaintiff.

Felix C. Newman for appellant; L. T. Applegate, W. M. Rardin and J. F. Ellis for appellees.

MAYSVILLE & BIG SANDY R. R. CO. v. SPARKS, &c.

Filed February 8, 1893. Appeal from Lewis Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *In this action against a railroad company to recover damages for injury to abutting property* by the construction and operation of defendant's road so as to unreasonably obstruct plaintiff's ingress and egress, the action of the court in assuming, in its instructions to the jury, that the title to the property was in plaintiff could not have prejudiced defendant, as the plaintiff's title was proved by record evidence and there was no countervailing testimony.

2. *Same—Measure of damages*—As the instructions plainly told the jury that the right of plaintiffs to damages depended on the obstruction and appropriation by defendant being of such a nature as to "deprive" plaintiff of the reasonable use of the street, they could not have supposed that plaintiff's were entitled to recover for mere inconvenience resulting from temporary negligence on the part of defendant.

3. *Same—Prejudicial errors*—An instruction telling the jury that they could give damages not to exceed $1,000 when plaintiff claimed only $600 was not prejudicial, as the verdict was for less than the proper limit.

4. *Same*—As the jury were told that persons living on the street are not to be deprived of the reasonable use thereof "for foot passengers, wagons and vehicles for any ordinary use," they were not left without a guide as to plaintiff's rights in the street.

5. *Evidence as to the value of the property* just before the road was built and just after was not objectionable. And while the attention of the witnesses should have been called to the fact that they were to speak of such difference in value as was caused by the construction and operation of the road in the way complained of by plaintiff, yet as this could have been done by defendant in cross-examination, it will not be heard to complain here that it was not done.

6. *Admissions by plaintiff made to the assessor as to the value of her property* just before and just after the road was built would have been competent to go to the jury for what they were worth, but as her affidavits were not made part of the record this court can not say that it was error to exclude them.

Wadsworth & Son and Cockran & Son for appellant; George T. Holbert and Samuel J. Pugh for appellees.

MAYSVILLE & BIG SANDY R. R. CO. v. LYNCH.

Filed February 8, 1893. Appeal from Mason Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Railroads—Injury to abutting property*—Although a railroad company has appropriated the street of a city, with both legislative and municipal sanction, yet if its road has been so located and constructed and is so operated as to unreasonably obstruct the street as a means of ingress and egress, or so as to injure the house of an abutting lot owner by blowing into it soot, cinders, etc., or by undermining its foundations, cracking the plastering, etc., the company is liable for the damage directly resulting from all or any one or more of these causes. And the measure of damage is the diminution in value of the property occasioned by these circumstances.

2. *Same—Instruction as to damages*—The defendant has no ground to complain of an instruction confining the jury in awarding damages to the "diminution in actual salable value of plaintiff's property caused by ob-

Digitized by Google

structing the street so as to prevent access to said property by the usual and ordinary means of travel upon public street." The instruction was prejudicial to plaintiff if to any one.

3. *Same—Prejudicial error*—The defendant was not prejudiced by the failure of the court to confine the jury to such injuries as were the result of a prudent operation of the road, as there was nothing to suggest that the defendant had been or would be negligent as to any of its operations.

4. *Same*—The fact that plaintiff submitted his several grounds of recovery in separate instructions did not prejudice defendant.

Wadsworth & Son and Cochran & Son for appellant; E. Leslie Worthington, T. C. Campbell and G. S. Wall for appellee.

MUDD v. COMMONWEALTH.

Filed February 15, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Forfeited bail bond—Where the accused in an examining court was charged with the offense of robbery, was held to answer for that offense and it was so nominated in the bond, the fact that the acused was indicted in the circuit court not for robbery but for petit larceny, does not release the sureties in the bail bond from liability. The objection is unavailable for the reason, if for no other, that larceny and robbery are offenses which differ in degree only.

Powers, Atchison & Miller and T. A. Martin for appellant; W. J. Hendrick and R. Reid Rogers for appellee.

L. & N. R. R. Co. v. COPAS.

Filed February 8, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Railroads—Improper loading of cars*—Although the rules of a railroad company require trainmen and yardmen to know for themselves whether the freight on flat cars or other open cars project in such a manner as to render the coupling or uncoupling of such cars dangerous, yet it being the duty of the car inspector and yardmaster to see that the cars are properly loaded, employes coupling cars have the right, when they can not see for themselves, to assume that the inspector and yardmaster have done their duty in this respect. And in this case, in which the plaintiff, a switchman and car coupler, was injured in coupling a flat car loaded with steel rails, some of which projected beyond the end of the car, the fact that the plaintiff was not expressly ordered to couple the car does not exempt the company from liability, it being his duty to couple the car without any special direction. And as the car was coming to him and he could see no unusual danger in it he had the right to assume that his superiors had discharged their duties.

2. *Plea of contributory negligence—Reply necessary*—An answer pleading contributory negligence presents new matter, and a reply thereto should be filed, although the plaintiff may have alleged in his petition that the injuries complained of were received by him without his fault, such an allegation in the petition not being necessary to the statement of a cause of action, and, therefore, immaterial.

3. *Same—Reply waived*—Where the defendant goes to trial as though a reply by way of traverse were in, and after verdict fails to ask for judgment notwithstanding the verdict, he will not be heard to say in this court for the first time that he was entitled to judgment on the pleadings. Nor will a motion for a peremptory instruction be regarded as a motion for judgment on the pleadings, the conduct of the defendant being inconsistent with such an idea.

James A. Mitchell for appellant; B. F. Proctor and Edward W. Hines for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. APRIL 1, 1893. No. 19

KENTUCKY COURT OF APPEALS.

SIMPSON COUNTY v. LOUISVILLE & NASHVILLE R. R. CO.

(*Filed May* 26, 1892.—*Not to be reported.*)

Bonds—Dividends—Estoppel—At a time when a stock dividend on railroad bonds held by it was due Simpson county, its county court directed and authorized the railroad company to issue stock to the holders of Simpson county railroad tax receipts for the years 1862 and 1863, and to charge the stock so issued against the stock dividend due the county. This the railroad company did. In this action by the county, instituted in 1870 to recover the whole of the stock dividend alleged to be due the county, together with all dividends due upon the same, *Held*—

First—That the action of the county court estops the county from now claiming the stock.

Second—Even if the county court had no authority to take such action, yet the sinking fund commissioners knew of what was being done and remained silent, without interposing any objection, and neither they nor the county can now be permitted to question the authority of the county court.

W.W. Bush, John Mason Brown and W. P. D. Bush for appellant.

I. & J. Caldwell & Winston, Russell Houston and Wm. Lindsay for appellee.

Appeal from Simpson Circuit Court.

Opinion of the Court by Judge Lewis.

In virtue of an act incorporating the Louisville & Nashville Railroad Company, and amendments thereto, the county of Simpson, by its county court, subscribed 10,000 shares of stock to the capital stock of the company, in payment of which bonds of the county, of the face value of $100,000, payable in twenty years and bearing interest at the rate of six per cent. per annum, payable semi-annually, were delivered to and accepted by the company.

By the terms of the contract the county was entitled to interest on its stock of $100,000 thus acquired at the rate of six per cent. per annum, payable in stock of the company, until declaration by the company of its first cash dividend, which was not, however, made until June 24, 1864.

Digitized by Google

But, to pay accruing interest on the bonds, and, ultimately, the principal thereof, statutory provision was made for levying a tax on property of the county, and for commuting tax receipts into stock of the company, which was, however, not to bear interest, although the aggregate of tax receipts thus converted into stock was, at the making and declaring of cash dividends, to be deducted from the amount of stock held by the county.

It appears that January 2, 1864, the board of directors of the Louisville & Nashville R. R. Co., by resolution, declared a stock dividend of 10 per cent. for twenty-two months, ending July 1, 1863, "on the stock and stock liabilities of the company on that day, out of the previous earnings, applied to the payment of the mortgage debt as above stated." November 9, 1864, the following resolution was passed: "That the commissioners' certificates for tax receipts of 1862 and 1863, after being assigned, be taken up by this company in stock, and the amount so taken up be charged to the several counties against the 10 per cent. stock dividend." And in pursuance of that resolution, the entire amount of dividend on its stock, to which it is claimed Simpson county was entitled under the resolution of January 2, 1864, being $10,000 in stock of the company, was applied in taking up certificates for tax receipts of 1862 and 1863.

This action was instituted July 16, 1870, by commissioners of the sinking fund of Simpson county, to recover from the company amount of said stock so applied and appropriated, together with amount of dividends thereon subsequently declared by the company.

The only ground of defense we deem it material to consider is based on and connected with the following order, made December 24, 1864, by the Simpson county court, composed of the presiding judge and justices of the peace: "That the president and company of the Louisville & Nashville railroad be and are hereby authorized and directed to issue stock to the holders of Simpson county tax receipts paid off to defray the interest on Simpson county railroad bonds for the years 1862 and 1863, upon the Simpson county commissioners' certificates, and said company is directed to charge the 10 per cent. stock dividend belonging to said county with said stock when issued."

If the county court had authority to so order application of the stock dividends, the county and sinking fund commissioners as well are now estopped to claim the stock from the company, for it was disposed of and applied precisely in accordance with the order and direction of that court. And if it be conceded, as is argued, that the sinking fund commissioners, and not the county court, had the right to control and dispose of the dividend stock, their conduct was not such as to entitle them to relief that involves injustice to the company, that is not shown to have acted in bad faith. For the evidence is entirely satisfactory that they knew of and consented to, if they did not directly advise, the action of the county court, and also were aware of the fact that the company was applying the stock as directed and authorized by the county court, yet they made no objection then, nor thereafter for more than five years. To suppose the commissioners were not aware of the disposition that was being made of the stock in question, that they now claim to have had the exclusive right to hold and control, is to assume they were utterly unmindful of their duties, and if they did know, it was their duty to then speak, and having acquiesced so long, they can not now equitably ask the relief sought.

Judgment affirmed.

Digitized by Google

DUNGAN V. BRYANT'S ADM'R, &C.

(*Filed Jan.* 24, 1893—*Not to be reported.*)

Allotment of dower—Devises—A testator devised 100 acres of land, including his dwelling house, to his widow for life, remainder to a grandson upon condition that he reside with and support and care for the widow. The widow renounced the provisions of the will for her benefit and united in a suit with the administrator and certain devisees, asking that her dower be allowed her in money out of the proceeds of the sale of all of testator's lands. The widow refused to live with the grandson, but made her home with a married daughter; but the court having held that the vested remainder to the grandson was not defeated by the renunciation of the will by the widow or her refusal to live with the grandson, the widow filed an amended petition asking that her dower be allotted to her in land so as to include the 100 acres and dwelling house above mentioned. *Held*—

First—Dower need not necessarily be so allotted to a widow as to include the dwelling house.

Second—The widow's dowable interest in this case ought to be given her in money out of the proceeds derived from the sale of her husband's lands and out of the reasonable rent for the 100 acres and the dwelling house, with which the grandson must be charged during the life of the widow. The grandson is chargeable with rent therefor from the death of the testator.

Will. C. Curd for appellant.

O. H. Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Lewis.

October 7, 1889, William Bryant died testate, leaving a widow and one child and children of five others who had previously died. He was owner of about 225 acres of land, all of which he directed sold and the proceeds thereof distributed among his heirs, except 100 acres, described by metes and bounds in the will, upon which was his dwelling house. That part of his land he devised to his widow for life, remainder to his grandson, E. J. Dungan, upon condition he staid with his grandmother and supported and cared for her until her death. It was further provided in the will that "all the stock, horses, cattle, etc., and farming tools, wagons, etc., be kept on the farm by his wife for use of the farm until her death, then go to E. J. Dungan upon conditions before mentioned."

Soon after death of the testator H. E. Marcum, husband of his only surviving daughter, was appointed administrator, with the will annexed, and in January, 1890, the administrator, widow and all the devisees except three, uniting as plaintiffs, commenced this action for settlement of the estate, sale of land and distribution amongst those entitled, E. J. Dungan and his sister and her husband being made defendants

In the petition it was stated that the widow, Sarah Bryant, had, in due time and proper manner, renounced provisions of the will and claimed her dowable and distributive share of the estate to be paid to her in money out of proceeds of sale of all the land and personalty. It was further stated she had abandoned the homestead and gone to the home of her daughter, wife of the administrator, to reside, and had declined to remain with, be cared for and supported by her grandson, E. J. Dungan. And sale of the 100 acres devised to him was also prayed for, and proceeds thereof as well as of the residue of the 255 acres distributed, upon the alleged

Digitized by Google

ground that the conditions prescribed in the will not having been complied with by E. J. Dungan, no estate in the 100 acres of land passed to him.

But the lower court adjudged he did acquire a vested remainder in the land, and that judgment was, upon appeal to this court, affirmed. Upon return of the case, however, an amended petition was filed, in which a claim in behalf of the widow to dower in all the land owned by the testator was made and judgment asked so allotting it as to include the dwelling house; and for that purpose E. J. Dungan be required to surrender possession during life of the widow, and also to account for rents since death of the testator. By terms of the judgment, from which is the pending appeal by E. J. Dungan, there was directed to be laid off to the widow, as dower, one-third in value of all the land of which the testator died seized, including the dwelling house, the whole including the 100 acres, being, by actual survey, about 186 acres.

Having renounced provisions of the will for her benefit, the widow would have been certainly entitled to one-third in value of all the land, including the 100 acres laid off and allotted to her as dower, and also to one-third of the rents and profits of her husband's dowable real estate, from his death until her dower was assigned. But it does not necessarilly or always properly follow that the dwelling house should be allotted to her, section 8, article 4, chapter 52, General Statutes, simply providing that the widow "shall hold the mansion house, yard, garden, the stable and lot in which it stands, and an orchard, if there is one adjoining any of the premises aforesaid, without charge therefor until dower is assigned to her." The widow, in this case, voluntarily, or was persuaded by her son-in-law, who is administrator, to leave the homestead and go to another county to reside. And, moreover, she united with the administrator and others as plaintiff, and, in the original petition, asked for a sale of all the land and payment to her of her dowable share out of proceeds of such sale. It is manifest to us she was induced by others to abandon the homestead and renounce provisions of the will in belief the devise of the 100 acres in remainder to E. J. Dungan would be thereby defeated. But after return of the cause from this court she shifted her ground, and, by amended petition, asked for allotment of her dower, including the mansion house, which is situated upon the 100 acres, and ever since death of the testator occupied by E. J. Dungan. The widow was at death of her husband about 82 years of age, and at date of the judgment appealed from 85 years of age, and it is scarcely probable that of her own accord she either abandoned the homestead with a view to defeat the devise to her grandson, who was raised by and lived with his grandparents from his infancy, or that she now desires to reoccupy it, whereby the grandson will be dispossessed and the land will be exposed during her life to waste by tenants. It seems to us very clear the old woman has been influenced by her son-in-law to ask for allotment of dower in such way as to discommode her grandson, and not for her own benefit; for she now resides with her daughter in a county other than the one where the land is situated, and can not be reasonably expected to return and take possession and use to her own advantage the 100 acres.

In our opinion the lower court, looking alone to her rights and interest, ought to have adjudged her entitled to dower, payable in money raised out of sale of all the land except the 100 acres, added to amount of reasonable rents of the latter tract.

Digitized by Google

There can be no question of rents from the 100 acres being subject to pay dower in money to the widow, for her support from that source was looked to and provided by the will, and E. J. Dungan, has no greater estate than a vested remainder taking effect from her death. It seems to us the lower court ought to have adjudged E. J. Dungan to pay a reasonable rent of the 100 acres from the time the widow renounced provisions of the will up to date of the judgment appealed from, and provided for payment of reasonable rents thereafter, the whole rents to be applied to pay the dower, interest and, in case of deficiency, to apply necessary amount of proceeds of sale of the residue of the land for that purpose.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

HARDING, &c. V. PUTNAM, &c.

(*Filed Jan.* 24, 1893—*Not to be reported.*)

Appeals—In cases respecting roads this court can review only errors of law arising on the record. And in the absence of a separation of the conclusions of law and facts of this case, relating to the opening of a new road, the judgment must be affirmed.

Hugh P. Cooper for appellants.

Sam. T. Spalding for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

In road cases this court can review only errors of law arising on the record. (General Statutes, chapter 94, article 1, section 43.)

If the proof in this case establishes the public necessity of the road sought to be opened and brings the case within the provisions of the law authorizing the opening of new roads, as indeed it apparently does, then certification of such finding should have been required of the lower court. In this way the law, or supposed law, under which it refused the application, would have been disclosed, and a state of case presented over which this court could have entertained revisory jurisdiction.

In the absence of a separation of the law and facts, we are constrained to *affirm* the judgment of the lower court.

DRAKE V. COMMONWEALTH.

(*Filed Jan.* 26, 1893—*Not to be reported.*)

Evidence sufficient to support verdict for manslaughter—The evidence conduced to show that the accused and deceased had a difficulty on a street, during which the deceased took away from the accused a knife. The parties were separated and the deceased was taken into a store. The accused by artifice forced his way in there and renewed the difficulty with deceased, in which the fatal wound was inflicted. *Held*—That the evidence authorized a verdict convicting the accused of manslaughter.

Digitized by Google

J. R. Botts and E. B. Wilhoit for appellant.

Z. T. Young and W. J. Hendrick for appellee.

Appeal from Carter Criminal Court.

Opinion of the court by Chief Justice Bennett.

The appellant was tried for the murder of Able Rubert; he was convicted of the crime of manslaughter, and his punishment was fixed at confinement in the State penitentiary for the period of ten years. He has appealed.

The Commonwealth, on the trial, clearly established the following facts: That the appellant and Rubert met on the street and had a personal encounter, in which Rubert took a knife, which the appellant had drawn upon Rubert, away from him; they were then separated and Rubert went into a drug store close by and the door was fastened upon him to keep the appellant out. The appellant armed himself with brickbats and made three attempts to get in the drug store, and, on the third attempt to get in, the door was opened for him to enter upon the assurance that he only wished to get his knife from Rubert and would raise no "fuss." He threw down his brickbats, but just then a person present armed him with a knife, and he entered the house with it open in his hand. He approached Rubert with the knife opened in his hand and demanded his own knife. Rubert replied that he would not give him the knife at that time; that he (appellant) had cut him on the street; that thereupon the appellant, using an epithet, struck at Rubert with the knife, and Rubert immediately struck the appellant with his fist and knocked him down; that a person then struck Rubert, the blow staggering him. The appellant by this time had arisen to his feet and struck at Rubert with the knife again. Rubert died of the wound made by the first cut with the knife. It does not matter which of the parties was in fault in the difficulty upon the street, for it clearly appears from the testimony of the Commonwealth that the appellant was, without excuse, the agressor in the second trouble. His own evidence convicts him of that fact, and we think that the verdict of the jury was exceedingly mild. We, under the circumstances proven, see no error prejudicial to the appellant in the instructions.

The judgment is affirmed.

HOGAN, &C. V. KENTUCKY UNION RY. CO.

(*Filed Jan.* 31, 1893—*Not to be reported.*)

Railroads—Neglect—The evidence shows that decedent was killed by falling into a cut that appellee had made across a public highway, when he was endeavoring to cross it to go to his home at 10 o'clock on a dark night. Some of the evidence conduced to show that the appellee had negligently permitted portions of the fence by which the cut was inclosed to fall down and remain down for an unreasonable time; that such condition of the fence made travel on the highway along the cut unsafe, and that deceased fell into the cut by reason of the gap in the fence. *Held*—That a peremptory instruction for defendant was erroneous, and it was neglect for the railroad company to permit the fence to remain out of repair.

W. M. Beckner for appellants.

Digitized by Google

E. S. Jouett for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

It is an admitted fact that the appellee, on the 14th day of December, 1889, was engaged in constructing a railroad in Clark county; that in the course of constructing the same it had made a very deep cut at a point where the railroad crosses the Winchester and Paris turnpike near the northern limits of the town of Winchester, at which place the appellee had acquired the right of way, and had obtained full possession of the same; and which turnpike was a public highway. It also clearly appears that C. S. Hogan, the appellants' husband and father, in passing from the town of Winchester, where he was engaged as a printer, to his home north of the railroad where it crosses the cut, fell into the cut and died the next day from the injuries received by the fall. The appellants, the widow and children of the said deceased, brought this action to recover damages for the death of the deceased, caused, as is alleged, by the willful neglect of the appellee. As said, the appellee, in constructing its roadbed, of necessity made a deep cut across said pike—a public highway—and in order to accommodate the traveling public the appellee constructed a temporary bridge across said cut, with a wagon and footway, the footway having a plank walk at both approaches to the bridge, which extended to the picket fence erected across the pike on either side of the cut and about thirty feet from it, to prevent travelers not aware of the existence of the cut from going into it. There was also erected on either side of the cut and along the plank walk a plank fence, extending from the picket fence across the pike to the bridge, which was fastened to the end of the bridge to prevent persons from missing their way and getting on the pike between the picket fence and the cut. There was evidence before the jury that the picket fence on the north side of the cut from Winchester, on the occasion of the accident, was down, and had been down more or less; it was also in evidence that about six or eight feet of the plank fence, where it joins the bridge, on the same side, was down, except the bottom plank. It also appears that at the gap of the plank fence next to the bridge it is not more than twenty inches to the edge of the cut and that there is a pathway leading along the cut from the gap. It also appears that the deceased fell into the cut about sixty feet from the gap and within the range of the pike leading to the cut. There is evidence to the effect that while the deceased knew of the cut he did not know the means or location of the crossing, for he asked his father-in-law that day how to cross it in order to get to his house, which he had just rented, situated on the north side of the cut. It also appears that his father-in-law told him to cross the bridge and then go along an alley which was north of the picket fence and leading east. It also appears that the deceased, about 10 o'clock at night, crossed the bridge, going north to his home; that when he crossed the bridge he did not go to the alley, but either went through the gap at the plank fence and walked along the path until he fell into the cut, or walked to the pike beyond the picket fence and then, confused by the darkness, turned toward the cut, and the picket fence being down, there was no obstruction to his going forward in the direction of the cut, and he walked into it. It also appears that there were many residences north of the cut and that people commonly crossed the same at night, going to their homes from the business part of the town. Also there was evi-

Digitized by Google

dence to the effect that the picket fence being down and a gap being in the plank fence made it dangerous for persons not knowing the way to cross the bridge at night, when they could not discern the situation. Also, it is clear that if the plank fence and the picket fence were permitted to remain down, as described by the witnesses, it was a case of negligence, and if the deceased got hurt in consequence of it an action will be for damages, and the jury should have been so instructed.

The judgment is reversed and the case is remanded with directions for further proceedings consistent with this opinion.

HOOVER V. HOOVER.

(*Filed Feb.* 2, 1893—*Not to be reported.*)

Right to alimony—Evidence—The evidence upon which the court granted the husband a divorce does not justify its refusal to allow the wife alimony and a reasonable attorney's fee. The charge of adultery brought against the wife by her husband is not supported by evidence of a satisfactory or convincing nature, and the court should have disregarded it and allowed her alimony.

Weed S. Chelf and Hobson & O'Meara for appellant.

G. W. Thurman for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

Standing alone on the ground of his wife's abandonment in his original petition for divorce, the appellee, nearly a year after the commencement of his action, and after some preparation of the case justifying the wife's absence, amended his petition, and relied on the additional ground of adultery and lewd and lascivious conduct on the wife's part to obtain the coveted separation.

No corespondent or *particeps criminis* is named, but a dragnet is thus cast out to gather up whatever might be found to besmirch his wife's fair name.

The chancellor granted a divorce to the husband, looking, it must be presumed, solely to the question of abandonment, but refused alimony, *pendente lite* or otherwise, to the wife, and of this she complains.

The testimony discloses that in 1884 the appellee, when some forty odd years of age, married the appellant, who was about eighteen, and they lived together happily until the summer or fall of 1889.

The wife was of a lively, almost rollicksome and girlish, disposition. She sought the company of the young and unmarried girls of the village, but was duly kind and affectionate to her husband. He was of steady and serious habits. He was an undertaker and away from home to a limited extent. For some reason not disclosed in the record, but there appears to have been no trouble causing it, the appellant, in the latter part of the year 1889, left home to visit her brother or father in Cincinnati.

Her husband accompanied her to the depot and affectionately kissed her goodbye, and this was the abandonment complained of. When she returned, after some weeks, she was not met by the hus-

Digitized by Google

band. She repaired to the village inn and sent for her husband, and, after being charged with infidelity, insisted on facing her accusers.

They started out for that purpose, and when she found that her character was to be tried by a coterie of negro strumpets she indignantly sought the shelter of her father's house in an adjoining State, accepting, presumably from dire necessity, the sum of $5.00 from her penurious husband.

The judgment granting him a divorce can not be disturbed, but, after examining carefully the voluminous body of testimony, without here reviewing it in detail, we are clearly of opinion that the insane jealousy of this otherwise seemingly fair-minded husband has rendered him blind to the plainest dictates of duty and affection, and led him on in this unrighteous attempt to blacken the good name of his wife. We are told of no alienation of affection, no special infatuation or guilty amour, but on the public highway, at the open window looking out toward the town thoroughfare, in the woods and out on the fields, and with any passer-by, are these wicked debaucheries and lewd acts practiced; and amid it all the respect of the pure-minded and the confidence and company of the best people of the community are retained and enjoyed by the defendant. A veritable Dr. Jekyl and Mr. Hyde! And after her alleged detection and fall she is guided by instincts of purity to the home of her kindred and is engaged in honest work to provide an honest living.

The court should have allowed her a reasonable sum for alimony, and on the return of the case let this be done, including an additional fee for her attorney; and for these purposes and to this extent the judgment of the lower court is reversed.

COMMONWEALTH, FOR GREENUP COUNTY, V. CHESAPEAKE & OHIO RY. CO., &C.

(*Filed Feb.* 4, 1893—*Not to be reported.*)

1. *Trusts—Statute of frauds*—A verbal agreement by the holder of the legal title that another shall have an interest in it, or to buy land for the benefit of another, who pays or has paid no part of the consideration therefor, is within the statute of frauds and no trust results in favor of such person.

2. *Same—Railroads—Exemption from taxation*—The evidence shows that the railroad has leased certain land from the owners for the period of one thousand years, agreeing to pay therefor an annual rental amounting to about five per cent. on what the land cost its owner, and in addition thereto all taxes and charges against it The railroad claims that the holder of the legal title acquired it under a verbal agreement to hold the land for its benefit, although he paid his own money therefor, and that said property is, therefore, exempt from taxation under the statute allowing such exemption to railroad for five years from the commencement of the construction of the road. *Held*—

First—That a verbal agreement by the holder of the legal title to hold it in trust for one who paid no part of the consideration therefor, is within the statute of frauds and no trust results from such agreement. Therefore, the railroad occupies the position of a lessee of the property.

Second—The owners of such property are liable for the taxes thereon, and, since the railroad, as lessee, has agreed to pay this tax as a part of the rent, it would be inequitable to allow it to escape the payment of such taxa-

Digitized by Google

tion on the ground that it is exempt from paying taxes for five years, etc.; such claim to exemption is in violation of its agreement with the owners of the land.

Ben. B. Roe for appellant.

W. E. Wadsworth & Son and B. F. Bennett for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Cheif Justice Bennett.

The sheriff of Greenup county reported to the Greenup County Court that J. C. Woodruff and Julia W. Anderson owned a certain tract of land lying in said county, which they had leased to the Chesapeake & Ohio Railroad Company, and which property had not been "assessed for taxes due for 1890."

The said parties were summoned to appear, etc. Thereafter J. C. Woodruff and Julia W. Anderson were proceeded against as non-residents of the State, and the Chesapeake & Ohio Railroad Company and the Maysville & Big Sandy Railroad Company entered their appearance, the latter-named road claiming to be the lessee of the former.

A trial of the case resulted in a judgment ordering the clerk of the court to assess the property in the name of Woodruff and Anderson, except a small portion that the Chesapeake & Ohio Railroad Company was entitled to, and which was not assessed, presumably upon the ground that the same was exempt by statute for the period of five years, which time had not expired. The railroads appealed to the circuit court, and that court reversed the judgment of the county court and dismissed the action upon the presumable ground that the legal title to the whole tract of land was in Woodruff and Anderson as trustees of the Chesapeake & Ohio Railroad Company, and as said company held the equitable title and possession the property was exempt from taxation under said statute.

The record facts as to the purchase, ownership and lease of said property are as follows: That C. H. Coster, of New York, purchased the land from H. A. Meade at the price of $32,000, paying his own money therefor. He then leased the property to the Chesapeake & Ohio Railroad Company for the term of one thousand years for an annual rental of $1,650, to be paid in monthly installments, and that said company was to pay all taxes and charges on the land that might come against it in addition to the yearly rental; that Woodruff and Mrs. Anderson finally acquired this property by purchase, paying their own money for it, and they leased the property to the Chesapeake & Ohio for the same time, and on the same terms indicated above, and that the Chesapeake & Ohio Railroad Company then leased the same property to the Maysville & Big Sandy Railroad Company for one hundred years at a rental of $1,650 per year, and the payment of the taxes, etc.

There is no expression indicating a trust in any of said conveyances. But the appellees, the railroad companies, attempt to establish a trust by the following verbal agreement: That the Chesapeake & Ohio Railroad Company, wishing to purchase said property for the purposes of its road, and not having the money with which to pay for it, applied to C. H. Coster to loan it the money and take a mortgage on the land to secure the payment, which he agreed to do, but in order to avoid circuity and complication he was to pay for the land with his own money and take an absolute deed to himself,

Digitized by Google

and then lease the land to said company for the term of one thousand years at an annual rental of $1,650, an amount equivalent to interest at the rate of five per cent. per annum, and the payment of all taxes and charges in addition; that the subsequent conveyances were made with the same understanding and agreement. It is claimed that this verbal agreement as to the loan of said money, and the deed, absolute on its face, should be held to be only a mortgage to secure the same, and to create an enforceable trust, and which gave the appellees the equitable title to said land.

There is an equitable principle prevailing in many States, and which used to exist in this State, that in the sale of land, if the deed was made to one person, and the consideration was paid by another, the holder of the legal title would hold it in trust for the person paying the consideration upon the "principle that the right of property should result to the source of the consideration." But by article 1, section 19, chapter 63, General Statutes, it is declared that such transaction creates no trust in favor of the person paying the consideration. But, leaving the statute out of view, and admitting that the equitable rule is in force in this State, it is clear that the facts of this case do not come within the rule, for it is clear that the appellee paid no part of the consideration, but Coster and the subsequent vendees paid the respective considerations with their own money. And it is well settled that in such case no enforceable trust can result, for, as said, the foundation of a resulting trust of this nature is the payment of the consideration by a person other than the person to whom the deed is made.

A verbal agreement by the holder of the legal title that another shall be interested in the title, or to buy the land from a stranger for the benefit of another, without that other paying the consideration, comes directly within the statute of frauds and creates no enforceable trust. (See notes to Dyer v. Dyer, 1 volume White's & Tudor's leading cases in equity, pages 336–7.)

Besides, it seems that, under the circumstances, the evidence of the witness that is relied on to establish this trust is not sufficient for that purpose. for the written leases all fix the term of lease at one thousand years, except that to the Maysville & Big Sandy, at an annual rental of $1,650, which sum does not pay exceeding five per cent. interest per annum.

Now the question arises: When and how would the lessors get their principal at the end of the thousand years? How would the fact be established?

The truth, from the evidence, seems to be that Coster purchased the land at the suggestion of the Chesapeake & Ohio Railroad Company, as an investment, relying upon said railroad company to lease it at a rental that would pay a reasonable interest and the payment of the taxes and other charges in addition.

The lessors are bound to pay the taxes on the land from the dates of their respective purchases, and the Chesapeake & Ohio Railroad Company agreed to pay the taxes and other charges upon the land as a part of the rental consideration, and to allow it to escape the payment of the taxes for the period of its five years exemption would, in effect, allow it to violate one of its terms of lease and put the burden of the taxes for said period upon the lessors without remedy, which the company, by the terms of the lease, can not do, for its obligation to pay the taxes is contractual and commences from the date of the lease in order that the lessors may have the full benefit of the contract.

It seems the entire property should be assessed by Woodruff and

Digitized by Google

Anderson for the year 1890, and continually thereafter, unless it is given in by said company without reference to its exemption, in which case Woodruff and Anderson may not be required to give it in for taxes.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

VANMETER, &C. V. SPURRIER, &C.

(*Filed Feb.* 4, 1893.)

1. *Constitutional law—Title of act*—The act approved April 13, 1886, entitled "An act to regulate the sale of fertilizers in this Commonwealth and to protect agriculturists in the purchase and use of the same," does not relate to more than one subject, and the title sufficiently indicates that subject, and the act is not unconstitutional.

2. *Same—Double taxation*—Such act can not be successfully assailed on the ground that it authorizes a double taxation of commercial fertilizers.

3. *Same—Interstate commerce*—The requirement of the act that the manufacturer, before offering for sale a fertilizer in this State, shall have the same analyzed by the director of the Kentucky Experiment Station and pay a fee of $15 for such analysis, is not the imposition of an impost on interstate commerce in the manner in which such impost is prohibited.

4. *Contract prohibited by statute—Sale of fertilizer*—Where the doing of a given act is prohibited by a statute under a penalty, and the object of the statute was not the securing or protection of revenue but the protection of the public from fraud in contracts, and the penalty is not imposed once for all for a violation of such statute, but is a recurring penalty, imposed as often as dealings are unlawfully had respecting the subject-matter of the statute, contracts relating thereto are void and will not be enforced. The imposition of the penalty is construed to inhibit the making such contracts, although the statute does not in express terms declare them void.

Where commercial fertilizers are sold in this State with no certificate attached thereto showing the chemical elements thereof as required by statute, the vendor can not recover on a note executed in payment therefor, such contract being prohibited by statute and void.

J. H. Vanmeter, Sprigg & Chelf and Hobson & O'Meara for appellants.

Charles G. Ritchie and James Montgomery for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

Appellees, Spurrier & Bading, assignees, brought this action on a note given October, 1888, to the Thompson & Edwards Fertilizer Co. by appellants, Vanmeter and others, the consideration being commercial fertilizer sold and delivered in sacks to the purchasers. Two distinct grounds of defense are stated in the answer, which is also made a counterclaim:

1. That plaintiffs represented the commodity to be valuable and good for wheat, but that it turned out to be, after being properly applied, and was in fact worthless as a commercial fertilizer, and, consequently, the note is without consideration.

2. That by reason of noncompliance of the sellers with provisions of "an act to regulate the sale of fertilizers in this Commonwealth,

Digitized by Google

and to protect agriculturists in the purchase and use of the same," Approved April 13, 1886, the note is void and unenforcible.

As an issue of fact, in respect to the first alleged ground of defense, was made by the pleadings and submitted to and determined by the jury in favor of the plaintiffs we will not here consider it.

The statute mentioned is substantially as follows:

Sec. 1. On or before the first day of May of each year, before any person or company shall sell, offer or expose for sale in this State any commercial fertilizer, whose retail price is more than $10 per ton, said person or company shall furnish to the director of the Agricultural Experiment Station, inaugurated by the Agricultural and Mechanical College of Kentucky (which station is here recognized as the "Kentucky Agricultural Station"), a quantity of such commercial fertilizers, not less than one pound, sufficient for analysis, accompanied by an affidavit that the substance so furnished is a fair and true sample of a commercial fertilizer which said person or company desires to sell within this State.

Sec. 2. It shall be the duty of said director to make, or cause to be made, a chemical analysis of every sample of commercial fertilizer so furnished him, and he shall print the result of such analysis in the form of a label. Such label shall set forth the name of the manufacturer, the place of manufacture, the brand of the fertilizer and the essential ingredients contained in said fertilizer, expressed in terms and manner approved by said director, together with a certificate from the director, setting forth that said analysis is a true and complete analysis of the sample furnished him of such brand of fertilizer; and he shall also place upon each label the money value of such fertilizer, computed from its composition, as he may determine. The director shall furnish such label in quantities of five hundred or multiples thereof to any person or company desiring to sell, or expose for sale, any commercial fertilizer in this State.

Sec. 3. Every package of any commercial fertilizer, whose retail price is over $10 per ton, sold or offered for sale in this State, shall have attached to it in a conspicuous place a label having a certified analysis of a sample of such fertilizer, from said director, as provided in the foregoing sections.

Sec. 4. Any manufacturer or vendor of any commercial fertilizer, who shall sell, offer or expose for sale, any fertilizer, without having previously complied with the provisions of this act hereinbefore set forth, shall, upon indictment and conviction, be fined $100 for each violation or evasion of this act, which fines shall be paid into the State treasury.

Sec. 5. The director shall receive for analyzing and affixing his certificate the sum of $15; for labels furnished, $1 per hundred.

Section 6 requires the director to pay all such fees into the treasury of the Agricultural and Mechanical College of Kentucky, to be used "in meeting the legitimate expenses of the station, in making analysis of fertilizers, in experimental tests of the same and in such other experimental work and purchases as shall inure to the benefit of the farmers of this Commonwealth."

The director is required to report to the commissioner of agriculture the work done by him and itemized statement of receipts and expenditures; and among other provisions of section 7 is one authorizing any agriculturist, purchaser of a commercial fertilizer, to forward a sample of same to the experimental station for analysis free of charge.

Counsel for appellees contends, for various reasons we will now consider, that the statute is unconstitutional:

Digitized by Google

1. We do not see wherein the statute violates that clause of the Constitution requiring each law to relate to but one subject, and that to be expressed in the title. For there is no provision that we are able to discover which does not have a natural connection with the subject of the title, and relates directly or indirectly to it.

2. Equally groundless is the objection that it imposes double taxation. For the fees authorized to be collected from a person or company selling, or offering to sell, a commercial fertilizer, are intended to be used for the single purpose of supporting and maintaining the experimental station, and are not, in proper meaning of the term, taxes at all.

3. The statute can not be fairly construed to authorize, in the language of counsel, a levy of an impost on interstate commerce beyond what is necessary to insure inspection, nor is the language of section 6 susceptible of the meaning counsel gives it. The statute, as its title indicates, was enacted for protection of farmers of this Commonwealth against fraud and imposition of those having for sale commercial fertilizers. To accomplish that object each one selling, or offering to sell, any fertilizer is required to submit a sample for analysis and test of its quality at the experimental station. For that purpose only can the fees collected by the director be used, and in that way and to that extent only can farmers of the Commonwealth be benefited by the statute.

In our opinion the law is valid in every respect.

It is admitted that the retail price of the fertilizers sold to appellants was worth over $10 per ton, and that no one of the packages had attached to it when sold the label required by section 3 of the statute; and the main question, therefore, is whether the contract sued on is, by reason of such noncompliance with and disregard of the statute, void and unenforcible.

It is too well settled for argument that a contract prohibited by statute will not, nor should, be enforced by the court. But whether a contract has been prohibited sometimes depends upon construction of such statute when not clear in meaning, and we will at present assume such is this case.

In Benjamin on Sales, volume 2, page 712, the following two propositions are stated to be fairly deducible from the authorities:

1. "That when the question is whether a contract has been prohibited by statute, it is material, in *construing the statute*, to ascertain whether the Legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter, that it was.

2. "That in seeking for the meaning of the law-giver it is material also to inquire whether the penalty is imposed once for all on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case the statute is intended to prevent the dealings, to prohibit the contract, and the contract is, therefore, void; but in the former case such is not the intention, and the contract will be enforced."

Tested by either one of these rules the statute in question would have to be construed as intended to prohibit the contract in case of noncompliance with or breach of its provisions. For the Legislature had in view, when enacting it, not the security and collection of the revenue, even partly, but had in view the protection of the public from fraud in contracts for sale of fertilizers; and it is ex-

Digitized by Google

pressly provided in section 4 the fine shall be imposed for each violation or evasion of the act.

In Lindley v. Rutherford, 17 B. M., 248, the following proposition, stated in Chitty on Contracts, was referred to with approval: "A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such penalty implies a prohibition. If the contract be illegal it makes no difference, in point of law, whether the statute, which makes it so, has in view the protection of the revenue or any other object."

But it was, nevertheless, there held that contracts for sale and purchase of bills of exchange were not prohibited by the statute then under consideration, which required each person conducting the business of brokers or exchange dealers to obtain a license under penalty of a fine, the court being of opinion the statute was intended to raise revenue, not to strike a blow at the business.

But neither the conclusion in that case nor reason for it affects the question before us, for there is a marked difference between a statute, the precise or sole purpose of which is to secure or raise revenue by a license tax, and one enacted to protect the public against fraudulent sale of goods, or for other reason of public policy.

To prohibit a contract in one case, when the business is known and recognized to be otherwise lawful and legitimate, is not essential to the main purpose, which is to raise revenue by a license tax. But to do so in the other class of cases is essential to the main purpose, whether it be to prevent fraudulent sale of spurious and hurtful commodities, to secure the public health, or protect public morals.

That a penalty implies prohibition in such case as this, though there be no prohibitory words in the statute, has been decided not only by this court in Lindley v. Rutherford, but by numerous courts in England as well as in this country.

In Woods v. Armstrong, 64 Ala., 150 (25 Am. Rep., 671), the same question arose as the one before us, and as to construction of a statute enacted for the same purpose and in all respects like the one we are now considering, and the contract was held void. There, upon authority of a previous case in the same court, the proposition of law already referred to was thus stated: "It has been repeatedly determined that a penalty inflicted by a statute upon an offense implies a prohibition, and a contract relating to it is void, even when it is not expressly declared by the statute that the contract shall be void."

In McConnell v. Kitchen, 20 S. C., 430 (47 Am. Rep., 845), was determined the proper construction and meaning of a statute like the one in question, and it was held that "when a merchant sold a fertilizer without a tag stating its chemical composition, etc., as required by the statute under penalty, and took a note for the purchase money, he could maintain no action on the note."

Under a similar statute in Georgia it was likewise held an action could not be maintained for purchase price of a fertilizer sold by a merchant who had violated provisions of the statute; and such must be the logical conclusion from the legal proposition referred to which are sustained by courts and text writers generally.

Counsel for appellees call our attention to the cases of Harris v. Reynolds, 12 Howard, 79, and Munger v. Wright, 75 Va., 239. But in the first case it was said that "when the statute is silent and contains nothing from which the contrary can be properly inferred, a cantract in contravention of it is void." And in the other it was conceded "that as a general rule a contract founded on an act for-

Digitized by Google

bidden by a statute under a penalty is void, although it be not expressly declared to be so." And the decision of the case turned upon the meaning of the various parts of the statute which, considered together, in opinion of the court, authorized the conclusion the Legislature did not intend to avoid a contract made in contravention of it.

But there can be, we think, no question of the intention of the Legislature in this case; for, in language too plain to be misunderstood, the statute makes compliance with each provision thereof an indispensable condition of the right of any person or company to sell, offer or expose for sale in this State any commercial fertilizer, retail price of which is more than $10 per ton. And according to what rule of government or administration of justice a party who has refused to comply with that condition can ask enforcement of a contract so distinctly prohibited, we are unable to see.

It appears from the evidence that a sample of the fertilizer was analyzed by the Kentucky Agricultural Experimental Station in January, 1888, and it is contended the statute was thereby substantially complied with. But no record of the analysis is required by the statute to be kept by the director, nor is there any other way provided by which the fact of analysis can be made known to a purchaser, or preserved as a guide or check, except by means of the label upon which a certified analysis is required to be placed. It seems to us the attaching of the label to each package is essential to accomplish the purposes of the statute, and its provisions can not be regarded as complied with without the label being so attached.

The defendants in their counterclaim ask for damages, but it is hard to see how they have been damaged, in view of the fact they have used the fertilizer and paid nothing for it.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

BRADSHAW'S ADM'R, &C. V. L. & N. R. R. CO.

(*Filed Feb.* 7, 1893—*Not to be reported.*)

Railroad—Willful neglect—A section hand, pursuant to an order of his "foreman," went upon a "hand car," which it was alleged was overcrowded with other "hands," for the purpose of going to a certain place on the road. Said employe was operating one of the levers by which the car was propelled; his hand slipped therefrom and he thereupon fell from the car and was run over by it, it being alleged that his fall from the car was caused by its overcrowded condition. The car and its appliances was in good condition. *Held*—That when the employe obeyed the order of the foreman by going upon an overcrowded car he assumed the hazard of all dangers resulting from such overcrowding, and the railroad is not liable for an injury resulting to him on that account. A demurrer to the petition was properly sustained.

A. H. Clark and W. R. Howell for appellants.

Joe McCarroll for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellants' intestate while in the employment of the appellee as section hand was thrown from a hand car, which he was helping to pro-

Digitized by Google

pel, and was run over by the car and killed. It is alleged that said killing was caused by the willful neglect of the appellee, in manner as follows: That by the direction of the section boss, under whose control the intestate was, he got onto the overcrowded hand car, which was being operated by the appellee for the transportation of section hands; that by the order of the said boss they were required to reach a certain siding on said road in advance of the time that a passenger train was to pass; that the intestate, by the direction of the said boss, operated one of the levers; and while operating the same with all of his "manhood" his hand slipped and he fell, and that, by reason of the overcrowded condition of the car, he fell to the ground and the car ran over him and killed him.

All railroads have such hand cars as described in the petition for the transportation of their hands from one point to another along the tracks of the roads, which are propelled by hand. It is not alleged that the car in question was unfit for the purpose of transporting the intestate and the other hands thereon, nor is it alleged that the hand of the intestate slipped by reason of any of the negligence of the appellee; but the alleged gravamen of the appellee's negligence consists in the fact that the car was overcrowded with the hands in the employment of the appellee, which caused the intestate to fall overboard (when his hand slipped), instead of on the platform of the car, thereby losing his life.

Now it is not alleged that the intestate did not know that the car was "overcrowded," nor is there any inference to be drawn to that effect; on the contrary the inference is that if such was the fact he could and did see it and knew it. Such being the case, it was his right and duty to refuse to obey the orders of the section boss in that regard; but as he elected to obey, he took the risk of the overcrowded condition of the car, and the appellee is not responsible for any injury to him caused thereby.

The judgment sustaining the demurrer and dismissing the action is affirmed.

COVINGTON & LEXINGTON T. R. CO. V. SANFORD, &C.

(*Filed Jan.* 14, 1898.)

1. *Constitutional law—Amendment of charters of turnpike companies—Fixing of rate of toll*—The charter of a corporation, enacted in 1834, which authorized the construction of a turnpike road, provided that the Legislature should subsequently have a right to reduce the rate of tolls only in the event of the net earnings of the road amounted to exceeding 14 per cent., and the rate was not to be so altered as to reduce the dividends below 14 per cent. per annum. In 1851 the act of incorporation was amended so as to divide the turnpike into two sections, and two distinct corporations were created, each one possessing one section of the road, and each "possessing and retaining all the rights, powers and capacities in severalty" that had been granted by the original charter to the old company. *Held*—That the exemption of the original corporation from legislative regulation of the rate of tolls, so long as the net earnings did not exceed 14 per cent., did not attach to the new corporations. When the road was severed by the act of 1851, the old corporation ceased to exist and no longer had capacity to render any service to the public; two new corporations were created, whose rights and duties were entirely distinct from the old, and no obligation exists as to them on the part of the State to refrain from interfering in the rates of toll charged.

Digitized by Google

2. *Same*—The sale by one of the corporations, created in 1851, of thirty miles of its road to a railway company, and the distribution of the proceeds of the sale among its stockholders, placed it in a condition where it could no longer comply with the contract as embodied in its charter; therefore, it would be unjust to require the State to look to the small part of the road remaining, or its profits, to earn such a net dividend as would authorize a reduction of the rates of toll by the State, under the charter of 1834.

3. *Same—A grant of a corporate franchise is taken subject to the right of eminent domain by the State*, and, therefore, the turnpike can not excuse the sale of its roadway to a railway by the plea that the charter of the railway authorized the condemnation of the turnpike as a right of way for the railroad.

4. *Same—Taking or destruction of private property for public use*—The Legislature has no right to so amend the charter of a turnpike company as to require it to open its road for public travel free of charge, or to do that which amounts to a spoliation or destruction of its property, without any compensation therefor. But the question as to the reasonableness of a particular rate of toll fixed by the Legislature, is one for the Legislature and not the courts to determine.

5. *Same—Contract*—An amendment to the charter, in 1865, fixing a rate of toll, did not amount to an irrevocable contract between the company and the State, as the act of 1856 reserves to the Legislature the right to modify, alter or repeal all the acts thereafter passed.

6. *Same*—An act merely fixing a maximum rate of toll to be charged by a turnpike, does not constitute a contract between the State and the turnpike company, which deprives the State of all power thereafter to modify or regulate the rate of toll.

W. H. Holt, O'Hara & Bryan and W. H. Mackoy for appellant.

Wm. Goebel for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

The Legislature of 1890 passed an act regulating the tolls of the Covington & Lexington Turnpike Road Co., that the company maintained was in violation of its contract with the State by the express terms of its charter; and further, that the rate of toll is such as amounts to a destruction of the franchise, and is equivalent to a taking of private property for public use without compensation.

The original act of incorporation was passed in the year 1834, with the power to construct a turnpike from Covington through Williamstown, in Grant county, and through Georgetown, in the county of Scott, and ending at the city of Lexington.

By a section of the act of incorporation it is provided "that if, at the expiration of five years after the road has been completed, it shall appear that for the two years next preceding the net annual dividends shall have exceeded the average of 14 per cent. per annum, then, and in that case, the Legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll so that it shall give that amount of net dividends, and no more."

After this road had been completed as far as Williamstown, in Grant county, the Legislature, in the year 1839, authorized a separate board of directors to be elected by the stockholders, for the purpose of superintending the construction of the road from Williamstown on to Lexington; at the same time giving the stockholders the power to elect a separate board for the part of the turnpike that had been constructed between Covington and Williamstown.

In the year 1851 the act of incorporation was amended so as to incorporate the two divisions of the road into two separate and inde-

Digitized by Google

pendent corporations, the one corporation of that part of the road north of Williamstown (between that place and Covington) was styled the Covington & Lexington Turnpike Road Co., and the corporation controlling the road south of Williamstown, and between that place and Georgetown, was styled the Georgetown & Dry Ridge Turnpike Road Co.

Each company had the exclusive control of its road, and the one in no wise responsible for the acts and doings of the other, "each to elect its own president and directors, to declare its own dividends, and to pay the same to its own stockholders, *each company preserving and retaining all the powers, rights and capacities in severalty granted by the act of incorporation and the amendments thereto* to the original company, and subject to all the restrictions to which said company is subject, and neither company shall be liable for the debts and contracts of the other."

In the year 1865 the Legislature amended the act incorporating the Covington & Lexington Turnpike Road Co., by reducing the rates of toll, or regulating them in a different manner from that provided by the original act, passed in 1834, thereby assuming the right to fix the tolls on the road, as if no contract had been made by the terms of the original grant.

This amendment was accepted by the corporation, and it has, so far as this record shows, conformed to its provisions. If the original act of incorporation created a contract between the State and the turnpike company, it is contended by the appellees that the act of 1851, creating two distinct corporations out of the one, and making them in every respect independent of each other, subjected both to legislative control in regard to tolls, while the appellant maintains that the provisions of the act creating the two corporations, with "*each possessing and retaining all the rights, powers and capacities of the original corporations*," carried with it the contract by which a net profit of 14 per cent. was allowed the company before any legislative interference could be had.

If, prior to the act of 1856, now embodied in the General Statutes, a provision was inserted in a charter by which a corporation was invested with the power to fix its own cost of transportation to a limit designated, then there might be some reason for sustaining the exemptions.

This was, in effect, decided by the Supreme Court, in the case of the Georgia Railroad, &c. v. Smith, 128 U. S., 174, but then, as was said in the case cited, "the exemption must appear by such clear and unmistakable language that it can not be reasonably construed, consistently with the reservation of power by the State."

In the case of the Evansville Railroad Co. v. Commonwealth, 9 Bush, 438, the act of the Legislature provided "that the franchises and rights of the Henderson & Nashville Railroad Co., purchased by the Evansville, Henderson & Nashville Railroad Co., are hereby granted to the Evansville, Henderson & Nashville Railroad Co." There was an exemption from taxation in the road or corporation sold and transferred to the purchaser, the Evansville Railroad Co., and the question presented in that case was: Did the purchaser, by reason of its purchase of the *franchise* and *rights* of the old company, become entitled to exemption from taxation? This court held not, and said: "We can not give to this language the comprehensive meaning or construction contended for by the appellant," and denied the relief.

The privilege of operating the road, with all the rights pertaining to such a franchise to enable its successful operation, would pass to the purchaser; but the exemption from taxation is not such a right,

Digitized by Google

and must be regarded as applying alone to the corporation in whose behalf the exemption is made, and not to a purchaser, unless by an express provision of the grant the exemption follows.

In this case the liability and duties owing the State and the public by the one corporation had been severed by the act of 1839, and by the act of 1851 two new corporations were created, with the rights and powers of the one entirely distinct from the other, and no means of ascertaining what per cent. the old corporation would have made upon its stock. In fact the old corporation was extinct, and to hold that the new corporations were exempt from legislative interference would be to restrain the exercise of legislative power by implication, when a reasonable construction of the new grants must lead to a different conclusion.

In the case of Maine Central R. R. Co. v. State of Maine, 66 Me., 488, certain railroad companies had provisions in their charters to the effect "whenever the net annual income of the company amounted to 10 per cent. upon the cost of the road and its appendages and expenses, exceeded 10 per cent., one moiety of the sum exceeding 10 per cent. should be paid into the treasury, *and that* no other tax should ever be levied or assessed on the corporation, or any of its privileges or franchises."

Afterwards these corporations were consolidated by an agreement of the stockholders, the act of consolidation providing that the one corporation, into which all had been merged, *should have all the powers, privileges and immunities* possessed by each corporation entering into the consolidation agreement, etc. This exemption from taxation, found in the charter of each corporation, was claimed to constitute a part of the charter of the one corporation by reason of the reservation of the powers, privileges and immunities originally belonging to the corporations before the consolidation.

The Supreme Court held that the distinct corporate existence of the several companies having ceased, the conditions upon which the limitation of taxation was prescribed ceased with them, and the State was under no obligation to accept a substituted performance by other parties.

So in the case before us the one corporation, its road extending from Covington to Lexington, was liable to perform the duties imposed by the act, and when there was a severance of the corporate property by the act of the stockholders, and the duties and liabilities of the one corporation made to devolve on two corporations, the one distinct from the other, the State was no longer under any obligation to withhold the exercise of legislative power in the regulation of tolls, in the absence of an express provision in the charter of each corporation recognizing its obligation to abide by the immunities granted by the original act of incorporation in the year 1834. Nor ought this court, in the absence of express enactment, after the lapse of more than half a century, with legislation not only severing the old corporation, but regulating the rate of tolls on these roads, hold that this immunity from legislative interference was a perpetual right, in the nature of a contract, that could not be disturbed.

The stockholders have consented and asked an entire change of the original grant, and submitted to legislation regulating these tolls, evidencing that with their own construction the immunities in the act of 1834 were not regarded as forming a part of the corporate grant subsequently made.

Besides, the appellant, as this record shows, has sold thirty miles of its turnpike road to the Cincinnati Southern Railway for $100,000, and that sum has been distributed to its stockholders.

Digitized by Google

It is, therefore, no longer in a condition to comply with its contract, if any existed, and it would be unjust to require the State to look to a small part of the road, or its profits, upon which to base its right to reduce the toll, as provided by the act of 1834.

It is contended that the appellant was compelled to sell thirty miles of its turnpike to the Southern Railroad because the State had given the railroad company the power to condemn turnpike roads in order to build its railway.

The grant, like all others, was subject to this right of eminent domain, and the parties must be presumed to have contracted with reference to its exercise, and it is, therefore, no defense to say that the State has deprived the appellant from complying with its contract for the reason that its property was condemned for railroad purposes.

It is further contended that the act of the Legislature reducing the tolls places the corporation in such a condition as to prevent any income whatever exceeding the actual expenses, and that it is equivalent to taking private property for public use without compensation.

What the profits of the road were in the year 1890, or for the two or three years preceding, is not alleged; or, if it was, when the stock, or much of it, was repaid by the sale of the thirty miles of this road, it is proper to reduce the stock to the extent it has been repaid when applying the dividend, and under the facts admitted by the pleadings this court is not disposed to adjudge that the rights of the corporation have been violated within the meaning of that provision of the Constitution prohibiting the taking of private property for public use without first making compensation. While the Legislature of the State has no power to compel the appellant to open its road for all travel free of charge, or do that which amounts to spoliation, or an entire destruction of this right of property, etc., we are not disposed on this appeal to adjudge that such is the result of the act of 1890 reducing these tolls.

The question of what charges are reasonable is one under legislative control in a case like this. There is nothing in the amended charter creating a contract, or by which the Legislature has surrendered the exercise of this power, and when it comes to the question as to what is or is not a reasonable toll, it is one that belongs to the Legislature and not to the judicial branch of the government. If the courts of the State should enter into an investigation as to what were reasonable and what unreasonable charges, there would be no end to litigation, and when submitted as a question of fact to either judge or jury their views would doubtless differ upon the facts of each case as presented, evidencing at once the necessity of confining the exercise of such a power to that branch of the government giving existence to the corporation itself.

A turnpike road, leading into and connected with a populous city like that of the city of Covington, could afford to charge less toll by reason of the immense travel upon it than turnpikes in thinly settled portions of the county or State, and hence, under former Constitutions, the Legislature has seen proper to regulate the tolls as the turnpike road may happen to be located.

The case of Munn v. Illinois, 94 U. S., 113, determines the question as to the exercise of this power in regard to tolls and charges where private property becomes devoted to public use. We do not understand, as counsel for the appellant contends, that the Supreme Court, in the case St. P. Ry. Co. v. Minnesota, 134 U.S., 418, has overruled the case of Munn v. Illinois, for in that case the power to de-

Digitized by Google

termine what were reasonable rates had been conferred by the Legislature on a commission, and while sitting they refused to hear proof as to what was a reasonable charge for transportation on the railway, and the court in effect held that it then became the subject of judicial inquiry, and as was said by the Supreme Court of Michigan, in reviewing that case, as well as the case of Munn v. Illinois, there is a manifest difference in the Legislature prescribing the rate of toll and conferring the power on some one else. (Wellman v. Railway Co., 83 Michigan, 592.)

In the case cited from the Michigan court the Legislature of that State amended the railroad law in regard to the maximum charge for the transportation of passengers and freight, and it was contended that the charges were not reasonable as fixed by the amendment, and the court said, in relation to the Minnesota case, "it rested not on the right of the Legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so." Such legislation opened the door to an investigation before the commissioner of what was a reasonable charge, and, therefore, there was no reason for excluding the railway company from a hearing on that question, and the Supreme Court, in Railway Company v. Minnesota, in determining that the right to create did not imply the power to destroy, could not have intended to say that the courts and not the Legislature had the power to say what charges were reasonable and what not, for if such is the rule then the courts are fixing the rates and not the law-making power.

Nor was the case of Munn v. Illinois overruled by the decision in the case from Minnesota.

In Budd v. The State of New York, 143 U. S., 528, recently decided, the Supreme Court, through Mr. Justice Blatchford, said: "We must regard the principle maintained in Munn v. Illinois as fully established;" and in referring to the case of Dow v. Beidelman, 125 U. S., 680, says: That was a very different case from Munn v. Illinois, or Budd v. New York, as in the last two cases the Legislatures had fixed the rates, and the case in the Minnesota court involved the question of the refusal of a State court, where no rates had been fixed by the Legislature, to hear proof as to whether the charges were or not reasonable as fixed by a commissioner empowered to fix rates; and in Budd v. New York it is also said the opinion in the Minnesota case "had no reference to a case where the rates had been prescribed directly by the Legislature."

We understand the rule to be that where there is no legislation on the subject of charges and no regulation of tolls, then the question as what are reasonable tolls may be made the subject of judicial investigation; but where the State has fixed the maximum charges to be made, the courts having nothing to do with the question, unless the law-making power should attempt to compel the corporation to use its property for the public benefit without compensation. The court said, in Budd v. New York: "In the case before us the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws, even if under any circumstances we could determine that the maximum rate fixed by the Legislature was unreasonable."

It is again insisted by appellant that the act of 1865 reducing and prescribing the tolls that appellant could charge created a contract between the State and the appellant that no legislation can effect, and the case of Hamilton v. Keith, 5 Bush, 458, is referred to as sustaining this contention. A complete answer to this is the statute in

Digitized by Google

force where the tolls were fixed in the year 1865, reserving on the part of the Legislature the right to alter, modify or repeal the act, nor do we understand that the mere prescribing of tolls amounts to a contract between the State and the corporation, depriving the State of all power to regulate them in the future, and if Keith v. Hamilton is to be so construed it is at variance with the *now* well-settled doctrine on the subject.

Mr. Justice Field, speaking for the court in Georgia Railroad Co. v. South, 128 U. S., 174, already referred to, said: "A contract embodied in the provisions of a charter, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the clause in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained, but to effect this result the exemption must appear by clear and unmistakable language that it can not reasonably be construed consistently with the reserved power by the State."

In the case cited the charter, as originally granted, fixed the charges for the transportation of freight and passengers, and the Legislature subsequently, through a commissioner, prescribed a lower rate of tolls, and both the Supreme Court of Georgia and the Supreme Court of the United States held that the provision in the charter, as originally contained, did not amount to a contract within the meaning of that clause of the Federal Constitution prohibiting the impairment of contracts.

In the case of Piek v. The Western Railway Co., 94 U. S., 164, where the State, by its Constitution, reserved the right to change or modify its grants of franchises, etc., the State had empowered the railroad company to make such charges as it might deem reasonable, and after this the State, through a commissioner, fixed the rates of tolls, and the railroad company claiming that the clause of the original charter conferring this power on the company was a contract between it and the State that could not be violated, the Supreme Court held that the State, under this reserved power, could not only modify that provision of the charter, but could repeal the entire act of incorporation.

It, therefore, follows that the mere fact of the Legislature having prescribed certain rates of toll by the act of 1865 did not create such a contract as comes within the meaning of section 10 of article 1 of the Federal Constitution, and the act of May, 1890, reducing the tolls on appellant's road, was a legitimate exercise of the reserved power to change, alter or even repeal the act of incorporation. In our opinion, therefore, the demurrer to appellant's answer was properly sustained, and the judgment perpetuating the injunction is affirmed.

BAKER, &C. V. KINNAIRD.

(*Filed Feb.* 2, 1893.)

1. *The constitutional validity of the act of* 1856, forbidding a preference of creditors by an insolvent debtor, is now too well settled by repeated adjudications to be called in question.

2. *Assignment by operation of law—Evidence*—It clearly appears that the debtor, at the time of the assignment and transfers of his property com-

Digitized by Google

plained of, was hopelessly insolvent and that his creditors were each seeking a preference, and that he was endeavoring to comply with their wishes so far as he could; the presumption from these facts, that the transfers of property was with the design to prefer, is conclusive, and such presumption is not rebutted by the combined testimony of the debtors and the creditors that no such intent to prefer was contemplated by them at the time.

3. *Same—An action by a creditor to have certain acts of a debtor declared an assignment under the act of* 1856 inures to the benefit of all the creditors of the insolvent; therefore, where the action is dismissed as to the original plaintiff creditor, other creditors, who were made plaintiffs before such dismissal, have a right to maintain and prosecute the action to a final judgment.

4. *Same--Consolidated actions*—Where an action by a nonresident mortgagee to foreclose his mortgage is consolidated with an action by the mortgagor's creditors, to have the transaction in which the mortgage originated declared an unlawful preference and an assignment of the mortgagor's entire estate for the benefit of his creditors, and proof is heard without objection in the consolidated action and a final judgment is rendered, it is then too late for such nonresidents to complain on appeal, for the first time, that they were not, by any process or warning order, brought before the court as to the creditor's action, and that the judgment is, therefore, erroneous as to them.

5. *Same*—The mortgage executed by the insolvent to his friend, to indemnify him from loss by reason of his suretyship on a note held by the bank, was evidently intended as a preference; and the assignment of the mortgage to the bank and the renewal of the note by the surety in his own name only more surely indicates the nature of the original transaction.

6. *Creditors can not complain of a mortgage, with the intent to prefer by an insolvent, of his homestead.* The debtor has a right to dispose of this.

H. C. Baker, Montgomery & Jones, J. E. McMurtry and James Garnett for appellants.

R. B. Dehoney and Lewis McQuown for appellee.

Appeal from Adair Circuit Court.

Opinion of the court by Judge Pryor.

This appeal is brought here from a judgment of the Adair Circuit Court, adjudging that certain transfers of property, real and personal, by W. M. Hamilton, were within the act of 1856, and operated to pass the estate to his creditors.

That Hamilton, at the date of the first transfer of certain notes and accounts to John M. Robinson and others as collaterals to secure his indebtedness to them, was much involved in debt, more than three times the value of his assets, as appears from the testimony, and that his creditors were making a race of vigilance in obtaining securities for their respective claims, the written conveyances of his land and assignments of his personalty as found in this record clearly evidence.

If there is such a thing as bringing a case within the equity of this statute and to carry into effect its purpose, this is the case, and there are too many reported cases sustaining the validity of this statute and its equitable provisions to now bring the matter in question, and no stronger case has ever been presented to this court than the one before us.

This debtor, in his insolvent condition, on the 2d of October, '88, assigned to Newman & Co. and to Robinson & Co. a large part of his notes and accounts (he being a merchant) as collaterals to secure the payment of certain debts he owed.

Digitized by Google

On the 6th of the same month, within four days from this transfer, he executed a mortgage to Sutcliffe & Owen on twenty-one mules and other property to secure their debt. On the 8th of the same month he executed a mortgage to Bamberger, Bloom & Co. and other merchants on several tracts of land and some cattle to secure an indebtedness to each firm, and on the same day he executed to James Baker and Wm. Hamilton a mortgage to secure a debt to the Bank of Columbia. This was on his homestead and storehouse and other property. In November he executed a mortgage to Heath & Barlow on some of the same property, and a mortgage to a Cincinnati firm on his stock of goods, etc., and finally the debtor made an assignment of all his estate for creditors on the 22d of February, 1889.

His creditors were not only seeking a preference, but the debtor was seeking to gratify them, and with a view of giving the preference and in contemplation of insolvency he executed the assignments and mortgages as already stated.

The testimony as to the object in view is inevitable, and the testimony of the debtor and creditors, combined, to the effect that no such purpose was contemplated, would not be sufficient to repel the presumption arising from the acts of the parties that the purpose of the creditor was to obtain the preference, and that of the debtor to give it, and in contemplation of insolvency. It is needless to discuss the facts of the case. The bare statement is sufficient to sustain the judgment below.

The action was brought originally by the assignee, J. W. Kinnaird, to have the various transfers and conveyances to operate as an assignment to creditors. The action was brought on the 8th of March, 1889.

On the 28th of March, 1889, Shuttleworth and others, the assignee among them, instituted an action as individual creditors to have these various transfers declared as acts of insolvency, making the same averments as were made by the assignee. The action by the assignee was dismissed on the ground that he had no right to maintain such an action, or on the ground that two actions, one by the creditors and one by the assignee, could not be maintained. The parties elected to abide by the creditors' action, and under that this proceeding was had.

It is, therefore, not necessary to decide whether the action could have been maintained by the assignee, the estate of the debtor having passed, by operation of law, to the creditors.

It was the duty, however, of the assignee, under the circumstances, to have the question settled, as the appellants were claiming, in their independent actions, that the property belonged to the debtor, and, if so, it devolved upon him to see that the creditors were protected, and to administer the estate under the assignment.

The creditors had filed their independent actions and were asserting their right to enforce their liens upon all the mortgaged property, and to have the collateral paper held by them as security for their debts sold.

The assignee set up the fact, and particularly in the case of Mann & Co., the nonresident, to the effect that the transfers and mortgages were in contemplation of insolvency, and with the design to prefer, and without objection the cases were all consolidated with the action by the creditors.

It is now claimed that as they were not warned as nonresidents, and had not made an actual appearance to the creditors' bill, they were not before the court. They were seeking to subject, in an independent action, property they claimed belonged to the debtor, and which

Digitized by Google

in the creditors' suit was claimed to belong to the creditors. The assignee of the debtor by an answer had set up the same facts as alleged in the creditors' petition for the purpose of having determined to whom this property belonged, and where the case is decided adverse to the appellants they complain that they had not appeared in the action or been summoned. This is a technical view of the question and is too late, even if available, to be made here.

The assignee had made the question directly by his answer. The evidence, without objection, had been heard in the consolidated cases, was considered by the court, and that an appearance must be regarded as entered, under the circumstances, admits of no doubt.

The petition filed by Grauman and Shuttleworth was dismissed by them, but before the dismissal Kinnaird and Hamilton, who were both creditors, were made plaintiffs with them by an amended petition. This amended petition was filed on the same day the original petition was filed and process issued. There was a motion to quash the summons because it was blank. No blank summons appears here, nor is there any thing showing that the summons issued before the amended petition was filed. The petition, however, by Grauman and Shuttleworth, inured to the benefit of all the creditors, and any creditor had the right to proceed under it, and whether the amendment was filed or not is immaterial. An order was entered to the effect that the dismissal was not to affect Kinnaird and Hamilton. Kinniard was a creditor if Hamilton was not, and the case was permitted to progress, as it should have been, for all creditors, and the act of insolvency occurring on the 2d of October, 1889, all the transfers of real and personal estate and collections made from and after that date, by reason of the transfers and in payment of these bebts, passed to the creditors.

The only question to be considered in this case is as to the priority allowed the Bank of Columbia or James Baker for the $1,400 embraced in the renewal note to the bank for paper past due. This mortgage to the bank or to James Baker was made when act after act of insolvency had been committed. The execution of the mortgage and the pledges of collaterals were known to the bank when the mortgage to James Baker was executed.

James Baker lived in the same town with the debtor. They were friends, indorsed for each other, and there was no reason for James Baker going on this paper, or when going upon it requiring security in the way of mortgage, except to secure himself in the $600 note, for which he was already liable. The president of the bank had left his town and gone to the village in which the debtor lived, demanding security on the overdue paper, prepared a mortgage that James Baker knew but little about, and reciting that it was to inure to the benefit of the bank. Baker, after this, renews the note to the bank in his own name and assigns the mortgage to the bank, without even recollecting that he had done so, showing an utter indifference to this assumed liability that was evidently resorted to for the purpose of placing the bank on a secure footing. That this was a race by creditors to obtain precedence and secure their debts owing by an insolvent debtor is too apparent from the testimony to be controverted, and it is equally manifest that the transaction with James Baker and the debtor was to secure the bank's debt by a renewal that brings that case clearly within the provisions of the act of 1856, if it stood alone in this controversy. There was no actual fraud on the part of the bank president and James Baker, but such an effort as every creditor of a failing debtor will resort to for the purpose of saving his debt, but such acts, as the law now stands, only places the creditor

Digitized by Google

on an equality with all the rest, and to prevent such preference the statute was enacted.

The money that has been paid to the creditors on collaterals must be refunded or credited on the claims if the amount does not exceed the sum to which the creditor collecting it is entitled.

We are aware of the cases cited of Southworth v. Casey, reported in 78 Ky., 395, and Fuqua v. Ferrel, 70 Ky., 69. In the first case the debtor, before suit brought, sold some of his property to a *bona fide* purchaser and obtained the money, and this court held that parties who purchased in good faith could not be compelled to surrender the property because the statute provides that the court shall compel every person acquiring by purchase, assignment or otherwise, property or effects of the debtor, after the suit contemplated by this act shall be instituted, to surrender the same to the receiver. The question decided in that case does not arise here, for the reason that none of the estate of the debtor was purchased in good faith, but all the collaterals and mortgages taken to secure antecedent's debts by an insolvent debtor with the design to prefer, and the sums of money collected by the creditor from the collaterals is the money the chancellor requires refunded. The debtor has paid no money, as in case of Fuqua v. Ferrel, but the creditor has collected it from the pledged estate, which pledge was an act of insolvency within the statute. In other words there are no *bona fide* purchasers in this case, and while they are *bona fide* creditors they have brought themselves within the statute by obtaining the preferments already referred to. *Bona fide* creditors are not protected unless the debt and mortgage are simultaneously created and executed before suit brought without knowledge of the contemplated insolvency and the design to prefer. So these cases have no application here.

The judgment below is affirmed on the original and reversed on the cross appeal as to James Baker and the bank. They must come in like any other creditor except as to the homestead. This the debtor had the right to dispose of.

GREENUP COUNTY V. MAYSVILLE & BIG SANDY R. R. CO.

(*Filed Feb.* 9, 1893—*Not to be reported.*)

1. *Dedication and acceptance of highway—Evidence*—In an action by a county against a railroad company for damages, caused by defendant's failure to restore a public highway, that had been crossed and injured during the construction of the railroad, in such a manner as not to destroy its usefulness, the plaintiff must prove both a dedication of such highway and its acceptance by the proper authority.

Such dedication and acceptance may be shown by parol evidence of uninterrupted and adverse use of the highway as such by the public as a right for the period of fifteen years. A conclusive presumption of its dedication and acceptance arises from the adverse, uninterrupted use for such a period.

2. *Same—Peremptory instruction*—In this action against a railroad to restore a county road destroyed by it, the evidence for the county showed that the highway had been openly and notoriously used by the public and controlled by the county authorities for thirty years; that in 1857 the old road fell into a river and a new one was opened and worked and used as such until a few years ago, when about 100 yards of it fell into the river and a new road for that distance was opened and used, and that since the bringing of the suit the defendant caused a new road to be opened on a hill in the place of this

Digitized by Google

old one. *Held*—That the question as to the dedication and acceptance of the old road as such should have been submitted to the jury under proper instruction, and it was error to give a peremptory instruction for the defendant.

The acceptance of the new road over the hill by the county should have been considered by the jury in mitigation of damages for the destruction of the old one.

B. E. Roe and Ed. F. Dulin for appellant.

Wadsworth & Son and B. F. Bennett for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Chief Justice Bennett.

By section 12 of an act approved March 4, 1850, the appellee, when necessary for the construction of its road, had a right to intersect or cross any road or highway lying in or across its route, or to change the location of a road or highway during the progress of the construction of its road, but it was made imperative upon the appellee to restore the road or highway thus intersected or crossed to its former state, or in a sufficient manner not to destroy its usefulness, etc.

The appellant, Greenup county, instituted this action against the appellee to recover damages for its failure to restore a public road that it crossed in such manner as not to destroy its usefulness, etc. A demurrer was sustained to the petition by the lower court, but this court reversed the case upon the ground that the petition set up a cause of action. (See MS. opinion, June 6th, 1889, 11 Ky. Law Rep., 169.) Upon the return of the case an issue was formed out of chancery, and the case was submitted to a jury to try the question of damages. The court, upon hearing the evidence, instructed the jury to find for the appellee, which was done, and the case was dismissed.

The appellant has again appealed to this court. It is well settled a road or street dedicated to the public must be accepted by the county court or town. Both a dedication and acceptance must concur. The acceptance must be by the proper authority, either "upon its records or by the continual use and recognition of the ground as a highway for such length of time as would imply an acceptance. The use of a road by the public for fifteen years or more, with exercise of power on the part of the county court over it, appointing overseers over it, etc., would constitute it a highway." (Gedge v. Commonwealth, 9 Bush, 64; Wilkins v. Barnes, 79 Ky., 323.)

It seems to be settled that a grant of a right of way and its acceptance by the proper authority and in the proper manner will be conclusively presumed from an uninterrupted and adverse use by the public as a right, and not the effect of indulgence or permission for the period of fiteen years or more.

Such use may be established by parol, and when so established the dedication and acceptance of it by the proper authority and in the proper manner will be conclusively presumed.

Now there was evidence that the road in controversy had been "notoriously and openly used by the public as a highway" for thirty years; that it had been overseered by the authority of the county all that time; that in 1857 the old road having slid into the Ohio river and a new road was opened, which has been used and worked ever since as the old road had been used and worked; that a few years ago about a hundred yards of the new road slid into the river; a new

Digitized by Google

one for that distance was opened up and used and worked as before; that since this suit was brought the appellee caused a new road to be opened on the hill, intending it to be in place of the old road on the river, etc.

Now it seems to us that the question as to whether or not the old road, as moved back in the manner indicated, was dedicated and accepted by the county court, expressly or presumably, by an adverse user for fifteen years or more, as indicated, or whether or not the appellee opened the new road on the hill in lieu of the old road, which was accepted by the proper authority in the manner indicated, should have been submitted to the jury; and in the event that the jury found that the old road was a public road, and that the new road on the hill was opened and accepted as indicated, then the jury should consider the latter fact in mitigation of damages.

The judgment is reversed and the cause is remanded, with directions to proceed consistently with this opinion.

IMBODEN V. CULLEY.

(*Filed Feb.* 9, 1893.)

1. *Right of appeal from decision of contesting board concerning result of election*—Either of the candidates for the office of justice of the peace may appeal from the decision of the contesting board, which decided that the vote was a tie between them and settled the same by lot; and the unsuccessful candidate before the contesting board is not estopped from asserting his right by appeal by having agreed to a particular mode of settling the question by lot.

2. *Contested election—Evidence*—The statement of the voter that he was born on a certain day, and that he was twenty-one years of age before the election day, is corroborated by other evidence, and is sufficient to support the finding of the circuit court that he was a legal voter.

Blue & Blue and F. J. Imboden for appellant.

Nunn & Cruce for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Hazelrigg.

The right to the office of justice of the peace in Bell's Mines precinct, in Crittenden county, Ky., is involved in this appeal.

Culley, the appellee, over his objection, was deprived of four votes, on the ground of alleged illegality, by the contesting board of elections, and when his total vote was counted, after it was thus reduced, the vote between his opponent, Imboden, and himself was found to be a tie.

Whereupon the right to the office was determined by lot, in the following manner, namely: "Ten slips of paper were prepared, each having a number written on it, folded up and placed in a hat and well shaken; after which A. J. Pickens was selected by the contestant, and H. A. Haynes for the contestee, to draw out said slips," and it appeared from a count of said drawing that the contestant "had drawn fifty-three and the contestee forty-eight in number, which gave the contestant, Imboden, the greatest number by five." He was thereupon adjudged to be duly entitled to the office by said board.

Digitized by Google

Culley appealed from this decision to the Crittenden Circuit Court, and there he was adjudged to be entitled to one of the four votes denied him by the lower tribunal, and was, therefore, declared elected by a majority of one vote.

Imboden now brings the case to this court, insisting that Culley, "having agreed to this method of settling the question as to his right to said office, is thereby estopped from asserting any further right;" and that the circuit court had no jurisdiction of his appeal. We do not so understand the law.

We do not find that the appellee made any agreement on the subject. The law pointed out the course to be pursued in case of a tie, and the board adopted it.

The circuit court, under the express language of the statute (section 6, article 7, chapter 33, General Statutes), is given jurisdiction on appeal from the decision of the board, at the instance of any person in interest, feeling himself aggrieved.

The board had deprived Culley of four votes; he felt "himself aggrieved" thereby, and had a clear right of appeal.

The appellant also insists that the vote of Thomas Kemp, which was counted for appellee in the circuit court, was an illegal vote. Kemp himself proves that he was born on July 4, 1869, and was, therefore, twenty-one years of age in July, before the election. It may be true, as seriously asserted by counsel of appellant, that this is hearsay testimony (it could not well be otherwise), but he is corroborated by Taylor, one of the judges of the election, who had known him since his birth and who knew that he was born in 1869, because it was the year witness had moved to the place on which he then lived.

That he was born in 1870 was testified to by an uncle of Kemp, who compared his age with that of his daughter, but we can not upturn the finding of the lower court on the facts of the case, especially when the preponderance of the proof sustains the decision.

The judgment is *affirmed*.

THE AMERICAN LAND & IMPROVEMENT CO. V. CRAWFORD.

(*Filed Feb.* 2, 1893—*Not to be reported.*)

Vendor and vendee—Adverse possession—Parties to action—For answer to an action by a vendor on purchase money notes for 412 acres of land conveyed, the vendee asked a rescission of the contract of sale on the ground that 150 acres of the land was in the actual adverse possession of certain parties at the date of the conveyance. The deed of conveyance recited that the vendee was put in possession of the entire tract. On the trial the evidence was conflicting as to whether any one was in adverse possession of the 150 acres at the date of the conveyance. The vendee offered to file an amended answer making the adverse claimants parties to the action and requiring them to assert their claim. The court refused to permit it to be filed. *Held*—That the adverse claimants were proper parties to a final determination of the cause of action and should have been made parties. The amended answer should have been filed.

W. H. Holt and J. B. White for appellant.

Appeal from Lee Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

Digitized by Google

The appellee sold and conveyed by deed 412 acres of land to the appellant. The deed recites that the appellant was put in possession of the land. The appellant was sued on one of the purchase money installments. He made defense, asking for a rescission of the contract upon the ground of fraud, and that about 150 acres of the land covered by the said deed, to-wit, all that part lying north of the Crow and Adams line, was at the time of the conveyance in the actual adverse possession of Davis & Creech.

In the record there is not sufficient evidence of fraud to authorize the court to set aside the contract. Therefore, the question as to a portion of the land, and how much, if any, being in the adverse possession of Davis & Creech, is the only matter before this court. Upon that subject the appellee swears positively that there was none of the land, at the time of the conveyance, covered by the deed, in the adverse possession of Davis & Creech, or others, except the three small parcels mentioned in the deed; that he put the appellant in the posession of all the land covered by the deed. On the other hand, the appellant produces evidence that all the land north of the Crow and Adams line was, at the time of the conveyance, and is now, in the actual adverse possession of Davis & Creech. The appellant, by an amendment to its answer, offered to make Davis & Creech parties for the purpose of having them set up and establish their adverse possession, if any they had; but the court refused to allow it. We think that, under the circumstances, Davis & Creech ought to have been made parties, requiring them to set up their adverse possession and extent of it, if any they had, because the evidence as to the matter is contradictory, and any judgment in the case, as it now stands, would not settle the rights of all the parties concerned in the subject matter. If, as in this case, the judgment was in favor of the appellee, the right of Davis & Creech would not be affected by it; and if they were, in fact, in the adverse possession of the land, they could, and doubtless would, hold it as before, and not be required to take any action to protect their rights, and the contract being void to the extent of the champerty, the appellant could take no action against them to recover the land by virtue of superior title in them. Nor would the judgment in favor of the appellee as to superior title and amicable possession bind Davis & Creech. It seems to us, therefore, that Davis & Creech ought to have been made parties to the action and required to set up their claim and adverse possession, if any they had, so that the court could render a judgment binding all the parties concerned.

The judgment, for the reason indicated, is reversed, and the court is directed to let the amendment be filed and Davis & Creech be made parties; and the court will then proceed with the case as it thinks right.

There is no brief on file for the appellee.

COMBS V. COMMONWEALTH.

(*Filed Feb.* 11, 1893.—*Not to be reported.*)

Criminal law—Evidence—On the trial of appellant for murder, evidence that he had previously been tried and convicted for unlawfully selling liquor was incompetent and prejudicial.

The evidence in this case must be confined to the circumstances attending the homicide for which appellant was indicted.

Digitized by Google

W. P. Bentley, Wilson & Rawlings, Simeon Johnson and J. M. Bicknell for appellant.

W. J. Hendrick for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted with others in the Knott Circuit Court for the murder of one Artrip.

The object of the State seems to have been to establish a conspiracy between several, the appellant being one of them, to take the life of the deceased, but as to this branch of the case there is an absence of proof.

A number of young men, while at a corn husking, who seem to have been loaded with both pistols and whisky, and in the presence of young ladies whom they were expected to entertain, became beastly drunk, and in this condition, without any apparent cause, drew their pistols and began firing in the house, making it dangerous for all present and causing the young ladies to flee from the house for safety.

It was a disgraceful scene—one that could be looked for in savage life, but would never be expected to occur in a civilized community.

If such disgraceful conduct could be punished by confinement in the penitentiary, all present and participating in this drunken row ought to be within its walls.

The guilt of the accused is established from the fact that he had a pistol, and if the death of Artrip was caused by the indiscriminate firing in the house of Grear, the evidence would be sufficient to show guilt.

When Artrip was last seen he was in the presence of the accused, and, as the proof conduces to show, with pistol in hand. The accused was leaving the house as fast as possible; had passed through the gate into the highway and Artrip at his heels. Others were in pursuit of or following Artrip, and whether for the purpose of preventing Artrip from killing the accused, or for the purpose of taking Artrip's life, is in doubt. After these parties reached the highway two or more pistol shots were heard, and Artrip, shortly after, was found dead with a shot in his back, and was evidently shot by some one following behind him.

During the progress of the trial testimony was admitted as to the fact of the accused having been arrested and convicted for selling whisky. The warrant was read to the jury, the judgment of the court, and the fine imposed, all against the objection of the accused by his counsel. The whisky sold by the accused had no connection with the killing. It is not shown that the accused sold it to his young friends, and the effect of such testimony was to prejudice the jury against him and to authorize a conviction upon facts constituting an offense for which the accused was not being tried.

This alone requires a reversal of the conviction, and when the case returns confine the Commonwealth to its testimony to what took place at the time of the killing, as mere talk in the neighborhood should have nothing to do with this trial.

Reversed and remanded for a new trial consistent with this opinion.

Digitized by Google

LOUISVILLE BANKING CO. v. EISENMAN, &c.

(*Filed Feb.* 23, 1893—*Not to be reported.*)

1. *Corporations—Purchase by one stockholder of all the stock*—While one person can not organize a corporation, under chapter 56 of the General Statutes, yet when a corporation has been created under that statute, with the stock distributed among several stockholders, the purchase by one of them in good faith of all the stock does not destroy the existence of the corporation, but merely suspends its franchise until the stock may be transferred to others; and while in the meantime the corporate property is liable for the individual debts of the sole owner, and subsequent purchasers of stock take it subject to the liens or equities of his creditors created prior to the transfer of the stock to them, yet the individual property of the sole owner is not liable for debts created by him on behalf of and in the name of the corporation; the parties contracting with him as a corporation get all they bargained for when they subject the corporate property to the payment of their debts.

2. *Same*—In corporations other than such as are created under chapter 56 of the General Statutes the purchase by one stockholder of all the stock does not dissolve the corporation or suspend its franchise.

3. *Failure of stockholders to pay in stock required before beginning business*—In the absence of a frandulent purpose, the failure of the stockholders in a corporation created under the statute to pay in all the stock required to be paid in before beginning business does not render them liable under that provision of the statute giving a right of action against the members of the corporation in favor of any person who has been injured through their "intentional fraud" in failing to comply cubstantially with the articles of incorporation.

4. *Same*—The claim of the corporation against a stockholder for stock subscribed and not paid in forms a part of the assets of the corporation and may be subjected by its creditors.

Barnett, Miller & Barnett and Bright & Brandeis for appellant.

Burwell K. Marshall for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

A corporation styled the Eisenman Bros. & Co. was organized under chapter 56 of the General Statutes for the purpose of engaging in the milling business, and the purchase of grain, etc.

The incorporators were Jacob Kreigher, sr., David Frantz, sr., and J. C. Eisenman.

The capital stock of the corporation was $50,000, and by its terms the corporation could begin business when two-fifths of its stock had been paid in.

There is some conflict in the testimony as to whether as much stock as $20,000 had been paid when the corporation began to deal with the public, and we shall assume, for the purposes of this case, that only $15,000 of paid-up stock was in the vaults of the corporation at that time.

J. C. Eisenman, the appellee here, purchased up the stock of the corporation and became the sole owner of all the stock and the corporate property. This purchase was made in January, 1889.

The appellee, on account of his individual indorsements for the corporation, made an assignment to the Germania Safety Vault & Trust Company, and the assignee instituted this action for the purpose of settling up the estate assigned and its distribution between

Digitized by Google

creditors. On the — day of October, 1889, the corporation also transferred its assets to the trust company for the payment of its debts. In the months of September, October and November, of the year 1886, a firm known as J. C. Mattingly & Sons, engaged in the manufacture and sale of whisky, drew their drafts on the corporation of Eisenman Bros. & Co. for large sums of money, amounting in all to about $20,000.

The drafts were accepted by the corporation, indorsed by Mattingly & Sons, and discounted by the Louisville Banking Co., the appellant in this case, and placed to the credit of J. C. Mattingly & Sons.

The corporation of Eisenman Bros. & Co. had no interest in the loans, but had accepted the paper for the accommodation of J. C. Mattingly & Sons, and of that fact the appellant, from the facts and circumstances of this case, must have been fully apprised, and but for the failure of Mattingly & Sons the corporation of Eisenman Bros. & Co. would have continued solvent.

The appellant instituted its action at law and recovered a judgment against the corporation of Eisenman Bros. & Co. on the paper of Mattingly & Sons, and had an execution issued with a return of no property found.

Having been made a defendant to the action for a settlement of the estate of the appellee by his assignee, the Germania Trust Company, the appellant is seeking to make J. C. Eisenman liable in his individual right for the amount of the Mattingly notes upon two grounds:

First. The corporation of Eisenman Bros. & Co. practiced a fraud on the public when it announced that it had two-fifths of its capital stock paid in.

Second. That J. C. Eisenman, having purchased all the stock of the corporation, the corporation ceased to exist, and the latter having indorsed or accepted the paper, although in the corporate name, will not be allowed to say that it was a corporate liability, and more particularly when the fact of Eisenman being the sole owner of the stock was unknown to the appellant.

The formation of this corporation, of which the appellant was a member, was had under the General Statutes, and it is proper, therefore, to refer to some of the provisions of the statute on that subject in order to reach a correct decision of the questions made by the appellant.

Section 1 of chapter 76, General Statutes, provides that "any number of persons may associate themselves *together* and become incorporated for the transaction of any lawful business, except banking and insurance and for the construction of railroads, but such incorporation shall confer no powers or privileges not possessed by natural persons, except as hereinafter provided."

It is, we think, manifest the Legislature never intended to permit one person to conduct his ordinary business in the name of a corporation so as to exempt him from personal liability, or his property not embraced by or used in his corporate business from the payment of a debt for no other reason than its being a debt of the corporation.

The purpose of the statute was to enable two or more persons possessed of capital or skill to associate themselves in business, and to limit their liability as against the improvident debts of each other, or the act of the corporation in the event of pecuniary loss in the legitimate and proper conduct of its business. It invites the investment of the capital stock of one to be placed in the same business

Digitized by Google

with the skill of another, or a combination of capital that encourages trade, the burden of which mere individual enterprise would be unwilling to assume, and it could not have been the legislative intent that any one man could form a corporation of which he is the creature and sole stockholder, so as to limit his liability for debts contracted, and from which he has derived the benefit, to the extent only of what he might designate his corporate estate. He owns the entire property belonging to the corporation—it is his. He can sell or dispose of it as he pleases, borrow money, acquire property in the name of the corporation for the sole purpose of exempting him from any responsibility other than that belonging to the corporation, and, however reckless or improvident he may be, has all to gain and nothing to lose.

He could make a gift of the entire corporate estate—dispense with all corporate forms, and to say, when exercising such unlimited control, he is not finally responsible for every debt he contracts would be to pervert the plain purpose of the statute.

There is no such being in this State as a sole corporation, and certainly none such allowed to be created by the statute.

This corporation, however, was properly organized; had its several stockholders and board of directors, and was prospering in the business until these drafts were drawn for the benefit of Mattingly & Sons. The drafts were all made payable at the Masonic Savings Bank, and no direct transaction was had by the appellee and the appellant with reference to the paper. There is, in fact, no evidence showing that the corporation ever authorized the acceptance of these drafts, and while the paper was negotiable, if the corporation actually existed, its liability on the paper might well be questioned. The appellant, however, maintains that this appellee, when he signed the corporate name to these drafts, was the sole owner of the stock, and that from the moment he purchased the stock of Krieger and Frantz the corporation ceased to exist.

The corporation may have been virtually dissolved, and yet we are not disposed to hold the appellee personally liable for the amount of the drafts discounted by the bank. Both the appellant and appellee were acting on the belief that the corporation was alone liable is beyond dispute, and the corporation, as it was called, the appellee being the sole owner of the stock, submitted to a judgment against it for the drafts, in an action by the Bank, and the appellee is making no resistance to its payment out of the property of the corporation, but insists that no personal liability exists.

The appellant has obtained all that he contended for. There was no fraud practiced upon it by the appellee, and certainly no intention to bind himself personally, nor any of the proceeds of these drafts applied to his benefit in any manner, or to the benefit of what he supposed was an existing corporation.

If the stock had been held as it was originally, the pecuniary condition of the corporation would have been the same, as no act had been done by the appellee by which the interest of creditors, or those dealing with the corporation, would have been prejudiced. Nor are we prepared to adjudge, after a corporation has been created by the statute, with the stock distributed between several stockholders, that the purchase by one stockholder of all the stock destroys the corporate existence and places all the property of the corporation upon the same footing with the other estate of the individual stockholder.

The legal title to the estate of the corporation is still vested in it, and while the stockholder's interest could be subjected to the pay-

Digitized by Google

ment even of his individual debt, where he contracts in behalf of the corporation and with no fraudulent intent, it seems to us the party with whom he contracts gets all he bargains for when he subjects the corporate property to the payment of his debt.

In the case of Swift v. Smith, 65 Md., 428, Cruikshanks owned all the stock of the corporation and executed a mortgage to Swift on the corporate property, to secure the latter in the sum of $17,000 loaned the corporation. The mortgage was signed by Cruikshanks in his own name and that of the corporation, and, subsequently, Cruikshanks sold shares of stock to third parties, who claimed that this mortgage, executed by the sole owner, Cruikshanks, had no precedence over their stock; that it was the individual act of Cruikshanks and not that of the corporation.

The court held that the stockholders took their stock subject to the mortgage, and said that whether in the name of the corporation or the individual stockholders, the latter being the absolute owner in equity, if not in law, the mortgage was effectual and the subsequent purchasers of stock took their interests in the corporate property with the equities or incumbrances placed upon it when Cruikshanks was the sole owner.

It is said in that case that "while the purchase by Cruikshanks of all the stock in the corporation, and all its property, did not necessarily work a surrender of the franchise, it did virtually, for the time being, suspend its operation as a corporation until the election of new officers through new stockholders purchasing from Cruikshanks. If from the moment Cruikshanks became the real owner he had concluded to transact the business as an individual, and without the corporate name, can it be doubted that the mortgage created a valid equitable lien on the property," etc.

The case cited comes nearer adjudging that a purchase of all the stock by one stockholder dissolves the corporation than any we have found, and still such an act, in the light of the opinion, only suspends the operation of the charter, and places the stockholder in a condition where he may abandon its provisions and control the property as his individual estate.

In the case before us there was no surrender of the franchise, but the business conducted in good faith, and under the belief that the corporate estate was alone liable. The corporation still lived and had such vitality as enabled the holder of the stock to transfer it and proceed with the corporate powers as if he had never become the sole owner, and the argument that such a construction as to the meaning of the statute would enable two or more to organize a corporation, with a view of vesting the entire stock in one of the corporators, is not available, for the reason that the corporate property in the hands of one stockholder, when made liable by him for his corporate or individual debts, remains so, although he may transfer the stock to others, as they must take it subject to the incumbrances the sole stockholder has placed upon it prior to his sale of the stock. It must be recollected that we are determining alone in this case the meaning of the statute under which these corporations are formed, as it is plain as to both public and private corporations, unless otherwise provided by the charter, the title to the corporate property still remains in the corporation, although one may become the sole owner of the stock.

In Button v. Hoffman, 61 Wis., 20, it was held that one having purchased all the stock of a private corporation, does not thereby become the owner of the property, and to maintain replevin must bring the action in the corporate name.

Digitized by Google

In Wilde v. Jenkins, 4 Paige, 481, it is said: "A conveyance of all the stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on the business under the act of incorporation and in the corporate name."

In Winona, &c. R. Co. v. St. Paul, &c. R. Co., 23 Minn., 359, it is said: "The corporation is still the absolute owner and vested with the legal title to the property, and the real party in interest, although another has become the sole beneficial owner in its rights, property and immunities."

The elementary writers on the subject all concur in holding that the fact of one person becoming the owner of all the shares of stock does not work a dissolution of the corporation. (Cook on Stockholders, etc., 2d edition, section 631; Morawetz on Private Corporations, page 635.)

While we recognize the general rule on the subject, sustained by the authorities referred to, it must be held that the purchase by one of all the shares in a corporation *created under the statute*, is a dissolution of the corporation to the extent that it suspends the exercise of the rights under the franchise until the owner transfers the stock in good faith, so as to maintain an organization under the statute.

There is a difference between the attempt to create one person a corporation under this statute and the purchase in good faith of all the stock after the corporation has been created. In the first instance there is no corporation; and in the last there is a franchise, the operations of which are suspended until the stock may be transferred to others, and while in the hands of one person the corporate and individual property are, ordinarily, alike liable for the payment of any debt contracted by the owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors of the sole owner, created prior to the transfer of the stock to them.

In the present case, as before stated, there had been no change in the property or conduct of the business as to mislead or injure creditors. No fraud had been practiced by the appellee, and the entire credit was not only given the corporation, but the appellant had pressed it to judgment, and when in a court of equity the appellant should be confined in distributing the property of the corporation to its pro rata share of the proceeds; and neither the individual estate of the appellee assigned for the benefit of creditors, or the appellee made personally liable for their debts to the bank.

It is said the appellee is liable to the corporation for stock subscribed and unpaid, and, if so, his liability to the corporation exists and the amount of stock owing by him, when collected, becomes a part of the corporate assets, to be distributed between the creditors of the corporation.

The appellant is not entitled to the whole unless it is the sole creditor, and so the chancellor below adjudged. The statute makes the members of the corporation, or such of those who are guilty of intentional fraud in failing or refusing to comply substantially with the articles of incorporation, liable to an indictment, and it is urged in argument that the failure to pay up all the stock required to be paid by the act of incorporation was a fraud on the appellant, who did not deal with the corporation until long after it began to do business.

If the stock was not paid up, this, in the absence of a fraudulent purpose, did not make the stockholder individually liable for all the debts of the corporation, and, besides, the proof shows that the stock paid in and the assets of the corporation were amply sufficient to pay all the indebtedness, excepting the drafts drawn by Mattingly & Sons,

Digitized by Google

and this indebtedness was created long after the corporation had been organized, and was conducting a prosperous business.

This view of the question is sustained by the case of the National Bank of Salem v. Jas. F. Almy & Co., 117 Mass., 476.

We perceive no reason for reversing the judgment below, and the same is affirmed.

Judge Pryor delivered the following response to petition for rehearing:

There is a manifest distinction between this case and Brannin, &c.v. Loving, &c., 82 Ky., 370. In that case the corporation, for its own benefit, drew on Skillman & Mitchell for $5,000. The paper was accepted by them for accommodation and afterward indorsed to Brannin & Co. by the president of the corporation, who knew the condition of the corporation and that he was violating the provisions of the charter.

In this case the corporation of Eisenman & Bros. were the acceptors for accommodation only, and it is apparent the bank knew it, and not only so, the bank pursued the corporation to judgment, and is now in a court of equity seeking to subject not only the assets of the corporation, but to make its president personally responsible for the debt.

The good faith of the appellee can not be questioned. The appellant obtained all it bargained for, and there is no reason for fixing an individual liability on Eisenman for this debt.

Petition overruled.

KENTUCKY SUPERIOR COURT.

CITY OF OWENSBORO V. WEIR, WEIR & WALKER.

(*Filed Feb.* 22, 1893.)

1. *A contract made with a municipal corporation* beyond the scope of its corporate powers is void, and, therefore, persons contracting with such corporations must, at their peril, inquire into the power of the corporation or its officers to make the contract.

2. *Power of mayor to employ attorney*—The mayor of a city has no power either to authorize litigation in behalf of the city or to control it unless the emergency be serious and the necessity grave and impending. Therefore, an attorney employed by the mayor, where no such emergency exists, can not recover of the city compensation for his services.

Under a city charter, which vested in the city council the control of the property of the city and the power to prevent encroachments upon its streets or public squares, the mayor of the city had no power to authorize the city attorney to bring suit to enjoin a threatened encroachment upon ground which he believed belonged to the city, or to employ an attorney to assist in the prosecution of the suit, and an attorney thus employed without the consent of the city council, can not look to the city for compensation.

J. A. Dean for appellant.

C. S. Walker for appellees.

Digitized by Google

Appeal from Daviess Circuit Court.

Opinion of the court by Presiding Judge Yost.

It is a settled principle of law that a contract made with a municipal corporation, beyond the scope of its corporate power, is void, and, therefore, persons contracting with them must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. While it is true that these bodies politic have the power, acting through their proper officers, to employ an attorney to prosecute or defend suits in which the municipality has an interest, the question here is: Has the mayor of a city the right to employ an attorney, without authority from the council, and make the city liable for the amount of his fees?

Under the charter of the city of Owensboro its corporate powers are divided into three distinct departments, the legislative, executive and judicial, and it is in that instrument provided that no person or officer of one division shall exercise any power properly belonging to either of the others, except as he is expressly permitted and empowered to do so by the provisions of the charter.

We have to do with the legislative and executive departments only in the consideration of this case, the first consisting of the mayor and board of councilmen, and known as the common council of the city; and the latter, of its mayor.

Does the charter (Session Acts 1881, volume 1, page 817,) confer upon the mayor, acting alone or independent of the common council, the power to bind the city by contract, or is that most important function vested solely in the legislative branch of the city's government?

The powers of the common council and mayor are plainly pointed out in that instrument. The common council is given control of the finances and all property, real and personal, belonging to the city; power to prohibit persons from trespassing upon or injuring its public grounds; the further power to appoint all agents necessary to carry into effect its laws and ordinances, and to prevent and remove any and all encroachments into, or upon, any street, alley, sidewalk, avenue or public square of the city, and to exercise complete and perfect control over all public squares or commons belonging to the city, and over all its property, real or personal, within or beyond its limits.

The mayor shall see that the laws of the city are faithfully executed, and shall, from time to time, give to the common council information of the state and condition of the corporation, and recommend to its consideration such measures as he may deem expedient, and for that or any other purpose may call special meetings of that body whenever it is, in his opinion, necessary to the interest of the city.

This was an agreed case, submitted to the court without action for judgment, and from the statement and exhibits it presents the following facts: The county court of Daviess county was about to enclose within its public square a piece of ground adjacent thereto, which the mayor believed belonged to the city. Without calling the common council together he authorized the city attorney to bring an action, enjoining the county authorities from encroaching upon the property, and then employed the appellees, as counsel in the case, to assist the city attorney in its further prosecution. All these steps were taken at the instigation of the mayor alone, without the authority of the common council, which neither ordered the insti-

Digitized by Google

tution of the action nor the employment of the attorneys. Indeed, at its first meeting thereafter, and from the record, we judge that it was a meeting held for that purpose alone, as it is called an informal, rather than a regular, meeting, the common council instructed the city attorney to dismiss the suit, and this was at once done.

The value of the appellees' services are not disputed, the only question being did the action of the mayor bind the city to pay for them? It seems clear to us that it did not.

A piece of ground, which the mayor claimed was the property of the city, was about to be enclosed. What right had he, the executive of the city government, to act alone in the matter? Why not call together the common council, and let that body act, or refuse to act, at its pleasure? In it, and not in him, was vested the control of the property of the city, and the power to prevent any and all encroachments upon its streets or public squares. Yet with these powers so pointedly and specifically given to the legislative branch of the city government, the executive, in the face of the prohibition of the charter, attempted to exercise an authority "properly belonging to the other."

Said the court, in Newberry v. Fox, 37 Minn., 141, "the doctrine of *ultra vires* has, with good reason, been applied with greater strictness to municipal bodies than to private corporations, and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract."

In City of Bryan v. Page, 51 Texas, 532, the claim of the attorneys did not rest upon any ordinance of the council, but upon the action of the mayor alone, in employing them to prepare an opinion upon a matter of interest to the city. The court there say that the claim of the attorneys, that the city was bound to pay them, because of the employment by the mayor, could not be maintained, as if, said the court further, a municipal corporation can be held liable on an implied contract; when the charter has withheld the authority to make an express contract it is easy to evade and render useless such restrictions in their charters.

An ordinance of the city of Louisville provided that no contract should be binding on the city until it had been approved by both branches of the general council.

In Murphy v. The City of Louisville, 9 Bush, 189, a contract made by the mayor with Murphy was approved by the board of aldermen, but not, so far as the record showed, by the common council. There the court said that "if the approval of the common council can be dispensed with, the approval of the board of aldermen would be equally as unnecessary, and the mayor alone left with the sole power of executing all such contracts for the city. These safeguards, devised by legislative wisdom for the protection of municipal corporations, would thus be disregarded and the city placed within the power of an official who might be bold and reckless enough to render nugatory those conservative powers so necessary to the faithful administration of every city government."

In Butler v. City of Charleston, 7 Gray, 14, Butler sued for services rendered to the city council. The evidence showed that he was employed by four aldermen, an act wholly unofficial, which was never ratified by the council. It was held that he could not recover.

We find two cases where the city was made liable by the action of the mayor in employing attorneys without the authority of the council. One, the City of Memphis v. Adams, 9 Heisk, 518; and

Digitized by Google

the other, City of Louisville v. Murphy, 86 Ky., 53, and we will briefly review them.

The mayor and the register of the city of Memphis executed a power of attorney, under the corporate seal, appointing Adams to represent the interest of the city in a litigation, and this appointment and employment was subsequently ratified by the city council. There, although it was said that the contract was originally unauthorized, it was held that Adams was duly employed, the city being held liable on account of the ratification by the council of the act of the mayor. There is, it will be seen, a marked contrast between the facts in that case and in this. In fact the one is the antithesis of the other. There the mayor's employment of Adams was approved, ratified and confirmed; while here the action of the mayor in the institution of the suit and the employment of the appellees was disapproved, repudiated and annulled.

In the City of Louisville v. Murphy, 86 Ky., 53, the court said, while, as a general rule, the mayor of a city has no authority, by virtue of his office, to employ counsel, cases of emergency may arise when the power must necessarily exist. In this case the council had failed to impose any tax. The city was left without means, as the mayor had a right to suppose, of carrying on this city government. In such an emergency he called on counsel for advice. The court, holding that this power should be rarely exercised, because the mayor could otherwise disregard the legislative will, bringing and dismissing suits at his pleasure, said, it is certainly an exceptional case where it should be allowed, and one that seldom arises.

There was certainly no such emergency in this case. The common council could have been at once called together. There was absolutely no reason for the mayor to act alone. While the amount charged was small and well earned, yet there is a principle involved important indeed to all municipalities, and we do not think, unless the emergency be serious and the necessity grave and impending, that the mayor should have the power either to authorize litigation in behalf of the city, or to control it. A different rule of law would, in effect, dangerously enlarge and broaden the power of public officers to bind municipalities by contracts not only unauthorized, but prohibited.

Counsel for appellees contend that we have no right to review the judgment of the court below on this appeal, as the court did not state what his conclusions of the law were, arguing, with much ingenuity, that this is as necessary in a case where the facts are agreed as in one where the facts are found.

We can not agree with counsel in this contention. The facts were all agreed, and only the court's judgment on the law was asked, and it is only (section 332, Civil Code,) upon *trials* of questions *of fact* by the court that either party has the right to demand that the court shall state the conclusions of law, and then he must state as well the conclusions of fact found.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

JOHN C. LEWIS CO. V. SCOTT.

(*Filed Mar.* 22, 1893.)

Where a servant is wrongfully discharged, before the expiration of his term, he is entitled to recover only an amount equal to the stipulated wages, less

Digitized by Google

what he may have earned, or by reasonable diligence could have earned, in other employment; and in order to recover more than nominal damages for breach of the contract of service he must allege in his petition that he did not, and could not by reasonable diligence, get other employment.

As the petition in this case contains no such allegation it was not competent for the plaintiff to show that she had tried to get other employment and failed; and the court should, by its instructions to the jury, have confined them to nominal damages.

Willson & Thum for appellant.

O'Neal, Phelps & Pryor and Samuel B. Kirby for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Brent.

It was formerly the doctrine that a contract for service for a fixed period was indivisible; that a servant wrongfully discharged before the expiration of his term, upon showing he was always ready to perform, could recover for the whole term. His being always in readiness to perform was held to be constructive performance. Afterwards the courts came to the conclusion that as the servant was by this rule not only permitted, but theoretically required, to remain unemployed, in order to maintain his attitude of constant readiness, idleness was encouraged and public policy violated, and that the rule which gave a servant full wages, while inviting him to live in entire idleness, could not be sound. So it is now held that in such cases a discharged servant should seek work, and is only entitled to recover an amount equal to the stipulated wages, less what he may have earned, or by reasonable diligence could have earned in other employment, and this doctrine is no longer open to dispute.

A servant wrongfully discharged may sue at once upon the breach of the contract to furnish the employment for the time at the agreed rate of compensation, and recover whatever actual damage he can show he has thereby sustained.

In August, 1891, the appellee, Elizabeth Scott, was employed by appellant under the following written contract: "This indenture, made this the 1st day of September, 1891, between John C. Lewis Co., of the first part, and E. Scott, of the second part, that said party of the second part agrees to render services to the parties of the first part, in the capacity of modiste and dressmaker, for the period of one year from this date—to faithfully serve the interests of said first party, using her best endeavors to please and satisfy the patrons of the first parties—in consideration of the sum hereinafter named. The parties of the first part bind themselves to give employment to the party of the second part, as modiste and dressmaker, for the period of one year from this date, with the privilege of renewing the contract for two years longer, at a salary of $3,500 per annum. This contract to be binding alike on both parties unless sooner dissolved by mutual consent. In testimony whereof, witness the hands and seals of the parties hereto.

{ Seal. } "JOHN C. LEWIS CO., by
"JOHN C. LEWIS, Pres.
"ELIZABETH SCOTT."

On the 1st of September, the date of the contract, Miss Scott commenced work. On the 1st of October, the month following, she was discharged, and on the 29th of that month brought this suit for

Digitized by Google

damages. She alleged her employment under the contract; that she had commenced work as agreed, and that "the defendant, without any right or reason so to do, undertook to, and did, discharge her, and refused, and still refuses, to give her employment as provided under said contract, and refused, and still refuses, to pay her any part of said compensation of $3,500, in utter violation of her said written contract; that by reason of the premises she has been thrown out of employment, left without money in a city in which she is unacquainted and a stranger, and greatly injured in reputation as modiste and dressmaker, mortified and humiliated in feeling, caused to suffer great privation and discomfort, and has been damaged by *the breach of said contract* in the sum of at least $5,000.

She says she has, in all respects, performed, and offered to perform, the said contract, and has ever been, and is now, ready and willing to so perform the same as agreed by her, wherefore, she prays judgment against the defendant in the sum of $5,000, etc.

To this petition the defendant filed a general demurrer; the demurrer was overruled and the defendants answered. They first controverted the facts set out in the petition. Secondly, they alleged that the contract was void, because they were induced to enter into it by plaintiff's fraudulent representations. Thirdly, they counterclaimed for damages, on the ground that they had, by plaintiff's false representations as to her skill, taste, ability, etc., been lead to injure their business by advertising that they would perform what, by reason of her lack of taste, they could not perform. They also counterclaimed for material spoiled by her alleged incompetency, and claimed a set-off for money advanced her and goods furnished her.

The jury found upon all the issues for the plaintiff. They gave her as damages, for the breach of the contract, $2,200, and defendant has appealed to this court.

The first question to be determined is the sufficiency of the petition. The general rule seems to be that "when the servant is employed for a term, and wrongfully discharged before the end of it, the *presumption* is that he is entitled to recover for the whole term, and the burden is on the defendant to show a legal excuse for not paying him the full amount for the whole term." (Lawson's Remedies and Practice, volume 1, page 484, and cases cited in Note 1.)

If this was the rule in Kentucky the petition might be sufficient. The statement of the contract, the breach, and plaintiff's readiness to perform, without any further allegation, would entitle her, *prima facie*, to recover the amount of her wages for the term as general damages, naturally consequent upon the breach. But such is not the rule in this State. The wrongful dismissal of a servant or employe does not raise the presumption that he is actually damaged at all. If he is damaged, it must be in some particular way which he should specifically set out. Certainly (Duffey v. Bowman, 10 KY. LAW REP., 637,) the law does not presume that he can not, by reasonable diligence, obtain other employment, with wages, during the time for which he had engaged and which his employer refuses to let him serve.

That his discharge will result in his being unemployed, and without wages during the unexpired time of his engagement, is matter to be specifically alleged, if it is to be relied on as the ground of recovery. Supposing the general rule to obtain, the plaintiff did not allege that she had not gotten and could not, by reasonable diligence, get employment during the time to ensue; and so was without any

Digitized by Google

allegation upon which she could recover more than nominal damages.

It is true it would, perhaps, have been difficult for her to make and maintain such an allegation upon an immediate trial, but this was a burden she voluntarily assumed by suing when she did. Upon the trial the plaintiff, against defendant's objections, was permitted to introduce evidence to show that she had made efforts, without success, to get employment after her discharge. To permit this testimony to aid the plaintiff would be to permit causes to be tried upon the evidence alone, without allegations and properly joined issues to keep the controversy within bounds, and advise the parties what they shall expect and how they shall prepare for the trial.

We are, therefore, of the opinion that while the breach of the agreement entitled the plaintiff to nominal damages, that this was all that, under the pleadings, she could properly recover; and while the demurrer to the petition was properly overruled the judgment must be reversed. We see nothing in the treatment of the witness, Lynch, that could prejudice the defendant, for the court, it seems to us, was amply justified in all it said and did in this regard.

The court should have permitted all the testimony of the witness, Redfern, which bore upon the question of plaintiff's competency as a dressmaker, to go to the jury. While it was not exactly responsive to the interrogations as propounded, it illustrated the principal issue in the case. Had the pleadings been framed so as to have made it proper to submit the case to the jury for a verdict ascertaining the actual damage, on the ground that plaintiff had used reasonable diligence to get employment, the instructions are substantially correct.

Judgment reversed and cause remanded, with directions to set aside the judgment. If the plaintiff desires to amend her petition she shall be permitted to do so, and the case tried anew.

SUPERIOR COURT ABSTRACTS.

L. & N. R. R. Co. v. Davis.

Filed February 8, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Fellow servants*—A switch engineer and switch foreman, in the yard of a railroad company, were each the superior of the plaintiff, who was a switchman and coupler, and the company is responsible for an injury inflicted upon him by the gross negligence of either of them. The fact that the engineer and switchman were both subject to the orders of the foreman did not necessarily make them fellow servants.

2. *An employe is not bound by a rule of the company not brought to his attention* or which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce the rule.

As a rule requiring the use of a coupling stick in coupling cars was never enforced, plaintiff was not chargeable with contributory negligence in failing to observe the rule.

James A. Mitchell for appellant; W. E. Settle and Edward W. Hines for appellee.

Digitized by Google

L. & N. R. R. Co. v. Hoskins.

Filed February 8, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Employes of a railroad company on different trains are not in the same field of service*, and, therefore, the rule making a fellow servant in the same service assume the ordinary risks pertaining to such service does not apply to an action against the company by a servant on one train to recover damages received through the negligence of a servant on another train.

In this action against a railroad company to recover damages for injuries received by plaintiff in the collision of a freight train with a passenger train, plaintiff being the engineer on the freight train, the court properly instructed the jury to find for plaintiff if he was injured by the "negligence" of defendant's servants in charge of the passenger train or by the "gross negligence" of the servants in charge of the freight train.

2. *Same—Pleading*—An allegation in the petition that the injury was caused by "defendant's servants, the superiors of plaintiff in point of service," was, in so far as it affected the employes on the passenger train, not only a mistaken conclusion of law, but was mere surplusage, as the employes on different trains are as related to each other, neither superior nor subordinate, the one to the other. Therefore, the fact that the instructions authorized a recovery without regard to the grade of service in which the negligent employes on the passenger train were engaged does not render them objectionable.

3. *Competency of rules as evidence*—While some of the rules of the company admitted in evidence had no application, perhaps, to the conditions existing just before and at the time of the accident, yet, as they all related to the duties of the employes in flagging or signaling a train in case of accident, and part of them were confessedly pertinent, it was not improper to admit them all.

James A. Mitchell for appellant; B. F. Procter and Edward W. Hines for appellee.

Hegan Brothers v. Fowler & Brothers.

Filed February 8, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Contract for sale of lumber—Evidence as to meaning of technical term*—In this action to recover the contract price of a lot of lumber delivered by plaintiff to defendant, which, by the terms of the contract, was to be "log run," the evidence being conflicting as to the meaning of the expression "log run," and the lumber delivered being such as was called for by the contract, according to the testimony for plaintiffs, this court can not disturb the verdict of the jury in favor of plaintiffs as being flagrantly against the testimony.

2. *Same—Waiver of objection*—Although the contract was for "cherry lumber," yet as the plaintiffs, by letter accompanying the shipment of the lumber, notified defendants that there was a small quantity of walnut in the cars, and if they did not want it to notify another person, who would receive it and haul it away, plaintiffs having failed to do this and retained possession of the walnut lumber, they should be required to pay for it.

Frank Hagan for appellants; Polk & Hulsewede for appellees.

Stockhoff & DeWitt v. Brannin, &c.

Filed February 8, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. *Reformation of written contract for mistake*—To authorize the chancellor to amend or modify the terms of a written instrument on the ground of mistake as to its contents or legal effect when executed, such mistake must be clearly established, and must not be a mere inference from the weight of the evidence. Nor will a mistake upon the part of one of the parties au-

Digitized by Google

thorize the reformation of the contract that it may be made to meet his understanding—the mistake must be mutual.

2. *Claim of real estate agents for leasing trust property*—The claim of appellants, real estate agents, to a certain sum of money as commissions for their services in leasing trust property for the trustee for a term of twenty years being disputed by the trustee, and the dispute compromised by the trustee agreeing in writing to give to appellants the collection of the monthly rents and to allow him 5 per cent. commission thereon "so long as I hold and control said property under said lease," the deed of trust having since been cancelled, and the trustee having ceased to act as such, the appellants are no longer entitled, under the contract, to collect the monthly rents or to the agreed commission thereon. And in this action by them to reform the contract the evidence is not sufficient to sustain their claim that the words quoted from the contract were inserted by mistake. What would be the rights of the parties, independent of that provision in the contract, is not determined.

W. S. Hogue and Charles Carroll for appellants; W. O. Harris for appellees.

SMITH, &c. v. BAKER, &c.

Filed February 8, 1893. Appeal from Knott Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

1. *Bill of exceptions—Failure to state evidence*—As the bill of exceptions fails to give any part of the evidence, the court can not say that the instructions were erroneous.

3. *Appearance*—As the defendants appeared in court and filed answer, the court properly overruled their motion to vacate the judgment on the ground they had not been served with process.

A. H. Howard, John W. Howard, L. H. Salyer and G. W. Howard for appellants.

KIMBALL, &c. v. THURMAN, &c.

Filed February 8, 1893. Appeal from Larue Circuit Court. Opinion of the court by Judge Brent, reversing.

1. *Failure of county judge to take sufficient surety on guardian's bond—Limitation*—The liability imposed by statute upon a county judge and his sureties for his failure to take sufficient security on a guardian's bond, is not a "liability created by statute," within the meaning of the statute of limitations, but is a liability embraced by the bond of the county judge, and, therefore, in an action on the bond to enforce the liability the five years' statute of limitation does not apply.

2. *Same—Laches*—The failure of the ward to sue her guardian for nearly a year after she came of age was not such laches as affected her right of action against the county judge for his failure to take sufficient security on the guardian's bond.

3. *Same*—The county judge is responsible, if he either knows the surety accepted by him on the guardian's bond is not sufficient, or if what, upon inquiry, he learns of his condition is not what would satisfy a man of ordinary prudence of his sufficiency.

In this case the facts known to the county judge were such as plainly indicated that the surety was not sufficient, and, therefore, the verdict for defendants must be set aside as against the evidence.

4. *Same—Evidence*—It was error to permit defendants to prove that the surety's wife was the daughter of the richest man in the county, and that his father was a rich man.

J. P. Hobson for appellants.

SETTLES v. DAVIS.

Filed February 15. 1893. Appeal from Bath Circuit Court. Opinion of the court by Judge Brent, affirming.

Digitized by Google

1. *Summons was not necessary on an amended petition* which merely stated grounds for a specific attachment. Grounds of attachment do not constitute a cause of action.

2. *Void order of attachment*—An order of attachment which was not issued in the name of the Commonwealth, and was addressed to no one, was void.

3. *Same—Reversible error*—As plaintiff was entitled to a sale of the attached property under the contract lien asserted by him, the fact that the attachment was void is not ground for reversal.

4. *Filing pleadings out of time*—Judges must be allowed to exercise their right to determine under what circumstances they will grant or refuse leave to file pleadings out of time, without interference, except when plainly demanded by the interests of substantial justice.

As the defendant in this case had no excuse whatever for not filing his answer when it was due, and the amount about which he wishes to raise an issue is only $37.25, this court will not reverse on account of the refusal of the court to allow the answer to be filed out of time.

Reuben Gudgell & Son for appellant; C. W. Goodpaster for appellee.

L. & N. R. R. Co. v. Wilson.

Filed February 15, 1893. Appeal from Carroll Circuit Court. Opinion of the court by Judge Brent, affirming.

Railroads—Liability for diverting accumulated water on another's land—If a railroad, skillfully and properly built, merely presents a barrier which arrests the downward flow of surface water from a hillside, and the water thus arrested, obeying its own laws and seeking its own outlet, is diverted onto lower land, no action lies in favor of the owner of such land to recover the consequential damage. But where the road is so built as to accumulate the water, the railroad company has no right to divert the water so accumulated onto the land of another in a volume, or in any manner different from its natural flow, and, if it does so, it is liable to the owner of the land in damages.

Winslow & Winslow for appellant; Gaunt & Downs for appellee.

Hobbs & Co. v. Miller.

Filed February 15, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

Commissions of real estate agent—Appellants, real estate agents, hearing that appellee, who was absent from the State, wished to sell his farm, wrote to him that they had a purchaser for it and asked him to fix his lowest price, allowing commissions. Appellee wrote, naming $225 per acre as his "lowest net price," and saying: "Whatever your price for selling may be must be added to this." There was no further correspondence and nothing further was ever said by appellants to appellee as to the sale of the farm. Four months after the passing of the letters appellee sold the farm *for* $200 *per acre* to the person with whom appellants were negotiating for its sale, but with whom they never made any contract. In this action by appellants against appellee to recover commissions for making the sale, *Held*—That upon proof of the facts stated the court did not err in giving a peremptory instruction for defendant. As appellants do not show that they ever procured a purchaser on the terms named, or have, by the wrongful act of appellee, been prevented from so doing, they can not recover.

O'Neal, Phelps & Pryor for appellants; W. W. Thum for appellee.

Gosnell, &c. v. City of Louisville.

Parkland Improvement Co. v. Gosnell, &c.

Filed February 15, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

Digitized by Google

1. *Assessments for street improvements*—The requirement in an ordinance contract for the improvement of a street that "the pavement and the material composing the same shall be kept in good repair for the period of five years from the completion of the work and its acceptance by the general council" does not bind the contractor to do more than remedy the defects in his work as they may appear or develop, and in no way compels him to keep the street in repair; and as he can not be presumed to add that expense to the estimate, the abutting property owner, in paying his assessment for street building, pays nothing, either directly or indirectly, for repairs.

2. *Same*—Even if the provision quoted binds the abutting property owner to contribute to keep up the repairs on the street for five years, yet as it is not so interwoven with the other provisions of the ordinance as to vitiate the whole, the contractor is still entitled to recover except to the extent the defendant's assessment has been increased on that account. And as there is nothing in the petition to show that there has been any increase in defendant's assessment on that account a demurrer to the petition was properly overruled.

Lane & Burnett for Gosnell, &c.; H. S. Barker for city; William Krieger for Parkland Improvement Co.

Brannin, trustee, &c. v. Wigginton.

Filed February 15, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

New trial—Newly discovered evidence—In this action by a landlord against his tenant to recover rent the defense was that the plaintiff had agreed to release defendant and look to a sub-tenant for the rent. The jury having found a verdict for defendant the plaintiff moved for a new trial upon the ground of newly discovered evidence which consisted of a writing executed by the sub-tenant to the plaintiff admitting that he was "wrongfully occupying said property and claiming same as sub-tenant," and agreeing to surrender possession at a certain time. The sub-tenant had testified that he had delivered to plaintiff a writing agreeing to give peaceable possession and plaintiff denied it. *Held*—That even if the new evidence was of such a certain and convincing character as to probably change the result upon another trial, yet as plaintiff failed to show proper diligence the motion was overruled. The fact that the writing was mislaid and that plaintiff had forgotten it does not help the case.

Simrall & Bodley for appellants; J. E. Gaither for appellee.

Mt. Sterling and Owingsville T. R. Co. v. Hamilton, &c.

Filed February 15, 1893. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Barbour, affirming

1. *Contract granting privilege to one and his "family" to travel free of toll*—Under a contract made by a turnpike road company with H., the owner of a farm bordering on the road, agreeing to allow him "and his family the free use of the road forever," the right to travel free of toll should be restricted to those who were members of H.'s family when the contract was made. The contract does not run with the land.

2. *Introduction of testimony*—In this action by a turnpike company to recover tolls, as the lessee of the road was the real plaintiff in the case, the court did not err in refusing to permit him to testify in chief after he had introduced other testimony in chief.

3. *Res adjudicata*—This court is bound by the law of the case, as laid down in the opinion on a former appeal.

Wm. Lindsay and Wood & Day for appellant; Turner & Son, Young & Young, Tyler & Apperson and J. M. Elliott for appellees.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. APRIL 15, 1893. No. 20

KENTUCKY COURT OF APPEALS.

LLOYD, TRUSTEE, v. WAGNER, ASS'EE, &C.

SAME V. SAME.

HARPER'S TRUSTEE V. WAGNER, ASS'EE, &C.

SAME V. SAME.

(*Filed Jan.* 28, 1893.)

1. *Insolvent corporation—Claim of president on account of interest coupons paid by himself*—Where a corporation issued bonds with interest coupons attached, and after the insolvency of the corporation a number of such uncanceled coupons were found in the possession of its president, his claim against the corporation for the amount of those coupons, upon the ground that he had paid them out of his own means, can not, under all the circumstances, be sustained, it appearing that there was on the books of a bank of which he was the vice-president and chief managing officer a large sum to the credit of the corporation of which he was president, and that the coupons were paid in the ordinary course of business. Nor can he be heard to say, with this bank under his management, that the credit thus appearing was a fictitious one, and that memoranda in the vaults of the bank show that the corporation was indebted to the bank in a much larger sum; and, even if those memoranda be considered, it must be assumed that the charges which thus appear were for sums which went to pay the coupons or to reimburse the president of the corporation after he had paid them.

2. *Judicial sales—Resale of property*—The chancellor had the power to order a resale of property which had been sold under decree, the purchaser having failed to pay the purchase money notes.

H. P. Lloyd and C. L. Raison, jr., for appellants.

Chas. J. Helm and Geo. Washington for appellees.

Appeal from Campbell Chancery Court.

Digitized by Google

Opinion of the court by Judge Pryor.

Edward Harper, on the 21st of June, 1887, then living in the State of Ohio, in the city of Cincinnati, made an individual assignment of all of his estate for the benefit of creditors. The assignee appointed by the deed declined to act and resigned, when the present appellant, Harlan P. Lloyd, qualified in his stead, having all the rights and powers of the original trustee.

On the same day the corporation known as the Swift Iron & Steel Works made an assignment for the benefit of its creditors to one Adam Wagner, who qualified and took charge of the corporate property.

The first assignment (by Harper) was made in Ohio, and that of the corporation in this State, the corporation doing business in the city of Newport. The assignee of the corporation filed an action in July, 1887, in the circuit court of Campbell county against the corporation and its creditors for a settlement of the corporate estate, and obtained an injunction against the creditors preventing them from suing or further prosecuting actions against the corporation, one John Lapp having already instituted an action against the corporation.

On the 15th of January, in the year 1876, the Swift Iron & Steel Works executed a mortgage on the whole of its property to Samuel F. Cary and John H. Morton, to secure the payment of certain first mortgage bonds that had been issued by the corporation, numbering from one to twenty and each bond for $5,000, payable in twenty years, with coupons attached of $200 each for the semi-annual interest on these bonds. Almira Swift held and owned eighteen of the bonds, and L. T. Hubbard two of the bonds. The mortgage, the bonds and, as is contended, the coupons, amounting to $24,000, were unpaid at the time the Swift Iron & Steel Works made the assignment.

There is no question in regard to the validity of the bonds and their nonpayment.

Edward Harper, at the date of his individual assignment in Ohio, owned a large portion of the stock of the corporation and was its president. The trustees under the mortgage came into the chancery court in the action by the assignee, and, by proper pleadings, set up their mortgage lien, asking for a sale of the property to satisfy these bonds and the interest. Lloyd, the assignee of the individual estate of Harper, came into the case and claimed that from time to time the latter had advanced out of his own means and purchased of the holders maturing coupons to the extent of $24,000, or at least only asserts a right to that amount in this controversy.

His claim was presented to the master upon the general order of reference, and was allowed as an unpreferred claim; but upon exceptions to the report by other creditors the entire claim for the coupons was rejected and the report confirmed. From that order this appeal is prosecuted.

There is some question as to the character of the pleadings, and whether or not a final judgment was rendered from which an appeal could be taken. It seems that the appellant (Lloyd) attempted to get in the case by a petition, setting up the facts relating to his claim, and the filing of his petition refused, still it appears that his claim was presented to the master, proof heard upon it and the claim allowed; and afterwards exceptions were filed to the report and sustained, rejecting his claim. We will, therefore, treat the claim as having been presented to the master in the ordinary way; its allow-

Digitized by Google

ance by him and its rejection by the circuit court, from which this appeal was taken.

We think the order made allowing the appellant by consent to be made a party, and his petition taken as his answer, had reference to an independent claim for rent that had been offered before the claim for the coupons was asserted, and, therefore, can have no bearing on the question now presented.

These coupons were made payable to bearer, and at the Third National Bank of Cincinnati, Ohio, and when they fell due the money was paid by the teller or the cashier to the holders of these bonds. The coupons were never canceled, but were, no doubt, believed by the holders to have been paid by the corporation. Matthews, however, its treasurer, says that the money to take up these coupons was furnished him by Harper, and he generally paid in currency and not in checks; that the steel works never furnished the money to him on his individual account to take up these coupons *to my knowledge, not directly;* that he delivered the coupons to Harper when he took them in, and it appears from the testimony that they were found in Harper's papers, after the assignment, in an envelope marked "*personal property of E. L. Harper.*"

The books of the corporation also conduce to show that the corporation was largely indebted to Harper, and yet there is so much mystery in regard to this case, or the claim of Harper to these coupons, as must make the chancellor reluctant to place him in a position where he can swallow up the assets of the corporation by reason of claims that every one had reason to suppose had been paid.

If he took up the coupons he did so without seeking to transfer or making known to the holders that he was advancing the money for the corporation; and while the mere possession of such paper would ordinarily authorize the presumption of their having been purchased, but when found in the possession of one whose duty it was to see that the corporation paid the coupons, we are not willing to recognize such a doctrine. Besides, it is singular that no one connected with the corporation knew that these advances were being made for its benefit, or that no credit was given Harper on the books for the corporation out of his own means, and equally remarkable that these coupons would be paid off in currency, when it is shown that Harper had a large credit to his account in the Cincinnati banks and in the Fidelity Bank, of which he was the vice-president and chief managing officer, and in which the bank account of the corporation, for some years before the assignment, had been kept.

He, in fact, owned the corporate property, and when it comes to be insolvent he meets the creditor of the corporation with the statement that these liens upon the property of the corporation I have extinguished, not from the means of the corporation, but from my own pocket, and, therefore, I hold a prior lien—a payment made without the knowledge of the members of the corporation, and certainly not at their instance or direction, and to the holders of the bonds, who believed the paper was thereby extinguished.

In the years 1886 and 1887 the books of the Fidelity National Bank showed a credit balance to the corporation of near $125,000, and yet it appears from the testimony of the teller that if the cash memorandums held by the bank against the Swift Iron Works had been charged up to the corporation the debt of the corporation to the bank would have amounted to $274,000, and that the credit on the bank's books given to the corporation consisted of checks on banks and funds drawn by the corporation, who were in no manner indebted to it. What was done with all this money drawn from the bank, and evi-

Digitized by Google

denced by these memorandums, does not appear, and the presumption is that the process of withdrawal had been going on for some length of time, and no charge made against the corporation for this large sum that must have been made up of many items.

The corporation may not have paid the coupons from its own treasury, but the large drafts from the Fidelity Bank, and charged by mere memorandums to the iron and steel works, accounts, doubtless, for the manner in which the money was obtained, either to pay the coupons as they become due or to reimburse Harper in the amount already expended by him. The president of the one corporation and the vice-president and chief manager of the other, having both under his control, must be presumed, under the circumstances of this case, to have paid, or ordered this money paid, to the holders of the coupons as the corporation money, and in full satisfaction of the several demands.

There is nothing in this case to imply a sale or to authorize this court to hold that any purchase was ever made by Harper from Mrs. Swift, the holder of the bonds, nor can Harper be substituted to the rights of the holder under the doctrine of subrogation. It is said in the text-books that this doctrine flows from a principle of natural justice, and is a pure equity by which one who pays a debt is substituted to the rights of another. (Sheldon on Subrogation, 2, 3.)

It may be insisted that the payment of these coupons was made by Harper, out of his own means, to protect his own interests, or that of the corporation in which he was so vitally interested; and while that may be true when applied to a state of case where intervening rights are affected, it can not operate as against creditors in favor of one who, as president of a corporation and without the consent of the corporation or the directors, voluntarily places himself in a position where, if the corporation remains solvent, the claims are paid, and, if insolvent, he comes in with a lien over the creditors who have been confiding in the proper management of a corporation of which Harper was the president and owner of four-fifths of the stock. This case is unlike that of Ketchum v. Duncan, 96 U. S., 659. In that case William Duncan, of the firm of Duncan, Sherman & Co., notified the company owning these coupons that they would purchase, on their own account, sterling coupons payable in London. The firm also telegraphed to the Bank of Mobile and to the Union Bank of London to purchase the coupons there presented for them, charging them with the amount, and transmitting the coupons uncancelled. This was done. The railway company had no funds to meet the coupons. The banks were repaid by Sherman & Co. the amount advanced for the coupons, and it never, says the court, was intended by the firm of Sherman & Co. that this should be regarded as a payment by the company of its coupons; and yet in that case four of the judges dissented from the majority opinion. The doctrine announced in the case of Duncomb v. R. R. Co., 84 N. Y., —, to which we have been referred, where the president of the railway company received, as a collateral, the bonds of the company to secure a debt honestly due him, we regard as sound; but the difference in the facts of that case and the one before us is so manifest that the decision of the one case can in no wise control the decision in the other.

The vaults of the Fidelity National Bank were open to Harper. In that bank was kept the accounts of the Swift Iron & Steel Works, and the large amount of currency, evidenced by the various memoranda, drawn out by the corporation may have found its way to the Third National Bank, as before stated, in payment of these

Digitized by Google

coupons, or to reimburse Harper what sums he had previously advanced for the corporation. Harper must have withdrawn this money without a check or an entry on the books of the Fidelity Bank; and with a credit on the books of the bank of near $190,000 in favor of the Kentucky corporation, the chancellor is told that this is merely fictitious, and if he will go to the drawers of the bank he will find the steel works, as is evidenced by memoranda, is indebted to the bank in a sum exceeding $200,000.

Harper, with the management of that bank under his control, ought not to be heard to say that the credit given the iron and steel works on its books was fictitious, but this court should argue, as the chancellor below did, that trust money paid was the money of the corporation, and not Harper's. Besides, the testimony of Matthews, the treasurer of the corporation, in speaking of the payment by Harper, says that he knows of no money having been furnished by the corporation *directly* to pay these coupons; and what he means by the expression is difficult to determine, and we think it evident there is an absence of all such equity in Harper's claim as would place him in advance of any creditor of the corporation, or that would authorize the chancellor to allow it as against the corporation.

There is another appeal on this record, in which the creditors are complaining, or the corporation, of the act of the chancellor in ordering a resale of this corporate property to satisfy one of the purchase money notes. The property of the corporation had been sold during the litigation, and the order of resale seems to have been made by consent. We see no reason why the chancellor could not resell the property. It left the securities in the purchase money bonds liable for any deficit, and it is the constant practice of courts of chancery to resell where the purchaser fails to pay.

There is a second appeal filed in this case in August, 1891, from a judgment refusing to allow two lists of coupons, amounting to $8,000, to the assignee of Harper, the controversy being between the wife of Harper, the assignee of the iron works, and the appellant, Loyd, as trustee of Harper. The same evidence applies in this case as in the first appeal. There is no cross appeal, but it is evident that Lloyd, as trustee, has no lien over the general creditors, and equally plain that he is not entitled to recover on the many checks issued by the iron works, payable to its own order, and found in his (Harper's) possession.

The judgments appealed from on the appeals of August 17, 1891, are both affirmed, as well as the judgments from which the first appeal was taken—in other words, the judgments from which all the appeals are taken are affirmed.

Judge Pryor delivered the following response to a petition for rehearing:

It is somewhat remarkable that, in a well-considered, exhaustive and pursuasive brief by counsel, that nothing is said about the Harris claim, amounting to many thousand dollars. That which is now contended involved more than any other branch of the case is overlooked by both the court and counsel, if the petition for a rehearing is to prevail. If the Harris case is here, and the appellant insists it is, the rejection by the master of the claims asserted by Harris and Lloyd, trustee, and his report confirmed, should end the controversy. Lloyd, trustee, as we suppose, is litigating this Harris claim in the court below by proper proceedings. He has not filed any affidavit

Digitized by Google

or made proof sufficient to authorize these claims to be allowed him. His case is not here, and the labor of examining such a record so as to correctly understand what is necessarily involved is of itself a sufficient burden, without imposing upon the court the additional burden of trying to ascertain whether or not counsel is correct in saying that the court has overlocked such an important item as a claim made up of many vouchers of $116,000. We must say that there is nothing, so far as appears from this record, entitling Lloyd to this money on the Harris vouchers. What may appear hereafter is a different question.

Petition overruled.

BRANNIN, BRAND & GLOVER V. BROADDUS, &C.

(*Filed Feb.* 7, 1893.)

1. *Authority of sheriff to cry bid of absent party—Sales*—Where a sheriff is verbally requested by the plaintiff in an execution to cry at an execution sale of land by the sheriff to satisfy same, the amount of his debt, interest and costs for the land, and to sell it to him if no one bids more, the sheriff making the sale may cry such bid in the absence of the plaintiff, and the sale to such absent plaintiff is not void.

2. *Liens—Fraudulent conveyances*—Four days before the sale of a son's undivided interest in remainder in a tract of land by a sheriff to satisfy an execution in his hands the son conveyed his interest therein to his mother, as is alleged, for a valuable consideration. The mother owned previously a life estate in said land, and subsequently sold the entire tract to certain innocent purchasers, who paid full value therefor, and had no notice of the levy and sale by the sheriff. The plaintiff in the execution purchased the son's undivided interest at the sheriff's sale at an inadequate price and now seeks to have the deed from the son to his mother set aside as fraudulent. *Held*—Since the land is now in the hands of innocent purchasers for value from the mother, and there is much evidence conducing to show that the mother and son had no notice of the sheriff's levy and sale and of the good faith of the transaction between them, the deed by the son will not be set aside but will be held inferior to the lien acquired by the plaintiffs in the execution on the son's interest in the land under the levy of the execution thereon. The land is in lien to satisfy the amount of such debt, interest and costs.

Stone & Sudduth for appellants.

Wood & Day for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hazelrigg.

The sheriff of Montgomery county, on August 13, 1885, levied an execution in favor of Brannin, Brand & Glover against John R. Broaddus, on the undivided interest in remainder of the defendant in a tract of some 152 acres of land, and after one advertisement sold the same on September 21, 1885, to the plaintiffs in the execution.

The life estate was owned by Mrs. C. A. Broaddus, and the interest of defendant, who was her son, was the one undivided one-fifth therein.

The plaintiffs in the execution, who are the appellants here, were not present at the sale either in person or by attorney, but prior to the day of sale their attorney said to the deputy sheriff "that when he offered said interest for sale under said execution to cry the

Digitized by Google

amount of plaintiffs' bid for the amount of their debt on the day of sale for the whole of said interest, if no one else would bid that amount for same, and to knock it off to plaintiffs if no one else would bid that amount for it."

The sheriff did as directed. The purchase price of the land was less than two-thirds of its appraised value, and after the expiration of a year the appellants caused the sheriff to make them a deed therefor. This was made on the 11th day of April, 1887.

The value of the whole tract, as shown by the investment under the orders of the Madison Court of Common Pleas, was about $7,500, and the defendants' interest, not estimating the value of the life tenancy of his mother, who was about 68 or 69 years of age in 1889, was worth some $1,500. The plaintiffs' bid was $302.18. On the 17th of September, 1885, the defendant in the execution, J. R. Broaddus, who was then living in Owen county, Ky., came to Montgomery county, and without notice, as he alleges, at the issual of the execution or its levy, conveyed to his mother, Mrs. C. A. Broaddus, his interest in the land, and in this conveyance recites that it was made in pursuance of a written contract, dated September 15, 1884, binding himself to convey said land to her by reason of certain considerations passing between them. He had rented the entire tract from his mother in 1883, for which he was owing her something, and again in 1884, and for this year owed her some $600.

It is evident that after applying some credits for sale of crops he owed her in the fall of 1884 some $500 or $600; and the writing referred to in the deed of September 17, 1885, was executed as a "security" for said rental or a deed for the interest in case he did not pay the rent.

The deed of September 17, 1885, was indorsed on its back, "Acknowledged by J. R. Broaddus, September 17, 1885. Priest, clerk; tax paid September 18, 1885. T. P. Priest, clerk, by J. C. Brown, D. C."

It was brought to the clerk's office by an attorney, who paid the tax, and who told the clerk that he would come in afterwards and order it recorded if he wished it recorded, and he appears in this record as attorney for Mrs. C. A. Broaddus.

The alleged written contract of September 15, 1884, the existence and date of which is somewhat confusedly testified to by J. R. Broaddus, was burned, it is claimed, with the house on said farm, in September, 1884. And notwithstanding the request of the mother to that effect, no deed was made to her in pursuance of that writing until September 17, 1885, as shown above.

On November 11, 1885, the appellee, L. C. Kash, by written contract bought the entire tract of 152 acres from Mrs. C. A. Broaddus for the sum of $7,500, of which he was to pay, on January 2, 1886, $1,500, and to execute his notes, due in 1, 2, 3 and 4 years, respectively, and was to have a deed therefor upon making the first cash payment, which he did, and obtained a conveyance as provided for.

He obtained possession of the lands as tenant in March, 1885, and says that more than two months before the execution of the writing of September 11, 1885, he bought the land by an oral purchase from Mrs. Broaddus, who had become the owner in fee of said land, and that he was in the actual adverse possession thereof from that time on, and had no notice whatever of the levy on the land or its sale under any execution.

His four notes for $1,500 each, payable to Mrs. Broaddus on March 1, '87, '88, '89 and '90, were all paid by G. W. Goodpaster on the 19th

Digitized by Google

of July, 1888. Goodpaster appears to have bought the land from Kash, and hence paid the unpaid purchase money notes to J. G. Trimble, the owner of them by purchase from Mrs. Broaddus.

Upon this state of case the appellants, Brannin, &c., brought this action in equity on March 16, 1886, against J. R. & C. A. Broaddus, and to their suit Kash was subsequently made a party defendant, asking that the deed of September 17, 1885, of J. R. to Mrs. C. A. Broaddus be set aside as fraudulent; that their purchase under the execution sale of September 21, 1885, be upheld, and their right and title to said interest be quieted; and praying further if this relief be refused that the execution sale be set aside and their judgment debt be adjudged unsatisfied.

The defendants set up their claims and equities as foreshadowed herein, and upon preparation and hearing the chancellor adjudged that the deed from defendant, J. R., to C. A. Broaddus, of September 17, 1885, was fraudulent and void as to the plaintiffs; that the plaintiffs, by their purchase at the execution sale of September 21, 1885, took nothing, and that the deed of the sheriff to them was void and passed no title, but adjudged plaintiffs a prior lien on said interest by virtue of their levy, and ordered a sale for their benefit.

From this judgment Brannin, &c., have appealed, because their purchase under the execution sale was not sustained, and they were not given the land, and Kash, Goodpaster, &c., complain by cross appeal because the deed of September 17, 1885, from J. R. to C. A. Broaddus was set aside as fraudulent.

The legal inability of the sheriff to cry the bid of the plaintiffs in the execution, and the consequent nullity of the deed made by him in pursuance of such bid, is sought to be established on the authority of Stapp v. Toler, 3 Bibb, 450, where a sheriff himself bought a slave sold under an execution sale made by him. The sale was held invalid in the absence of a statute to that effect by reason of the obvious absurdity and palpable incongruity of the sheriff uniting in himself the inconsistent characters of both seller and purchaser, and it may be added that such a transaction would now be in direct conflict with section 8, article 15, chapter 38, General Statutes, which provides that "no officer shall directly or indirectly bid for or buy any property which may be sold under an execution by his deputy or principal or by his co-deputy."

But is this a case where the officer either bids or buys the property in the meaning of the statutes? Does it not mean bid or buy for himself?

The case of Dixon v. Sharp, 1 A. K. Marshall, 211, is also relied on by appellees and is nearer in point. It was there held that a sheriff could not bid for a purchase at a sale of land made by him, but this court commented on that case in Mullens, &c. v. Buskirk, decided on January 19, 1884 (5 Ky. Law Rep., 605), and held that where the sheriff was authorized by a letter from the plaintiffs in the execution to bid or cry the debt, interest and costs for the land, if no one else did so, the bid was one made by the parties themselves and not by the sheriff, and the crying of the bid as authorized was neither a violation of the letter or spirit of the statute.

In this case the authorization was not in writing, but was none the less specific and direct. No discretion was given the sheriff in crying the specified bid. He was not left to bid as much or as little as he pleased, as we inier may have been the case in Dixon v. Sharp, *supra*. It does not appear that Sharp in that case made any bid or left any with the sheriff or authorized the sheriff to make any for him.

Digitized by Google

We perceive no reason why a plaintiff may not leave a specific bid with the officer, which the latter may cry, without violating a statute which simply prohibits him in his own behalf from buying or bidding for property at his own sales.

It is laid down in Freeman on Executions, section 292, that this doctrine that a sheriff can not act as agent for another in making a sale "was not to be extended to cases where he is authorized to offer a specified amount in behalf of the absent bidder."

But in this case, while the strictly legal right obtained by plaintiffs might be upheld as indicated, the appellees show themselves to have been without notice of the levy in the country, and sale of the property, and to have bought and paid for same under the apprehension that it equitably belonged to Mrs. C. A. Broaddus under her written contract with J. R. Broaddus of September, 1884, and the legal title to which was attempted to be perfected by the conveyance of September 17, 1885.

The appellee. J. R. Broaddus, while he was indefinite as to dates, testified most earnestly to the good faith manifested by the parties, and to the fact that the writing was in existence so securing his mother, but was burned in 1884, and while such proof may not be sufficient to raise a prior equity in behalf of appellees as against the appellants' purchase, yet the facts and circumstances showing good faith on their part entitle them to equitable consideration. This is a suit in equity, and we are not disposed to hold that the deed of September 17, 1885, was, in fact, fraudulent, and conferred no equitable interest on the grantee, although certainly inoperative to defeat the plaintiffs' demand.

While the deed may be set aside at the suit of the appellants, it must be done on equitable terms and with due regard to the equities of the innocent grantee therein and the parties holding under her.

The judgment of the chancellor giving a prior lien to the appellants on the interest in question for the full amount of their debt, interest and costs effects this end, and will, therefore, be affirmed.

HIGGINS V. COMMONWEALTH.

(*Filed Feb.* 11, 1893.)

1. *Indictments—Unlawful detention of female*—Where a statute denounces the "unlawful" commission of a certain act as a felony, an indictment for such offense need not allege that the act was done maliciously, willfully or feloniously; it is sufficient if it alleges that the accused unlawfully committed such act. The rule is otherwise as to common law crimes.

An indictment charging that the accused "unlawfully" detained a certain female for the purpose of having carnal knowledge with her, etc., is sufficient; it is not necessary that it should be averred that the accused acted "feloniously."

2. *Same—Insanity—Instructions*—Where the victim of the alleged unlawful detention, etc., was an insane woman, an instruction that any act done toward the alleged victim by the defendant, other than acts of kindness, courtesy or friendship, was in law "done against her will," was proper.

An insane woman may be the victim of such an offense as well as a sane one.

3. *Criminal law—Right of defendant to change of venue*—When the defendant files a petition for a change of venue containing the allegations required by law therefor, and supports it by the affidavits of two credible witnesses,

Digitized by Google

and no other testimony is introduced or offered by either the Commonwealth or the defendant, the change of venue must be granted.

The amendment of April 1, 1880, to section 2, article 4, chapter 12, General Statutes, did not so change the law concerning application by defendant for change of venue as to make the granting or refusal of the change a matter entirely within the discretion of the trial court. If the allegation of the petition for the change, and of the affidavits accompanying it, are not controverted by the Commonwealth, the trial court has no discretion except to grant the change.

W. A. Morrow, J. W. Colyer and C. H. Blackburn for appellant.

W. J. Hendrick for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was tried, convicted and sentenced to the penitentiary for the term of two years, upon an indictment under section 9, article 4, chapter 29 of the General Statutes, which provides that "whoever shall unlawfully take or detain any woman against her will, with intent * * to have carnal knowledge with her, * * * shall be confined in the penitentiary not less than two nor more than seven years."

On this appeal he urges as grounds for reversal, first, the omission of the word "feloniously" in the indictment.

To this it is sufficient to say that the acts mentioned in the statute quoted, when unlawfully done, constitute the whole of the crime denounced therein. It need not be charged of the accused that he acted maliciously, willfully or feloniously; if he be charged, in the language of the statute creating the crime, and in the manner required by it, then the charge is complete and includes all that is required to be established in order to constitute the guilt of the accused. In common law felonies the rule is different. (Kaelin v. Commonwealth, 84 Ky., 354; Cundiff v. Commonwealth, 86 Ky., 196.)

Secondly. The appellant's counsel contend that the statute has no application in this case because of the insanity of the victim alleged to have been unlawfully detained; that the crime must be committed against a woman having a will capable of exercising it, and "against her will."

But the authority relied on happily stops far short of supporting such an inhumane and unreasonable doctrine.

The generous principle of the law governing the case was aptly illustrated in the instruction of the lower court, whereby the jury was told that any act done toward the alleged victim by the defendant, other than acts of kindness, courtesy or friendship, were done "against her will."

But the appellant, after due notice, filed his petition for a change of venue, alleging that on account of the prejudice against him and the excited state of public opinion, he could not have a fair and impartial trial in Pulaski county. He supported his petition with the affidavits of two credible witnesses, all in strict accordance with the requirements of section 2, article 4, chapter 12 of the General Statutes. No other testimony was introduced or offered by either party.

The court overruled the motion, dismissed his petition and application for removal, and of this he complains.

For the Commonwealth it is insisted that since the statutory

Digitized by Google

amendment of April 1, 1880, the question of removal is one of discretion with the court; whereas, theretofore it was absolutely incumbent on it to order the change whenever the defendant complied with the requirements of the statute.

The amendment reads: "And the court shall, on said motion, hear all witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to change of venue."

It is evident that the object of this amendment was to give the State an opportunity of combatting the *prima facie* case presented by the petition of the defendant and the affidavits of his friends. If this opportunity is not embraced the court has no discretion.

While the question was not directly presented, Judge Holt, in delivering the opinion of the court, in Wilkerson v. Commonwealth, 88 Ky., 25, says: "Undoubtedly, if an accused, under the law as amended, presents his petition, accompanied by the two or more affidavits, and no witnesses are introduced in court by either party, the change of venue should be granted."

We think that the appellant was clearly entitled, on the state of case presented, to have his petition for removal granted.

While the same proof may not be offered in the case on its return, it is proper to say that the testimony of Trimble as to the condition of the room on the day following the trouble in question was improper. This room was exposed and used at all hours of the day and night, and its "torn-up" condition twenty-four hours after the occurrence proves nothing; but in view of Clark's testimony might be misleading and prejudicial.

We perceive no error in the instructions of the court, and think they embrace the law of the case.

For the reasons indicated the judgment below is reversed and cause remanded, with directions to grant the appellant a new trial, and for proceedings consistent with this opinion.

HALL V. COMMONWEALTH.

(*Filed Feb.* 11, 1893—*Not to be reported.*)

Indictments—An indictment for grand larceny, which stated that the defendant did unlawfully and feloniously take and carry away certain money, which is described, personal property of B., with the intention of appropriating the same to defendant's use, and of depriving B. permanently of the same, is sufficiently clear as to the person from whom the money is charged to have been taken, and as to a taking without the consent of the owner. It states facts that constitute a public offense.

B. G. Williams for appellant.

W. J. Hendrick for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

The only ground for reversal urged by counsel in this case is that the facts stated in the indictment do not constitute a public offense.

The particular defects of the indictment suggested in argument are an omission of a statement of the person from whom the property was taken, and whether it was done with or without consent.

Digitized by Google

The offense charged is grand larceny, stated to have been committed by the defendant unlawfully and feloniously taking and carrying away money described, personal property of Mary Burns, with intention of appropriating the same to defendant's use, and depriving Mary Burns permanently of its use.

It seems to us the language is too plain and explicit to admit of a doubt in the mind of a person of common understanding about either the person from whom the money was taken, or whether it was taken with or without the consent of the owner.

Judgment affirmed.

McMEEKIN v. SMITH.

(*Filed Feb.* 11, 1893—*Not to be reported.*)

A devise to daughters and the heirs of their bodies by a father would have vested an estate tail in the daughters under the common law, which is by statute converted into a fee simple estate in this State. And this was the evident intention of the testator, as is manifest when the whole of the will is considered together.

John D. Carroll for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Pryor.

The words *heirs of their bodies* created an estate tail by the rule of common law, and by our statute such an estate is converted into a fee simple. The devise is to the two daughters, Mary and Henrietta, and the heirs of their bodies. The purpose of the testator was to give the fee and not to limit the estate.

The expression, "this will is given the lawful heirs of my body, many *or few*," etc., may show a purpose to confine the estate to the heirs living at the testator's death; but from a reading of the entire will his plain purpose was that his children should have the land, should his widow marry, such as were then living.

The will is awkwardly drawn, and by the testator himself, who was evidently ignorant as to the terms he was using in his devise of the estate.

The judgment below, by which the fee is in the children, is affirmed. (Johnson v. Johnson, 2 Met., 331.)

COMMONWEALTH, BY, &C. v. THE SINGER MANUFACTURING CO.

(*Filed Feb.* 14, 1893—*Not to be reported.*)

1. *Information by Auditor's Agent—Pleading*—Where information in writing is filed in a county court by the Auditor's Agent for the county against an alleged delinquent taxpayer, in which it is stated, with reasonable certainty, explicitness and definiteness, that such person was, in a certain year, the owner of designated property in the county which he failed to list for State taxation, it is the duty of the county court to fix the value of such property and assess it for taxation as required by law, unless the delinquent shows cause why this should not be done.

Information that a certain person, of September 15 of 1888 and of 1889,

Digitized by Google

was the owner of 1,000,000 feet of walnut lumber, situated in the county, of the value of $100,000, which he had failed to list for taxation for those years, was sufficiently definite and certain to authorize the county court to assess such property for taxation, in the absence of any cause shown why it should not be done.

2. *The judgment of the county court sustaining a demurrer to the information* is a judicial determination, from which an appeal may be taken to the circuit court.

Stewart & Stewart for apppellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hazelrigg.

Under the provisions of what is known as the "Auditor's Agent" act, Cline, as relator, etc., lodged information with the county court of Pike county against the appellee, alleging that it had failed and refused to give in to the assessor, or list for taxation, one million and more feet of walnut lumber, situated in said county, and worth $100,000, and had so failed and refused for the years 1888 and 1889, though it was the owner thereof on September 15th of each of said years.

After citation the company filed a demurrer to the information, because of want of authority in said relator, so far as the county was concerned, and because the information did not state a cause of action in favor of the State against the company.

The plaintiff confessed the demurrer as to the county, and the court sustained the general demurrer to the information against the State and dismissed the proceeding.

Cline, on behalf of the Commonwealth, appealed from this judgment to the circuit court. There he more specifically set out his agency and appointment under the act named; and after the case had been continued for several terms without an answer, or any showing to excuse the defendant for its alleged delinquency, the court, on the company's motion, and over the objection of the plaintiff, dismissed the proceeding and gave judgment against the State for the costs. From this judgment an appeal is prosecuted to this court.

The act in question provides, with reference to the agent, that "it shall be his duty, where any person in this Commonwealth has failed to give in his list, or a proper list of his taxable property, to give information of the same to the county court of the county where such list should have been given, and said court shall issue summons," etc.

Here the information given was by a writing, which was certainly reasonably explicit and definite.

The ownership of the property, its kind, quantity and value, and the fact that the delinquent had failed and refused to list it for the years named, or to give it in for assessment, are set out with reasonable fullness.

The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general. The citation is rather to search the conscience of one who is presumably evading the tax-gatherer.

It is the duty of each citizen to help bear the burden of taxation in common with his fellow, and equally with him, and even upon slight information that he is violating this duty the court should give him an opportunity to perform it.

The determination of the case on demurrer in the county court

Digitized by Google

was a judicial one, from which the appeal was properly taken to the circuit court, where, instead of dismissing the case, the court, on default of answer, should have determined the information sufficient, and adjudged that the county court should assess and fix the value of the property as required by law, unless good reason be shown why this should not be done.

The judgment below is *reversed.*

L. & N. R. R. Co v. Kellem's adm'x.

(*Filed Feb.* 14, 1893—*Not to be reported.*)

Willful neglect—Evidence—An employe of a railroad, when intoxicated and at 11 o'clock at night, while walking upon or attempting to cross the track, caught his foot in a cattle guard. Hearing or seeing a train approaching he threw his body and other limbs off the track, the train passed on, cutting off his foot; he died from the injury, which no one saw. In this action, *Held*—

First. The railroad was guilty of no willful neglect; the evidence does not conduce to show that deceased's peril could have been seen by those in charge of the train in time to avoid the injury.

Second. The railroad is not liable for such accident, because, at most, it was guilty of only ordinary neglect, and the deceased, by his own act, contributed to his injury.

Wm. Lindsay and H. C. Martin for appellant.

J. P. Hobson and J. C. Poston for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee's intestate, in February, 1888, died from the effect of an injury received by him by the appellant in January, 1888. The intestate left a widow and chidren. The widow, as administratrix, sued the appellant for the benefit of herself and children to recover damages for said killing. The appellee alleged two causes of action: One for the suffering and pain endured by the deceased in consequence of the injury; the other for willful neglect, causing his death.

The appellee was ruled to elect which cause of action she would proceed under, and she elected to proceed under that for willful neglect. She amended said cause of action by alleging that the deceased, at the time of his death, had a wife and children. She also set up in said amendment the suffering of the deceased in consequence of said injury.

Upon the trial of the cause the court, in substance, instructed the jury that the deceased being at the time he was injured in the employ of the appellant, the appellee could not recover damages for his death unless it was caused by the willful neglect of the appellant; but she might recover damages for his suffering the same as if he had not died, provided the injury from which he suffered was caused by the ordinary neglect of the appellant. The jury found for the appellee $3,000 in damages. The appellant's motion to instruct the jury peremptorily was overruled.

The evidence is, that about 11 o'clock at night, in January, 1888, the intestate's foot was cut off by the appellant's train at a cattle

Digitized by Google

guard near Hanson's station, in Hopkins county, Ky. No one saw the accident. There is no proof whatever of negligence on the part of the appellant. The only possible inference of negligence consists of the fact that the appellant might have seen the deceased in time to save him had it kept a proper lookout. But the whole evidence, in our opinion, dispels the idea of negligence.

The only evidence in reference to the circumstances of the deceased getting hurt is furnished by himself, in detailing them during his sickness, as follows: Mr. Powell says the deceased told him that he was getting out of the way of some men who were in the edge of the woods and trying to kill him (he had evidently been drinking hard), and in attempting to cross the track, before the train got to him, he fell into the cattle guard and got his foot hung, and he threw his body out to one side and the train ran over his leg, cutting off his foot.

Dyer, the conductor on the morning train that picked up the deceased, says the deceased said that he was trying to get away from some men that were after him with ropes, and he got his foot hung in the cattle guard and the train was too close on him to get his foot out.

The priest that attended the deceased during his suffering says that the deceased told him that he got his foot hung in the cattle guard, that caused the train to run over him.

The only rational solution is that the deceased, while walking on the track or attempting to cross it, got his foot hung in the cattle guard, near the rail, and seeing or hearing the train coming, and being unable to extricate his foot, he threw his body off the track into the cattle guard and the train cut his foot off, showing that his foot got hung very near the rail and his other limbs and entire body were off the track.

As said, there is no evidence that contradicts the statements of the deceased as to the circumstances of his getting hurt; and we fail in toto to see any evidence of negligence on the part of the appellant.

The evidence alluded to did not authorize the jury to believe that the appellant saw the deceased standing or walking on the track in time to stop it; but the legitimate and rational inference is that the deceased, upon seeing or hearing the train, threw his body from the track before the train got to him, and it passed on without his being seen, and no negligence, under the circumstances proven, should be attributed to the officers in charge for not seeing him. But if the appellant was guilty of any negligence, it was that of ordinary negligence, for which the appellee can not recover, first, because the deceased was in the employ of the appellant; second, because the deceased, by his own negligence, contributed to the injury.

The judgment is reversed, with directions to proceed consistently with this opinion.

SWEARINGEN'S EX'TX V. NASH, &C.

(*Filed Feb.* 16, 1893—*Not to be reported.*)

1. *The distribution of personal property is determined by the law of the decedent's domicile* at the time of his death. Therefore, when a citizen of Texas died entitled to a vested remainder in personalty, which was located in Kentucky and being used by a life tenant, a resident of Kentucky, the law of Texas regulates the mode of distribution of such vested interest.

Digitized by Google

2. *Same—Devise*—Where a testator who bequeathed the income of his estate during the life of his widow to certain legatees, upon stated conditions, and directed that any surplus of the income remaining after satisfying such bequests should be divided equally between his two sisters, with remainder of the estate to his two sisters and their children, and one of the sisters dies before the distribution of an accumulated surplus of the income, leaving a son who dies before such distribution, a resident of Texas, the son's interest in such surplus, whether he takes by descent from his mother or as devisee under the will, is a vested remainder in personalty, which passes under the law of Texas to his widow.

J. C. Beckham and L. A. Weakley for appellant.

Geo. Nicholas, jr., for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

Reuben Swearingen, of the county of Shelby, died testate, leaving a considerable estate, and directing John A. Middleton, who was made his executor, to manage it and apply the income, after paying expenses, etc., in the manner directed by the provisions of the will. His estate is not to be finally distributed until the death of his wife, who survived him.

He had no children, and first directed his executor how to dispose of the income of his estate that he was directed to manage and control after his (testator's) death. By the fourth clause of his will he gives to his widow five-eighths of the income; but if she marries she is entitled to only one-third of the income from that date (the time of the marriage). He then, by the fifth clause of the will, directs his executor to apply the remaining three-eighths of the income, from time to time, as may be needed, to the education and support of Arabella Bennefield, who is to have her one-eighth until she marries; to Daniel Bennefield his one-eighth until he is twenty-one, and to Herman Brann one-eighth until he is twenty-one; and provides "that *neither one of the three shall, for any year, receive more than one-eighth of the income of my estate.*"

The sixth clause provides: "Whenever, from time to time, as any surplus of income may arise under the provisions of the foregoing bequests, the same shall be divided, as it arises, between my sisters, Susan Young and Mary Majors."

It was the income of the entire estate the testator was disposing of. He had given to his widow five-eighths, but, if she married, one-third. He had given to three of his kinsmen one-eighth each, or rather directed his executor to apply as much of the devise of one-eighth to his three kinsmen as might be needed, from time to time, for their support and maintenance. He had then disposed of the whole of his income on certain conditions.

If his wife remained his widow she took five-eighths; if the one-eighth devised to each of his three relatives (three-eighths in all) was needed for their support and education, the entire income was disposed of. But the widow married, and this left seven twenty-fourths of the income in the executor's hands; and if the other three-eighths were not expended during the period fixed at which the devise was to end, then there was a surplus left of that part of the income; but proceeding on the theory that it took the whole of the devise to educate and support the three relatives, there was, from the date of the widow's marriage, seven twenty-fourths of the income going to his two sisters under the sixth clause; and if any of

Digitized by Google

the income was left of the devise of the three-eighths, or of the eighths devised to either one of the relatives, that went also to the two sisters.

The eighth devised to Arabella ceased when she married, and to the two young men on their arrival at twenty-one, and when these devises ceased the two sisters were entitled to one-third each of the income.

If the executor expended the one-eighth income to each he should not be held liable on the ground that it was too great an expenditure, and we have not examined the accounts to ascertain whether it was all expended or not. All the income not given to the widow and the three devisees named passed to the two sisters under the sixth clause of the will.

One of the sisters died (Mrs. Young), and leaving children, one of which was a son, John L. Young; he also died, after his mother, leaving no children, but a widow, surviving him. He lived in the State of Texas, and was there domiciled at his death. This was personal estate.

By the ninth clause of his will he devised the residue of his estate not disposed of by the seventh clause to his two sisters, Mrs. Young and Mary Majors, in equal shares, or to their children if they be dead. Whether John L. Young inherited from his mother, or took as devisee under this last clause, it was a vested interest in him, and the residue being personal estate his widow, by the law of Texas, is entitled to what passed to him when the estate is ready to be distributed. As to the income, it passed at once, and John being entitled to one-seventh of one-third, his widow takes it.

The law of the domicile regulates the manner of distribution as to personalty, and the widow, therefore, takes her husband's interest. It was, in one sense, the estate of the devisor being distributed in the manner provided by the will, and under the law regulating the manner of taking from the devisees who died before distribution.

If the entire estate was personalty and had been devised to John L. Young, and he dying after the testator and before distribution, can there be any doubt as to the right of his widow to take? We think not.

As there was both an original and cross appeal in this case, the judgment below is reversed on original and cross appeal, and remanded, with directions to adjudge the mode of distribution in the manner indicated, and for proceedings consistent with this opinion.

L. & N. R. R. Co. v. Bonhayo.

Same v. Holtzhauer.

(*Filed Feb.* 16, 1893.)

1. *The right of a land owner to the natural lateral support of adjoining lands* is an incident to his ownership of which he can not be deprived without his consent. Therefore, where his neighbor, by excavation or otherwise, withdraws this natural support from his land, the neighbor is liable for the damages resulting to the soil from such withdrawal, whether the excavation was done prudently or carelessly is immaterial.

2. *Same*--But where the owner erects building on his land, whose weight increases the lateral pressure of his soil so that a neighbor can not use and enjoy his own adjoining land in a lawful manner without causing the land to give way or fall by reason of its unnatural pressure, the neighbor is not

Digitized by Google

liable for injury accruing to either the house or the soil, unless he used his own property in such a careless or negligent manner as to cause the injury.

3. *Same*—If the excavation of the neighbor was done carefully and prudently, but was of such a nature as to withdraw the natural support from the owner's soil, and also to cause injury to the owner's house and foundation, which latter injury was due to the increased lateral pressure caused by the weight of the house, then the neighbor is liable for the damages resulting to the soil, but not for the injury to the house.

James C. Wright for appellant.

C. L. Raison, jr., for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

The dwelling and premises of the appellee were located on or near the railway of the appellant, and the latter, in widening its road, dug and excavated the ground so as to cause the soil to slide and take from his land its natural support, thereby causing the foundation of his dwelling to give way or move from its natural position, etc.

The plaintiff, as appears from the testimony, erected his dwelling after the road was constructed, and it is pleaded, as a matter of defense, that the increased weight of plaintiff's dwelling and other acts of his in digging trenches and excavating a cellar, brought about the injury complained of. The building is erected on a hillside that slopes toward the railroad, and if the digging and blasting by the company took from the soil its natural support, resulting by reason of the act of the defendant in this injury to his property, the defendant is liable in damages for the injury sustained. This right of lateral support is an incident to the land, and one adjoining or near to has no right to so excavate and dig the soil as to deprive the land of his neighbor of this support. If the buildings erected by the plaintiff has caused this soil to slide, or the pressure on the soil by the building is such that prevented the railway company from widening its road when exercising ordinary prudence in its work, the injury to the building can not enter into the question of damages, for the reason, as said in the case of Farrand v. Marshall, 19 Barb., 380, "that he who complains of the use which another makes of his own property must himself be free from fault." It follows, therefore, that for an injury to the adjoining land by reason of an act by the defendant that deprives the land of its natural support, damages may be recovered without showing negligence on the idea that the right of property has been invaded; but where the plaintiff has erected buildings that, by their pressure, causes this natural support to give way, when the act of the defendant is only such as the owner would have the right to exercise on his own soil, no recovery can be had for either an injury to the land or the buildings upon it. (Foley v. Wyeth, 2 Allen, 131.)

Suppose, however, the defendant, by neglect, in excavating his own soil, not only removes the natural support, but also injures the buildings of his neighbor, in such a case it is plain that damages may be recovered, not only for the actual injury to the soil, but for the damage done the buildings also.

In this case it is apparent, from the testimony, that the parties in interest were complaining of the manner in which the digging and blasting was being conducted, and entertaining fears that it would result in causing the soil to slide, were told that the defendant would

Digitized by Google

see that their land was protected. It is shown that one blast of powder and dynamite threw railroad ties in every direction, broke down outhouses and fencing, and in a day or two the ground began to crack or give way, from John street, on which appellee's property is located, to York street, the crack widening until the opening was five or six inches; and one of the defendant's own witnesses states that it was this excavation that caused the soil to slide.

There is also testimony conducing to show that the house and premises of the plaintiff were in good condition before that wrong was committed, and there is but little doubt but the injury resulted from the acts of the defendant, although there is testimony tending to show that a landslide had occurred at or near this spot many years ago, and also that the digging of trenches and cellars on the premises contributed to the injury. These were questions for the jury, and the verdict must stand, unless there was some error in the instructions given. There were two instructions given, embracing the question of title and possession. The deeds exhibited included appellee's land. He had purchased, and was in the possession, and his right to maintain the action can not be questioned. The first instruction told the jury that the land of the plaintiff was entitled to this natural support, and if deprived of it by the act of the defendant, the latter is liable, unless the plaintiff or some one of the adjoining owners on the same hillside had weakened or loosened the earth by digging, ditching or excavating for cellars, or by buildings had increased the down pressure, etc., and but for which the injury would not have happened, they must find for the defendant.

The jury was further told that if the lateral support of plaintiff's soil was not removed by defendant as stated, but that the plaintiff's property was injured by the careless and negligent manner in which the blasting was conducted, and that this caused the injury, they must find for the plaintiff.

The jury was again told that if those engaged in the blasting and removal of the stone and soil were not the agents of the defendants, or their employes, or if same were not acting within the scope of their authority, they must find for the defendant. This instruction was given on the idea that Synnis, who did the work, was an independent contractor, and that the railroad company was not bound for his negligence.

Another instruction had been given on that branch of the case, and the verdict being for the plaintiff, no complaint can be made of this ruling, although we think the proof shows that the parties doing this work were mere subordinates, and acting under the advice, control and management of the company in its execution, and within the scope of their authority. The instructions are lengthy, and may contain some abstract propositions, but the substance of them are given, and we think the verdict in this case was authorized by the testimony, and, in fact, the preponderance of the testimony is with the plaintiff.

Judgment affirmed.

The opinion in this case applies also to the case of the appellee, Gustavus Holtzhauer v. L. & N. R. R. Co. The question as to whether the natural support of the plaintiff's land was removed by the appellant, and causing the injury complained of, was properly submitted to the jury, and the evidence authorized the verdict.

Judgment affirmed.

Digitized by Google

STRAUS & FRANK V. HEAD, &C.

(*Filed Feb.* 23, 1893.—*Not to be reported.*)

1. *Sale of land for taxes—Title*—A deputy sheriff, who was making a sale of certain land for taxes in 1888, caused one to purchase it for his own (deputy sheriff's) benefit. No certificate of purchase was ever issued to any one or filed in the proper office. Subsequently the deputy sheriff caused a deed for the land to be executed by a succeeding sheriff to one H., upon payment by her to him of the amount for which the land was sold, the deed reciting that H. had purchased the land at the sale. *Held*—That the sale by the deputy sheriff to himself was void, and the deed to H. passed no title to the land.

2. *Fraudulent conveyance by husband to wife—Evidence*—Although the wife owned land at the time of her marriage to her husband, which she sold upon his agreement to purchase with the proceeds other land and have it conveyed to her, yet it appears that no part of such proceeds were invested in the land involved herein, which the husband paid for and caused to be conveyed to his wife, and such conveyance is void as to the husband's creditors.

3. *Same*—A husband purchased a stock of goods, for which he gave his note. He fails to pay the note, and the vendors obtained judgment and execution on the debt. The husband traded the stock of goods for a mill, and exchanged the mill for land, which he caused to be conveyed to his wife after execution of the judgment was issued. *Held*—That the conveyance to the wife was fraudulent and void as to such execution creditors, and the land should be subjected to satisfy their debts.

W. C. McChord for appellants.

J. W. S. Clements for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Lewis.

Straus & Frank having recovered judgment against W. T. Head, and caused execution to issue that was returned "no property found," sought to enforce satisfaction by subjecting a parcel of land, the legal title of which was, at commencement of the action, in Susie Head, wife of the debtor. Her defense first made to the action is, in substance, that when married she owned a tract of land which her husband persuaded her to sell, and in consideration thereof he agreed to purchase and have conveyed to her other real property; that in persuance of the agreement he did purchase and have conveyed to her the lot of land which plaintiff is seeking to subject.

To her answer a general demurrer was sustained by the lower court, and judgment rendered according to prayer of the petition. But upon appeal to this court that judgment was reversed and cause remanded for the demurrer to be overruled.

Upon return of the case the affirmative allegations of the answer were controverted; and thereupon an amended answer was filed by Susie Head, in which she set up and relied upon a deed made to her in 1891 by the sheriff, wherein it is recited the land in question had been sold in 1888 for taxes assessed against a former owner and purchased by her.

It seems to us she acquired by the sheriff's deed no valid title to the land. It is shown by evidence of the deputy sheriff who sold the land in 1888 that he procured another person to purchase it for his (the deputy sheriff's) benefit; that no certificate of purchase was ever given to any one or filed in the proper office, and moreover

Digitized by Google

that he caused the deed to be executed by the succeeding sheriff to Susie Head, upon payment by her to him (the deputy sheriff) of the amount of taxes for which he sold the land in 1888. The recital in the deed that Susie Head purchased the land in 1888 is not true; on the contrary, the deputy sheriff sold it, and illegally purchased it for his own benefit, and, of course, could not transfer his purchase to Susie Head so as to invest her with title. There appears other fatal objections to the mode by which title was attempted to be conveyed to her, but we need not refer to them.

It is shown by her evidence that she did own, at the time of her marriage to W. T. Head, a small tract of land, which was sold under an agreement he was to purchase and have title of other land made to her. And it appears a tract was purchased and conveyed to her, but it was subsequently disposed of, and it may be the proceeds thereof were used by W. T. Head, but for what precise purpose or to what extent he so used them does not clearly appear. But the lot of land in question appears to have been acquired by him as follows: He purchased of the plaintiffs, Straus & Frank, a stock of goods, for which he gave the note they recovered the judgment for, and with the goods he purchased an interest in a mill that was exchanged with one Coffy for the lot of land now in controversy. The exchange may have been made a few days before September 8, 1888, when the execution in favor of Straus & Frank was issued and placed in the hands of the sheriff; but the deed from Coffy was not made to Susie Head until that day, nor was it delivered for several days after.

It is manifest W. T. Head disposed of his interest in the mill and procured Coffy in exchange therefor to convey the lot of land to his wife, Susie Head, in anticipation of the execution of Straus & Frank, and with fraudulent design to prevent collection of their debt; and it is equally manifest the deed from Coffy is, in meaning of the statute, a conveyance by the debtor, Head, without valuable consideration, and, therefore, void as to Straus & Frank, for the evidence does not show that W. T. Head paid for any part of the stock of goods with either his own or his wife's money. On the contrary, the note on which Straus & Frank recovered the judgment they are now trying to collect was given for the stock of goods; and as it was traded for the interest in the mill which W. T. Head subsequently applied to pay for the lot in question, Susie Head acquired no interest in or right to the lot whatever available against his creditors, Straus & Frank.

We, therefore, think the lower court ought to have adjudged the lot of land subjected to plaintiff's debt, and the judgment rendered is reversed and cause remanded for the purpose of having the property so subjected.

DAVIS' EX'ORS V. JUSTICE, &C.

(*Filed Feb.* 21, 1893.—*Not to be reported.*)

Fraudulent conveyance—Husband and wife—The conveyance to the wife of land purchased and paid for by the husband after judgments were rendered against him was fraudulent as to such antecedent creditors and should be set aside as to them.

Personal property inherited by the wife, which the husband has reduced to possession and used for several years as his own, may be subjected to pay

Digitized by Google

his debts. And if the land in controversy was paid for with the proceeds derived from such personalty the conveyance was yet fraudulent as to the husband's creditors.

Stewart & Stewart for appellants.

Alexander Lackey for appellees.

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Bennett.

In 1886 the appellants' intestate obtained two judgments for costs, amounting respectively, to $52.70 and $107.15, against the appellees, John R. Justice and others.

The executions were returned by the proper officer, in substance, no property found. Afterwards this action was instituted to set aside a conveyance of the land in controversy made to Mrs. Justice, wife of the appellee, John R. Justice, upon the ground that it was made to defraud John R. Justice's creditors.

It seems that John R. Justice bought the land in 1889 at commissioner's sale; that he gave bond in his own name for the price, with M. Johnson security; that M. Johnson paid off the most of the purchase money, and by the direction of John R. Justice the deed was made to him to secure him in said payment; that thereafter Sweatman paid to Johnson a balance of the purchase money, and a deed was made to him to secure him; that thereafter Sweatman was paid this balance and he made a deed to Mrs. Justice, wife of John R. Justice.

It is claimed by the appellees, John R. Justice and wife, that the land was paid for by the sale of cattle, hogs, etc., and which she received from her father's estate and the sale of some cattle that she received for a small quantity of land inherited from her father. It is enough to say that said personal property was all reduced to possession by the appellant and used by him several years, and which was sold by him and the proceeds applied to the payment of this land.

It seems safe to say that notwithstanding the verbal understanding that might have existed between him and his wife relative to the ownership of this property, it was, nevertheless, subject to his debts existing before the purchase of the land, and his creditors could follow it and subject the land that it paid for to the payment of their debts.

To that end the deed ought to be set aside and the land subject to said debts.

The judgment is reversed and the cause is remanded, with directions to proceed consistently with this opinion.

HEAD V. DANT.

(*Filed Feb.* 21, 1893—*Not to be reported.*)

False representation in sales—Expressions of opinion—During the negotiation of the sale of a distillery for $4,000, and of a brand of whisky for $800, a statement by the seller to the purchaser that the brand was worth more than the distillery property, and that a sale of 1,000 barrels of whisky a year could be made by the use of the brand, were mere expressions of the seller's

Digitized by Google

opinion, indicating an exaggerated value of the brand. Such statements were not false or fraudulent representations entitling the purchaser to damages or a rescission of the contract of sale.

Hugh P. Cooper for appellant.

W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

By an opinion of this court rendered by Chief Justice Lewis in June, 1890 (12 KY. LAW REP., 153), all matters of defense to the obligation sued on were settled, except as presented by a clause of the amended answer filed by Dant, appellee, some two years after his original answer was prepared and sworn to, and which plea was as follows:

"The defendant further states that prior to the sale made by plaintiff to defendant, plaintiff had made a large lot of whisky of the F. M. Head & Company brand, which plaintiff had sold to one Howard, and that it was ascertained that the whisky was made by the use of impure water, and when Howard tried to sell it, by reason of the impure water with which it was made it could hardly be sold at all, and when sold it was at a depreciated price and the brand and trade-mark was thus injured, and about that the defendant knew nothing when he bought, and plaintiff knew it all, and fraudulently concealed it from defendant in order to impose on defendant the trade-mark as being superior, as he represented it to be, and of high and undoubted credit, when he knew that it was injured by reason of the use of the bad water with which the Howard whisky was made, and defendant avers that in some way plaintiff had injured and depreciated the trade-mark, which was the reason why the St. Louis men failed to buy."

These allegations were all denied. After a careful examination of the record we are of opinion that the appellee's own testimony does not sustain his plea, nor is he supported by other proof.

Except as to its ownership, the only thing said by the appellant to appellee about the brand during the entire trade is testified to by appelle as follows: He said that "I ought to have the brand. That brand was worth more than the distillery property, and he also said he would assure that we would sell a thousand barrels of whisky a year by the use of the brand. That was all the conversation we had in regard to the brand."

Here was no representation of superiority or of high credit, etc., as to the brand, but only an exaggerated opinion of value. The distillery property was sold for $4,000 at the same time, and the brand rated at only $800. So the appellant could not seriously have expressed this opinion of value, nor could appellee have been misled or deceived by it.

The assurance that they would sell the quantity mentioned to the St. Louis parties was mere speculation and not deceptive.

The appellee began distilling in February, 1882, and closed in March following, making only some 351 barrels. He quit, according to his testimony, because "the brand of F. M. Head & Co. was injured and nobody would buy the whisky." Again, because he discovered that by branding his barrels "F. M. Head & Co." he was deceiving the public and getting money under false pretenses and was liable to criminal prosecution; because, also, the assignee of Ede-

Digitized by Google

len, his partner, wanted him to pay an additional $110 for the use of the brand; also, because corn was getting higher and he had to borrow money to buy with, and the price of whisky was low and did not justify the making; and, further, because of a dull market he could find no one to make an offer for the whisky.

This last, we think, was perhaps the true reason, and for dull markets and low prices the appellant was in no wise responsible. The appellee threw up the business in March, 1882, but the proof is undisputed that the appellant sold no whisky of any kind to Howard until October 20, 1882, and yet he claims it was the bad whisky sold to Howard that discredited the brand and stopped his use of it seven months before.

The assignee of Edelen was not appointed until in 1883, and certainly his alleged demand for the $110 mentioned could not have cut off the appellee's work in March, 1882. There was doubtless some bad whisky made in the summer of 1881, but this is not shown to have affected the value of the brand in the least or depreciated its reputation. Its disposition was fully and satisfactorily explained by the appellant.

We think, too, that the appellee only contracted for the appellant's interest in the brand in question, which was a one-half interest, and that there was no misunderstanding between the parties on this subject.

The judgment below is not sustained by the testimony, and is, therefore, reversed, with directions to enter judgment for the appellant on the installments set up in the pleadings.

WILLIAMS V. WILLIAMS.

(*Filed Feb.* 23, 1893—*Not to be reported.*)

Divorce—Abandonment—Evidence—The evidence shows that the wife did not leave her husband with the intent to abandon him, and even now is disposed to return to him; therefore, the lower court properly refused to grant the husband a divorce, it being evident that the separation is due to a want of affection and sympathy on the part of the husband for his sick wife.

A. F. Byrd and W. L. Hurst for appellant.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellant is seeking a divorce from his wife on the ground of abandonment and the deprivation of her company for several years.

These pleadings evidence a disposition on the part of the wife to return to his home that he may, in his declining years, enjoy the society of this frail, delicate woman.

His own testimony discloses the fact that she had no idea, when she left home, of a permanent separation. Her father lived but a mile or two distant from her husband's home, and she went to his house for the purpose of regaining her lost health, and his conduct towards her whilst there is far from evincing such an affection for her as a husband should have for his wife; and we are satisfied if there had been more sympathy for the wife in her affliction the two would now be living happily together.

Digitized by Google

The chancellor rendering the judgment in this case evidently knew these parties and their surroundings, and we are not disposed to disturb his finding.

Judgment affirmed.

BROWN V. TINSLEY, SHERIFF, &C.

(*Filed Feb.* 23, 1893—*Not to be reported.*)

1. *The constitutionality of acts incorporating railroad companies and authorizing a subscription to their capital stock by counties, cities or towns*, on condition that a majority of the voters thereof vote in favor of such subscription, has been fixed and settled in this State since 1852, when the case of Slack v. Maysville and Lexington Railroad Co., 13 B. M., 1, was decided.

And an act authorizing a county, which has subscribed to the capital stock of a railroad, to compromise its indebtedness to the holders of the bonds issued by it, is also valid.

2. *Validity of bonds issued by county to railroad—Election*—Where the act authorizing the submission of the question of voting aid to a railroad to the voters of a county is imperative in directing the county court to make an order submitting such question to the voters, it is immaterial whether the justices of the peace united with the county judge as a county court when such order was made.

3. *The charge of fraud, made seventeen years after the bonds were issued*, comes too late, especially when it is made in vague and uncertain terms.

T. W. Brown for appellant.

E. H. Brown and D. M. Rodman for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Lewis.

By an act of the General Assembly, passed and approved in 1867, the Elizabethtown and Paducah Railroad Co. was incorporated, with right to construct a railroad between the two towns named; and in 1868 there was passed an amendment to the charter, section 2 of which is as follows: "That whenever the said Elizabethtown and Paducah Railroad Co. shall request the county court of any county, through or adjacent to which it is proposed to construct said road, to subscribe, either absolutely or upon specified conditions, a specified amount to the capital stock of said company, the county court so requested shall forthwith order an election to be held at the several voting places in said county on a day to be fixed by the court, not later than thirty days after the making of the order, and shall appoint judges and other officers to hold said election."

A proposition for a subscription of stock by the county court of Muhlenberg county, in the amount of $400,000, payable in county bonds, was, by order of said court, submitted to the voters of said county in May, 1868, and a majority having voted in favor of it the amount mentioned was duly subscribed, and bonds of the county were issued by proper authority and accepted by the company in satisfaction of such subscription.

The county of Muhlenberg was represented by its commissioners in annual meetings of stockholders of the company, and continued to pay the coupons attached to the bonds as they fell due, by levy of taxation, until the year 1874, when the county court refused to levy

Digitized by Google

or cause collected any more taxes for that purpose. Thereupon the individual holders of the bonds, all of which had been transferred by the railroad company to innocent purchasers, began suits looking to coercive collection of past due coupons, and recovered judgments, which were, however, not collected in any case. So that not only was the county in a partially disorganized condition, by reason of resignation of their offices by the several justices of the peace, but its credit was injured, property depreciated and general prosperity seriously checked; while those who had paid a valuable consideration for the county bonds, upon faith they and accruing interest would be promptly paid, were for the time apparently without any remedy for the breach of contract.

But March, 1878, there was passed by the General Assembly "An act to authorize and empower the county of Muhlenberg to compromise and fund its outstanding indebtedness, issue bonds and levy and collect taxes to pay the same." And the board of commissioners chosen for the purpose commenced, and had, up to about May, 1885, compromised and funded about one-third of the entire bonded indebtedness of the county, then amounting, principal and interest, to near $800,000, at the rate of thirty cents of new bonds for $1 of old bonds and accrued interest; and it is not at all unreasonable to suppose that, if not restrained, the board would ultimately and at no distant day have compromised the whole amount at the same rate, thus reducing the county indebtedness to about $240,000, bearing 6 per cent. interest, which is not a great deal more than half the original debt of $400,000, bearing 7 per cent. interest.

But about June 26, 1885, about 700 taxpayers of the county, uniting as plaintiffs, commenced this action against the sheriff, judge of the county court, members of the funding board, the holders of original bonds, the holder of compromise bonds and all holders of bonds, made defendants. The relief asked by plaintiffs is that the original bonds of Muhlenberg county, as well as bonds issued under the act of March, 1878, be adjudged invalid, and an injunction restraining collection of any taxes levied for the purpose of paying interest on the bonds theretofore issued in pursuance of said act of 1878.

The injunction prayed for was granted by the circuit judge, and, as a result, there has not, since that time, been any further effort by the board of commissioners to compromise the county indebtedness, nor any attempt made to levy or collect taxes with which to pay interest on the new bonds, as there has never been any attempt since 1874 to either pay interest or meet principal of the original bonds.

August, 1885, appellees, Alexander and Truesdale, were, upon their petition, made parties defendants, and, upon their further petition, the action was removed to United States Circuit Court, when judgment was rendered, dissolving the injunction and dismissing the action. But upon appeal to the Supreme Court of United States it was decided the Muhlenberg Circuit Court alone had jurisdiction, and the case was accordingly remanded, and now judgment of the last-named court, likewise dissolving the injunction and dismissing the action, is before this court on appeal.

Counsel for appellants, plaintiffs below, have filed no brief except the one used on trial of the appeal to the Supreme Court of the United States, and to that we must look for grounds relied on for reversal of judgment of the circuit court.

1. The constitutionality of acts, like the one incorporating the Elizabethtown and Paducah Railroad Co., which authorize subscription of stock to the capital stock of railroad companies, on behalf of

Digitized by Google

counties, cities and towns, on condition of a majority of votes being cast at an election in favor of such subscription, has not been an open question in this State since 1852, when the case of Slack v. Maysville and Lexington Railroad Co., 13 B. M., 1, was decided. For the opinion in that case has been since adhered to, and such acts treated as constitutional by this court. And if the act of 1868, authorizing the subscription of stock and consequent bonded indebtedness of the county, be valid, certainly the act of 1878, authorizing a compromise with county creditors and consequent lessening of that indebtedness, can be neither invalid nor hurtful to taxpayers of the county.

2. It is contended that as the election was held without consent of the justices of the peace, it was illegal, and that the bonds are not obligatory, because issued upon order of county judge alone.

Where, as has been definitely and repeatedly held by this court, direction of the Legislature is imperative on the county court to make an order submitting the question of subscription to the voters of a county, it is immaterial whether the justices of the peace be associated with the county judge as a county court, when the order is made, or not. As such was the nature of the direction given in section 2 of the act of 1868, heretofore quoted, that objection can not avail; and for the same reason neither consent nor presence of the justices of the peace was necessary to legality of the order for issue of the bonds.

3. There is charge of fraud made in the petition, and also urged by counsel, but it has not been supported by proof; and as the act of 1867 and amendment of 1868, under which the election was, so far as it appears to us, duly and legally held, and the subscription of stock made and bonds issued, was acquiesced in until 1885, a period of seventeen years, it is too late to have the relief prayed for upon a charge of fraud, especially when it is so vague and indefinite.

Judgment affirmed.

ROBB, &C. V. ROBB.

(*Filed Feb.* 25, 1893—*Not to be reported.*)

1. *Mere inadequacy of consideration alone* is not sufficient ground for setting aside a conveyance of land, in the absence of fraud or deceit of any character, unless the inadequacy is so gross as to raise the presumption of fraud on the part of the grantee or ignorance or mistake or lack of will power on the part of the grantor.

2. *Conveyances—Inadequacy of consideration—Fraud*—An aged father and husband, without cause, seemed determined to put an end to the domestic happiness of himself and family, and expressed his purpose of selling all his land and property at a certain price to a stranger unless two of his sons purchased it. The sons, to prevent a sacrifice of the property to a stranger, bought and paid for it, intending to hold it for the benefit of their father and mother and sisters and other brothers. The price paid was admittedly inadequate. In an action by the father to set aside the conveyance, *Held*—

First. There is no evidence of any fraud that authorizes the setting aside of the conveyance. It was error to set it aside or to appoint a receiver for the property or to charge the sons with the full rental value of the land while they held it.

Second. The conveyance ought to have been held valid, but for the benefit of the father and mother and sisters and brothers as well as for the grantees.

Digitized by Google

The case should be retained on its docket by the lower court, so that it may from time to time by orders see that the grantees properly manage the land for the benefit of all parties in interest.

W. M. Rardin and James Ellis for appellants.

Leslie Applegate for appellee.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Lewis.

February, 1890, appellee, Joseph Robb, conveyed to his two sons, Albert and George Robb, a tract of ninety-nine acres of land and all the stock, products of the farm on hand and farming implements for the consideration of $1,300, consisting of debts he owed the grantees and another and $500 in cash, which has been, as is clearly shown, fully paid and satisfied.

June 4, 1890, the grantor brought this action to cancel the deed and restore to him the title and possession of all the property conveyed. The grounds upon which the judgment is prayed for are, first, gross inadequacy of the consideration; second, alleged fraud practiced by the grantees in procuring the deed.

There is no question of the consideration expressed in the deed, and so far paid by the grantees, being very much below the actual value of the property conveyed. But ordinarily that would not be a sufficient reason for setting aside a sale made freely and intelligently, except it be so utterly inadequate as to raise the presumption of fraud or lack of free will and ignorance of his rights on part of the grantor.

In this case the evidence does not show the least fraud on part of the grantees, or lack of either willingness or full knowledge on part of the grantor, of the terms of the sale or value of the property conveyed. For it is evident that the two sons, so far from suggesting and advising the transaction, or using any arts or devices to bring it about, endeavored, in good faith, to keep their father from disposing of the property, and were finally induced to make the trade by a well-grounded belief if they did not purchase the property he would sell and dispose of it at a ruinous sacrifice to a stranger.

Moreover, though not expressly so stated in their pleadings, it is evident they made the purchase, not for their own exclusive benefit, but in order to preserve the property for common joint use of their mother, their two brothers and sister, and also for the benefit of their father, who they have tried to induce to return to his home that he had deserted and live in amity and peace with his wife and children; and their counsel who argued this case stated that such was their original purpose and present intention in case the deed was left in force.

The evidence shows the grantor, Joseph Robb, to be not many years from three-score and ten, yet that he is dissipated and disagreeable and violent in behavior towards his family, having so little self-respect as to make public charge of unchastity against his wife and daughter, and attempted to take the life of his son, George. Moreover, his testimony in this case seems to have been in utter disregard of the truth and the sacred relation of husband and father he sustains towards those whose interests would be seriously affected by setting aside the deed, without any corresponding benefits to himself.

By the judgment of the chancellor in this case the deed was set

Digitized by Google

aside, and the property placed in the hands of a stranger as receiver, it being, in words of the court, admitted and stated that appellee ought not to be allowed to hold or control the farm and do as he wishes with it. It was further adjudged that appellants be charged with rent of the farm for the year 1890, and also with value of all the personal property in contest, sold or otherwise disposed of.

It was, in the first place, error to set aside the deed and reinvest appellee, Joseph Robb, with the title. It was error to place the property in the hands of a receiver, who, having no more than his own personal interest to subserve, can not be expected to realize as much from it as would those whose living depends upon economical and prudent management.

It was also error to charge appellants with full value of either rent of the land or of property sold; for not only did the wife of Joseph Robb, his unmarried daughter and two sons reside on the land and derive support therefrom and from proceeds of personal property sold or used, but he, the husband and father, also lived there for about six months of the year 1890, and might have staid there and been supported continuously if he had chosen to do so, instead of voluntarily leaving, after behaving in an improper manner.

It is in evidence that Joseph Robb had made up his mind to have no more peace and concord in his domestic circle, and his first intention was to divide the land into as many parts as he had children, and allot for their use all the parts, except one to be retained by himself during life, but afterwards determined to sell all his property to a stranger, if his two sons, Albert and George, did not purchase, which they did do at a price fixed by himself. Moreover, his wife had originally contributed some of the purchase price of the land.

It seems to us the proper judgment in this case would be to treat the deed in question as a conveyance to the grantees in trust for use of their father and mother during life, and at their death to go to the grantees and the other children, leaving possession and control with grantees for that purpose; and with a view of a proper and economical management of the property by the grantees, for reasonable support of their father and mother, the case should be left on the docket that necessary orders may be from time to time made and enforced.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

LEWIS V. PRATHER.

(*Filed Feb.* 28, 1893—*Not to be reported.*)

Deed delivered as escrow—Fraud—Appellant sold certain land to appellee, and executed and acknowledged a deed therefor, which was delivered in escrow to a third party to be delivered to appellee after the vendor's title had been examined and approved and the purchase money paid. Before the title was so examined the vendor surreptitiously withdrew the deed from the possession of the first party and conveyed the land to a stranger who had full knowledge of the whole transaction. *Held*—That the conveyance to the stranger was void and should be so held. The delivery of the deed in escrow was a valid contract and not within the statute of frauds, etc., and appellee was entitled to an enforcement of his contract.

W. E. Selecman for appellant.

Digitized by Google

J. W. S. Clements for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Bennett.

It seems that the appellant, Lewis, sold to the appellee his interest in his father's land for the agreed sum of $20.00. A deed to the land was made, signed and acknowledged by Lewis, and delivered by the direction of Lewis and the appellee to I. J. Prather, son of the appellee, in escrow, to be held by him until the title to the appellant's father could be investigated and the money paid, and was, upon the happening of these conditions, to be delivered to the appellee; but before the conditions happened and the deed delivered the appellant obtained the possession of the deed, and then sold and conveyed the land by deed to Keeley. The evidence shows, with reasonable certainty, that Lewis surreptitiously obtained the possession of the deed, and that Keeley knew it, and there was no cancellation of the contract of sale, nor authorization for him to withdraw the deed. The appellee sued to set aside the Keeley deed and to have his deed established and recorded, which the lower court did.

There is no doubt that a deed in escrow is not within the statute of frauds, etc. The process is simple. The deed must be made, signed and acknowledged. It is then delivered to a third person in escrow as the agent of both parties, to be held by him until the conditions are complied with, and then handed over to the grantee by his said agent. Therefore, in the nature of things, the transaction is not within the statute of frauds. The tax sale relied on by Keeley is, according to his own showing, void.

Judgment affirmed.

C., N. O. & T. P. RY. CO. V. BARKER, &C.

(Filed Feb. 16, 1893.)

1. *Railroads—Destruction of buildings fired by escaping sparks*—A land owner's erection and use of a building for ordinary purposes near a railroad track, although it is more exposed to fire than if it were at a greater distance, is not negligence and will not deprive him of a right of action against the railroad company for the loss of the building by fire, resulting from sparks escaping from a locomotive through the company's negligence.

2. *Same*—A railroad company is liable for the destruction of a storehouse by fire which spread from its depot, which was ignited by sparks escaping from a locomotive through its negligence. The injury is sufficiently proximate.

3. *Same—Pleading*—In this action to recover for such a loss, the denial of the answer that the defendant "negligently and carelessly set fire to its depot" is in effect an admission that defendant did set fire to its depot, and is a denial merely that it was "negligently" done.

4. *Same—Evidence*—Although the court struck from plaintiff's petition all allegations as to defendant's negligence growing out of the combustible character of the material in the depot, and defendant's knowledge of the fact, still it was competent for plaintiff to prove the facts thus stricken from his pleadings as the question as to whether defendant was negligent in the operation of its locomotive depended to some extent upon the character of the surrounding buildings; and, besides, the combustibility of the depot was a circumstance bearing on the question as to whether the depot was actually fired by the sparks.

Digitized by Google

5. *Same—Instructions to jury*—The jury could not have been misled by an instruction authorizing them to find for plaintiff if they believed the fire was the result of the negligence of defendant in the construction or management of its engine "or in the construction of its depot." The depot was admittedly fired by sparks which escaped in such quantities as to indicate a disarrangement of the spark arrester, and in whatever way the depot might have been constructed the verdict could not reasonably have been any thing else under the pleadings.

C. B. Simrall, O. H. Waddle and W. A. Morrow for appellant.

W. O. Bradley, J. L. and J. W. Colyer for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Hazelrigg.

The Barkers, as plaintiffs in the court below, brought suit against the defendant, now appellant, alleging that on the night of April 5, 1889, "the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and which extended to and consumed the storehouse of plaintiff aforesaid; that said negligence of the defendant was the natural, probable and proximate cause of the burning of their said house, and that by such negligent act of defendant they have been damaged $3,000. They also made proper averments of ownership and possession of the burnt property and its location and value.

At the appearance term of the case, October, 1889, they filed an amended petition, and "the defendant not being ready for trial on account of the filing of said pleading" was given a continuance.

The amendment charged that the defendant negligently elected and suffered and permitted its depot to remain near the track, although same—except the shed thereof—was covered with shingles and constantly exposed to fire and sparks emitted from its locomotive, and notwithstanding the fact it was fully aware of such danger and had been time and again notified of such danger, and knew that fire had been communicated to its said depot and other buildings time and again from such sparks and fire, all of which plaintiffs charge was gross negligence, and that by reason of which negligence the depot was burned and the fire directly communicated to their building, consumed it, etc. Thereupon a demurrer was filed to their amended petition, and also a motion to strike out such parts of it as alleged that the defendant was aware of such danger—referring to the shingle roof and the constant exposure to fire and sparks from the locomotive—and had been notified of such danger and knew that fire had been communicated to the depot and other buildings time and again from such sparks and fire.

At the April term, 1890, the court sustained the demurrer to the amended petition, making no order on the motion to strike out. The plaintiffs then filed their amended petition No. 2, alleging that the defendant carelessly and negligently set fire to its depot ("which depot was dangerously combustible") in said South Somerset by reason of which, etc.

On defendant's motion, and over the plaintiffs' objection, the words "which depot was dangerously combustible" were stricken out by the court, and a demurrer to the petition as amended was overruled. The plaintiffs' cause of action, therefore, was this: "That the defendant negligently set fire, by sparks and coals from its locomotive, to its depot, which consumed the same, and which extended to and consumed the storehouse of plaintiffs; that the de-

Digitized by Google

fendant carelessly and negligently set fire to its depot, by reason of which it was consumed, and the fire from which depot then and there communicated to and with the plaintiffs' building, and was the proximate, probable and natural result of the carelessness and negligence of the defendant, as aforesaid."

The defendant then, by one pleading, answered both the original and amended petitions, saying that it was "not true that on the night of April 5, 1889, it negligently set fire to its depot in Somerset, Ky., by sparks and coals of fire thrown from its locomotive, or that it carelessly and negligently set fire to said depot at the time mentioned and referred to in the petition," or that "the destruction of plaintiffs' property referred to and described in the petition was the proximate, probable and natural result of its negligence, as alleged in the petition."

These were the pleadings on which the case proceeded to trial. Evidently the answer, so far as it attempted to traverse the allegations of the original petition, is, in strictness, not good for any purpose. It may mean that the company set fire to its depot by sparks and coal thrown from its locomotive, but not *negligently;* or it may mean that it negligently set fire to its depot, but not by sparks and coals thrown from its locomotive. The latter could hardly have been intended, and taking it at its best it is an admission that it set fire to its depot by sparks and coals from its locomotive, but did not do so negligently.

In so far as it sought to traverse the statements of the amended petition, the answer, when liberally construed, simply says it is not true that the company *negligently* and *carelessly* set fire to its depot, manifestly admitting as a *fact* that it did fire the depot. Construed strictly, considering the conjunction "and," it might mean to admit that the company in fact fired the depot carelessly but not negligently, or negligently and not carelessly; but treating the words as synonymous, considered as a whole we think the answer must be taken to be a statement that the company in fact set fire to its depot by sparks and coals thrown from its locomotive, but did not do so negligently *or* carelessly.

The plaintiffs' proof was to the effect that on the night in question engine No. 58 was fired up and left a point in Somerset, south of the depot a few hundred yards, pulling northwardly a number of loaded cars; that when it passed the depot it emitted sparks and coals in large quantities, which floated up over and on the depot, and that shortly thereafter the shingle roof of the structure was seen to be on fire, the flames spread rapidly, and soon set fire to the house of plaintiffs, which was immediately across the street from the depot, a distance of forty-five feet; that the weather was warm and there were no fires being kept in the depot building. Plaintiffs also introduced some proof conducing to show that the locomotive used was not supplied with the most improved fire screen and spark arrester; that it slipped badly when on the track in front of the depot as if it were overloaded; that it worked hard and threw sparks in unusually large quantities.

Under the permission of the court, and over the objection of the defendant, the plaintiffs proved that the building was in part covered with shingles, and that there were spaces under the eaves of the building where birds had located their nests, and that on several former occasions, in warm weather, when there were no fires in the depot, the same roof had caught on fire just after a passing train, and that the defendant knew of this and had, in fact, repaired the burnt roof.

Digitized by Google

The defendant's testimony showed that their engine and its screen and spark arrester were of the most improved patterns in use or known to science; that the train was not loaded unusually heavy; that coal and not wood was used in firing the engine; that no sparks were emitted; there was no slipping on the track, or any derangement of the engine. Moreover, that the fire was seen inside the depot burning more fiercely than on the outside, and may have caught from the inside; that the night was cool and there was a fire in at least one of the rooms in the building. Its chief carpenter and superintendent of buildings fully explained the construction of the depot, which was covered partly with tin and partly with shingles, and there were no spaces under the eaves where birds could find lodgment for nests.

Upon this state of case the jury, after instruction, found for the plaintiffs the sum of $2,875.

It is insisted by counsel for the appellant that, although the court had, by its action in sustaining the demurrer to the first amended petition, and in striking out the words "the depot was dangerously combustible" from the second amended petition, narrowed the issue to the negligent setting on fire of defendant's depot; yet the trial was allowed to proceed, both as to the evidence and the instructions, upon the theory that plaintiffs' cause of action as set forth in their pleadings included or was founded on negligence growing out of the combustible character of the material in the depot and on the assumption that such fact was known to the defendant. And it must be conceded that unless this testimony with regard to the combustible nature of the depot legitimately and properly elucidates the issue as made by the pleadings, the defendant was prejudiced by its introduction.

Why was it that the learned judge below, at defendant's instance, or on its motion, sustained the demurrer to the amended petition, setting up the very facts which were admitted by the court as evidence on the trial, and why strike out the words respecting the dangerous, combustible character of the depot in the second amendment, when proof was immediately admitted before the jury regarding the shingle roof and the open eaves and birds' nests of straw, etc.? Manifestly because the setting fire to the depot *negligently*, or the *negligence* in setting fire to the depot by the sparks, depended on the character of the building alleged to have been set afire.

Negligence is the leading thought. The instrumentality or active agent of negligence was the locomotive throwing sparks; but upon what? On a tin roof? or on a clean plowed field? or on a straw stack? or on a depot covered with straw, or on one covered with shingles and constructed with open eaves? Clearly the negligence in setting fire to a thing by a locomotive depends on the conditions, not alone of the machine itself, but on the uses it is being put to—the location and the surroundings—and these are matters of evidence.

The combustibility of the depot was one of the circumstances bearing on the fact of whether the depot was actually fired by the sparks. Had the building been fully fireproof, would not that fact have furnished evidence against its being set on fire by the sparks? We do not pretend to decide that the mere fact that the depot was covered with shingles is of itself evidence of negligence. It is not ordinarily so. But when situated so that from some reason it is frequently fired by passing trains, and coupled with the significant

Digitized by Google

proof that the defendant was aware of the combustible material of which the roof was composed, and that it had before been fired by sparks, we are fully prepared to say that if defendant used a spark-throwing locomotive in proximity to such a roof, and fired it, it would be "negligently setting fire to the depot by sparks thrown from its locomotive."

With the fact conceded that defendant fired the depot by sparks thrown from its engine, with the fact established that an unusual number of sparks were thrown on the night in question, indicates a disarrangement of the spark arrester. With the knowledge and information brought home to the defendant respecting the previous fires and the dangerous quality of the pine and poplar shingles on the roof of the depot in dry weather, we are of opinion that the instructions on the subject of the construction of the depot could not have been misleading to the jury.

The first instruction reads as follows: If you believe from the evidence that the depot of the defendant at Somerset, on the night of April 5, 1889, was burned by reason of the negligence of defendant in the construction of its engine, or in the construction of its depot, or in the management of its engines, and the burning of plaintiffs' house was the natural and probable consequence, you will find for the plaintiffs; and unless you so believe, you will find for the defendant.

The only chance for misapprehension here on the part of the jury was in considering the meaning of "negligence in the construction of its depot," and this was not considered abstractly. No one could know what the expression would mean, or intended to mean, unless in connection with the proof, and when so considered and the proof in the case applied to the language, it is deprived of any ambiguities—or misleading feature—and this we think is true of the second instruction, which embraces this same expression.

The depot was admittedly fired by sparks from the engine, and whether it had in fact a shingle roof or other kind, or open or closed eaves, and in whatever way it might have been constructed, the verdict could not reasonably have been anything else under the pleadings.

Instruction "A," asked by defendant, precluded plaintiffs' recovery, if they built their house prior to the building of the depot, and knew of its exposure to fire, etc., and is not the law. "A land owner's erection and use of a building for ordinary purposes near the track, although it is more exposed to fire than if it were at a greater distance, is not negligence." (Pierce on Railroads, 435.)

Instructions "B" and "F" were, in effect, given by the court—"C" and "E," on the question of burden of proof, was wholly inapplicable, and instruction "D," offered on the "care" necessary to be used, was substantially given in the one defining negligence.

Nor is there any doubt as to the injury being sufficiently proximate.

"The ignition for which the company is liable need not take place from the very particles of fire thrown out by its engines." If the fire spreads from the matter first ignited the intervention of considerable space, diversity of ownership or various physical objects, etc., does not preclude recovery by the party injured or affect the company's liability for its first negligent act. (Pierce on Railroads, 441.)

Upon the whole case, we think there has been no error prejudicial to the substantial rights of the appellant.

The judgment is, therefore, affirmed.

Digitized by Google

BOARD OF TRUSTEES OF ELKTON, &C. V. GILL.

(*Filed March* 4, 1893.)

1. *An act of the Legislature extending the limits of a town or city will not be declared unconstitutional* upon the ground that property thus subjected to municipal taxation derives no benefit from the town or city government, unless it appears that the imposition of the tax amounts to the taking of private property without just compensation.

2. *Municipal taxation*—Whether the benefit and advantages derived from a municipal government are in a given case "adequate" compensation for local taxation imposed is not the province of courts to decide, legislative determination of that matter being conclusive.

In this action to enjoin the collection of town taxes imposed upon plaintiff's residence and lawn, it appears that the tract of land upon which plaintiff resides contains forty-six acres, which is used for farming purposes, but the area included in the town limits by the act, the validity of which is questioned here, and which is the land sought to be taxed, does not much exceed six acres. There is a street, improved and kept in repair by the town, on each side and adjacent to plaintiff's land and extending beyond his residence. There is another street connecting these two and extending along the front of his lawn. There is a sidewalk made by the town by which he can go from his gate to the central part of the town. Opposite his lawn is a church building and several dwelling houses. He has sold off his land, several lots at the rate of $300 per acre, that for farming purposes could not have been sold for more than $30 per acre, and on one street there are no vacant building lots between a point beyond plaintiff's dwelling house and the courthouse square. The plaintiff is a minister of the gospel and preaches in one of the town churches. *Held*—That there is no reason for exempting plaintiff's residence and lawn from municipal taxation.

Edward W. Hines and Ben T. Perkins, jr., for appellants.

H. G. Petrie and Wm. H. Holt for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Lewis.

In 1884 the General Assembly passed an act extending corporate limits of the town of Elkton so as to include, besides property of others, the residence of appellee, Gill, and incidentally land used as a lawn and grass lot lying between the new and old boundary lines. And the tax collector having, upon refusal of appellee to pay municipal taxes assessed against him for the year 1889, levied on and advertised sale of property to satisfy amount thereof, this action was brought for an injunction restraining such sale, which was granted temporarily, and by the judgment appealed from perpetuated upon the ground of unconstitutionality of the act.

The general power of the Legislature to extend the limits of a city or town, whereby municipal taxation is imposed upon property hitherto free of it, can not, in view of repeated decisions of this court, be now disputed. And it is only where that power is so exercised as to involve violation of the clause of the Constitution prohibiting taking of private property for public use without just compensation, courts will interfere. But the protection offered to, and advantages received by, the citizens from a municipal government are, in meaning of the Constitution, just compensations for taxation imposed in order to maintain it. And local taxation authorized by law can not be deemed taking private property without just compensation, unless it is palpable that persons or their property

Digitized by Google

are subject to such burthen for benefit of others, or for purposes in which they have no interest, and to which they are, therefore, not justly bound to contribute. (Cheaney v. Hooser, 9 B. M., 330; Maltus v. Shields, 2 Met., 553.)

Whether the benefit and advantages derived from a municipal government are in a given case adequate compensation for local taxation imposed is not the province of courts to decide, legislative determination of that matter being conclusive. (Cheaney v. Hooser; Swift v. City of Newport, 7 Bush, 39.)

For, as said in the first-named case, the limit of legislative discretion in regard thereto "can only consist in the discrimination to be made between what may, with reasonable plausibility, be called a tax, and for which it may be assumed that the objects of the taxation are regarded by the Legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or in some other form, the taking of private property without just compensation."

Tested by the rule so clearly and firmly fixed by this court, it seems to us there can be no doubt of the validity of the act in question and consequent liability of appellee for the tax imposed upon him.

He states that the quantity of land upon which he resides is forty-six acres, and that it is used for farming purposes, but the area of that part included within the town limits fixed by the act of 1884, whereon is his residence, does not, according to the plat filed, apear to much exceed six acres. There is a street improved and kept in repair by the municipality on each side of and adjacent to his land and extending beyond his residence. There is another street lately opened called Academy street connecting those two and extending along the front of his lawn, by which he has access to the railroad depot and also to the courthouse. There is still another called Allen street between the two first named that intersects Academy street and terminates opposite appellee's lawn or yard gate, 215 yards from his dwelling house. Along Allen street there has been made, at expense of the municipal government, a sidewalk by which he can go from his gate to the central part of the town. There is a female academy situated apparently upon the same block of land that his dwelling house stands and not far from it. Opposite to his lawn is a church building, two factories and several dwelling houses. He has sold off his land several lots at the rate of $300 per acre that for farming purposes could not have been sold at the rate of more than $30 per acre. Upon those lots dwelling houses have been erected, apparently further from the public or courthouse square than he resides, and upon the furthest out of those lots resides a member of the board of trustees. He is a minister of the gospel and preaches in one of the town church houses. He also has five or six teachers in the town schools boarding with him.

It further appears that population has increased in the last few years in the vicinity of his land, and that there is no vacant building lot on one of the streets mentioned between a point even further out than his dwelling house and the courthouse square. No street has been opened through his land, nor does it appear to be the present purpose of the board of trustees to open any. But that fact does not at all affect the question whether he, by reason of the relative situation and location of his residence, derives protection and benefits in common with other taxpayers from the municipal government. And especially is it immaterial in view of the existence of streets already constructed at expense of other taxpayers that afford him outlet

Digitized by Google

and convenient way in almost any direction he may wish to go. It is difficult to conceive wherein the act in question is obnoxious to the clause of the Constitution referred to as heretofore construed and applied by this court, or upon what just or reasonable ground appellee can be exempted from the taxation imposed.

The judgment is reversed and cause remanded for dissolution of the injunction and dismissal of the action.

KENTUCKY SUPERIOR COURT.

FIREMAN'S FUND INS. CO. OF SAN FRANCISCO, CALIFORNIA, V. MESCHENDORF, &C.

CONNECTICUT FIRE INS. CO. OF HARTFORD, CONNECTICUT, V. MESCHENDORF, &C.

(*Filed Feb.* 22, 1893.)

The failure of an applicant for fire insurance to state the existence of a lien upon the property sought to be insured will not, if no inquiries were made as to that matter, invalidate the policy, unless the fact was intentionally and fraudulently concealed. And this is true, although the policy provides that it shall be void if the insured "is not the sole, absolute, unconditional owner."

Gibson, Marshall & Lochre for appellants.

Dodd & Dodd for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

The appellants, the Fireman's Insurance Company and the Connecticut Insurance Company, each issued to the appellee, J. M. Hughes, a policy on his hotel furniture, insuring him against loss by fire to the amount of $750, "the company not to be liable beyond the actual cash value of the property at the time of the loss, or for a sum greater than the interest of the assured in the property."

The insured property was worth $2,200. It was partly destroyed by fire, the loss being $737. The insurance is what is termed "contributing insurance," and each company was, by the judgments appealed from, held liable for one-half of the loss.

We will first dispose of the appeal in the case of the Fireman's Insurance Company. In its policy is this provision: "If the interest of the insured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, or if the property in whole or in part be mortgaged or otherwise incumbered at or after the date of this policy, * * * * then, in every such case, this policy shall be void."

The company, relying upon this provision, averred that there was, at the time the insurance was effected, a lien of $1,400 upon the prop-

Digitized by Google

erty for the unpaid part of its purchase price, and that, therefore, the assured was not the sole owner of it; that his interest was not truly stated in the policy, and that, by reason of this mortgage or incumbrance, the policy was avoided. The reply denied that the lien was for $1,400, and averred that it was for only $400. It also alleged that Hughes was not asked any question with reference to the insurance, nor did he make any statement, representation or warranty of any character.

A demurrer to this reply was overruled, and the company, electing to stand by its demurrer, judgment was rendered against it. It is not claimed that Hughes concealed any fact or practiced any fraud in order to procure the insurance, and the single question, therefore, is, whether the undisclosed lien existing upon the property annulled the policy.

In the Bronger case, 6 Bush, 148, the policy provided that the written application should be deemed a part of it, and that unless the interest of the assured was truly stated, or if his interest "be any than the entire unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company and so expressed in the policy, otherwise the company shall not be liable."

In his application the assurred represented his title as unincumbered when there was a lien upon the property for the whole of the purchase price, and it was further encumbered by his wife's dower as the widow of a former husband. The court held that by reason of these *misrepresentations* the policy was, by its terms, avoided. In the Curry case, 13 Bush, 313, the court reaffirmed the rule laid down in the Bronger case and held that a vendor's lien for part of the purchase money brought the case within the terms of the policy, which were similar to those quoted from the Bronger case. In both of these cases the misrepresentation as to the title was made by the applicant. But in the case of the Kenton Insurance Co. v. Wigginton, 11 Ky. Law Rep., 539, and the case of the Phœnix Insurance Co. v. Cooms, 13 Ky. Law Rep., 239, decided by this court and afterwards by the Court of Appeals January 12, 1893, *ante*, 603, the rule laid down in the Bronger and Curry cases are so far modified that now an encumbrance, a vendor's lien, will not invalidate the policy unless it is material to the risk. In both of these cases the court said that the land independent of the house (the subject of insurance) was worth more than the lien or incumbrance upon the property, and that the lien could have been satified, or, as was the case in the Wigginton appeal, the interest of the cotenant could have been set apart to him out of the land other than that upon which the house was situated.

Counsel, however, attempts to draw a distinction beteen those cases and this, arguing that the lien here was upon each and every piece of furniture. This was so in the Cooms case. The lien existed upon the house as well as upon the land. In the Wigginton case the cotenant's interest covered the house and the land upon which it was built as well as the other part of the land. If the lien against Hughes had been enforced he would still have had of the property insured more in value than the amount of the insurance in both companies. We think the judgment can be sustained upon the authority of these cases.

But the company was not released for another reason. There was not, as in the Bronger and Curry cases, a misrepresentation, either intentional or unintentional. The company chose to insure Hughes without making inquiry of him as to the condition of his title or the

Digitized by Google

incumbrances upon it. He insured in good faith. There is not the slightest intimation of fraud. No concealment is charged. He paid the full premium. His insurable interest was much larger than the amount of insurance in both companies. He had every incentive to protect his property. Its destruction, notwithstanding the lien and the insurance, would result in loss to him. "All statements or descriptions in application for or policies of insurance shall be deemed and held representations and not warranties. Nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." (German Insurance Co. v. Reeding, 80 Ky., 223.)

There was no fraud. There was no misrepresentation. The property insured for $1,500 was worth $2,200. The lien upon it was for only $400, and in the very nature of things could not have increased the risk.

Again, no inquiry was made of the assured as to the condition of the title. He made no application, written or verbal. The rule is that when no inquiries are made the intention of the assured becomes material, and to avoid the policy it must be found not only that the matter was material but also that it was intentionally and fraudulently concealed. (May on Insurance, section 207; Wood on Insurance, 388; Alkan v. Insurance Co., 10 N. W. Reporter, 91; Vankirk v. Insurance Co., 48 N. W. Reporter, 798, and to the same effect are the Hartford Insurance Co. v. Hass, 8 Ky. Law Rep., 610; 87 Kentucky, 551; Agricultural Insurance Co. v. Yates, 10 Ky. Law Rep., 984.)

In the case of the Connecticut Insurance Co. the policy provides: "If the assured, in a written or verbal application, makes any erroneous representations, or omits to make known any fact pertaining to the risk, * * * or if the assured is not the sole, absolute and unconditional owner of the property assured, this policy shall be void." The company, relying upon this provision, pleaded in avoidance of its contract the same facts pleaded by the Fireman's Insurance Co. A demurrer to its answer was sustained. The only difference between the two cases, except the difference in the provisions of the policies, is, that in the case of the Fireman's Insurance Co. the lien is admitted to be $400 only, while in this case it is admitted by the demurrer to be $1,400.

The current of authority is that the mortgagor of chattels is the "sole and unconditional owner of the mortgaged property." (May on Insurance, section 286; Hubbard v. Hartford Insurance Co., 33 Iowa, 325; 11 Am. Rep., 155.)

The lien retained by the vendor of personalty is, in effect, a mortgage; nothing more. But it may be argued that the rule announced conflicts with the Bronger and Curry cases. But these cases are, in effect, so modified by the later cases of Wigginton and Cooms that the lien will not, even where the fact is misrepresented, when the misrepresentation is not fraudulently made, affect the assured's right of recovery, unless it is such as to make his interest probably less than the amount of the insurance. But when no inquiry is made of the assured as to his title or the incumbrances upon it, and there is no fraud upon his part, the assured—notwithstanding the provisions of the policy that "if he is not the sole, absolute, unconditional owner, etc., the policy shall be void"—should be allowed to recover the loss which he has sustained. Here the loss was $737. The assured's interest, excluding the lien, was $800.

As said by the Superior Court of Virginia in the case of the Wytheville Insurance Co. v. Sheltz, 87 Va., 636, "the assured is not aware of the necessity of disclosures, which long experience in insurance af-

Digitized by Google

fairs has shown to the underwriter to be necessary, and to hold his policy void for not making disclosures of the importance of which he is not aware, would be gross injustice. What is material must be determined upon the circumstances of each case. What is material in one case may not be in another, and so a wide field for litigation will be opened. The ends of justice will be best served by holding the assured only responsible for fraud. Insurance companies may protect themselves by inquiries in relation to these things, and after filling their policies with so much detail and so much minutiæ of information in regard to other matters as to create the impression that they are all satisfied, to hold that they are not bound by their contract, unless information of another kind is communicated by the assured, which is not sought for, would enable them to commit the rankest injustice."

The judgment in each case is affirmed with damages.

BLACKWELL V. MCBRIDE, &C.

SHELBY V. SAME.

(*Filed Mar.* 8, 1893.)

1. *Breach of warranty—Measure of recovery*—In actions for breach of warranty of title to land the true criterion of recovery is not the value of the land at time of eviction, but the amount received for the lost land, and all legal costs incurred in resisting the eviction. If the eviction be of only a part of the land purchased the damages to be recovered under the covenant of seisin are a ratable part of the original price; and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract.

In this case the widow of a remote vendor having recovered as the cash value of her dower interest sixteen per cent. of the value of the land, the plaintiff is entitled to recover of the defendant upon his covenant of warranty only sixteen per cent. of the consideration received by him, and in addition the legal costs incurred in resisting the eviction.

2. *Same*—As between an immediate vendee with warranty and his warrantor the warrantor may show what was the real consideration paid for the land, the title to which was warranted, but between a remote vendee and a warrantor the consideration expressed in the deed is conclusive, and can not be questioned in a suit on the warranty.

3. *Clerical misprision*—Judgment in this case for the full amount which had been recovered as dower instead of merely a ratable portion of that amount was not a clerical misprision; the relief granted being that asked by the pleading upon which the recovery was had, the judgment was simply erroneous.

4. *Petition for new trial no bar to appeal*—The pendency of a petition for a new trial upon grounds discovered after the term at which the judgment was rendered does not constitute a bar to an appeal from the judgment. Nor does the pendency of a petition seeking a vacation or modification of the judgment for errors manifest in the record constitute a bar to an appeal, as such errors can be reached only by an appeal, and, therefore, the petition amounts to nothing.

Philip B. Cheaney for Blackwell.

H. F. Turner for Shelby.

Montgomery Merritt for McBride.

S. B. and R. D. Vance for Witt.

Digitized by Google

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barbour.

This action was instituted by Mrs. McBride to recover dower in certain real estate. Her right is not questioned. The property, exclusive of improvements made upon it after her husband had parted with it, was valued at $3,020.66, and as it could not be divided the value of her dower was fixed at $486.93, and about this there is no dispute.

Mrs. McBride's husband owned the property, which was sold under execution against him in 1863. It was purchased by the appellant, Blackwell. Blackwell sold and conveyed to Ladd, Ladd to Dixon, Dixon to Witt, Witt to Dunlap, Dunlap to Shelby & McCormack and Shelby & McCormack to W. W. Shelby, who is now the owner of the property, and against whom Mrs. McBride brought this action.

Each of the grantors conveyed with covenant of general warranty. Shelby made his answer a cross petition against Witt, and setting up his covenant of warranty, etc., asked for judgment against him for the amount he would be required to pay Mrs. McBride. Witt in turn made his answer a cross petition against Blackwell, and asked for judgment against him for what he might be required to pay Shelby.

The court adjudged that Mrs. McBride was entitled to $486.93 as the cash value of her dower interest and that she recover that sum of Shelby & Blackwell, and directed execution therefor to be first issued in favor of the plaintiff (Mrs. McBride) against Blackwell, and if not made that plaintiff then have execution against Shelby, but provided that if Shelby should pay the judgment he should have execution for his own benefit against Blackwell.

It appears from Witt's answer that the consideration for the conveyance by Blackwell to Ladd was $850. Blackwell appeals and complains of the judgment upon the ground that he is required to pay too much, his contention being that he should only be required to pay the value of the dower based on the amount of the consideration received by him, and that as it is adjudged that the cash value of the dower is only .1612 per cent. of the land, he is only chargeable with that per cent. of the $850 received by him, or $137.02.

Shelby also appeals, insisting that the court, by failing to give him judgment on his cross petition against Witt and compelling him to look to Blackwell, does not allow him, in the event Blackwell succeeds in his appeal, as much as he is entitled to.

That the judgment against Blackwell is erroneous we think is plain. "In actions for breach of warranty of title to land restitution to the extent of the failure of consideration is the fixed and only stable or consistent rule. The true criterion is not the value of the land at the time of eviction, but the amount received for the lost land and all legal costs incurred in resisting the eviction. If the eviction be only a part of the land purchased the damages to be recovered under the covenant of seisin are a ratable part of the original price; and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract." (Kent's Com., volume 4, page 478; Robertson v. Lemon, 2 Bush, 301; Davis v. Logan, 5 B. M., 341; Hill v. Golden, 16 B. M., 551.) "As between an immediate vendee with warranty and his warrantor the warrantor may show what was the real consideration paid for the land, the title to which was warranted, but

Digitized by Google

between a remote vendee and a warrantor the consideration expressed in the deed is conclusive, and can not be questioned in a suit on the warranty." (Hunt v. Owing, 17 B. M., 73.)

It, therefore, follows that the extent of Blackwell's liability is $137.02, with interest from the institution of Mrs. McBride's action and the costs incurred in the action—not merely the costs upon Witt's cross petition, for the true criterion is the amount received, etc., and all legal costs incurred in resisting the eviction. (2 Bush, 301.)

Upon Shelby's appeal it is insisted for Witt that the cross petition does not state facts authorizing a recovery against Witt; that his allegations that Witt warranted the title, etc., are but legal conclusions; and further that he does not allege the amount of the consideration received by Witt for his conveyance, but merely avers that he received "the full value." The pleading is vague and indefinite, and unaided authorized no recovery against Witt; but Witt answered and admitted its averments, and made his answer a cross petition against Blackwell, and prayed judgment against him for the full amount which might be recovered of him by Shelby.

Upon the return of the case either of the parties should be allowed, if they choose, to amend their answers and cross petitions and set up the consideration received.

It is suggested that the judgment against Blackwell is in the assessment of the amount of recovery a clerical misprision, and that no appeal lies until after a motion to correct it has been made and acted upon by the lower court. Shelby's answer and cross petition asserts a claim against Witt, and Witt, in his turn, against Blackwell asserts a claim for the full value recovered by Mrs. McBride for her dower. The judgment, though unauthorized by these pleadings, was neither void nor a mere clerical misprision—it was simply erroneous.

At the term of the court succeeding that at which the judgment was rendered Blackwell, upon notice, moved the court to vacate and modify the judgment against him upon the ground that it was a clerical misprision. The judgment being final, and, as we have said, not a clerical misprision, the court had no jurisdiction of the motion. Blackwell at the same time filed a petition for a vacation of the judgment, in which he set up the errors of law committed by the court at the rendition of the judgment, and further alleged that he was prevented from opposing and defending by unavoidable casualty and misfortune, etc. Neither the motion nor petition was disposed of by the court, and it is now argued that the pendency of the petition is a bar to the prosecution of this appeal.

In so far as the petition seeks a vacation or modification because of errors in the judgment or proceedings it amounts to nothing. Such errors can not be reached in that way—they can only be reached by an appeal. (Coffey v. Proctor Coal Co., 14 KY. LAW REP., 415.) To the extent that it sets up new and extraneous matter—matter foreign to the record as completed by the judgment—it in no wise affects the judgment as the record stands. It properly presents nothing which could be considered on this appeal, or which should affect the appellant's rights as presented in the record before us. Even after a party has taken an appeal from a judgment which is affirmed—if the time prescribed by the Code has not expired—he may still, upon grounds authorized by the Code, and which are discovered after the term at which the judgment was rendered, petition for a new trial; and we see no reason why he may not, pending an appeal for the correction of errors manifest in the record, file a petition for a new

Digitized by Google

trial, or for the vacation of the judgment, upon grounds discovered after the term at which the judgment was rendered. There is nothing inconsistent in the prosecution of the two remedies. If it could not be done cases might arise where a meritorious cause would be lost.

The reversal of this judgment will necessitate the dismissal of Blackwell's petition for the vacation of the judgment, there being no longer a reason for its prosecution. What would be the result in this appeal were it shown that the prayer of the petition had been granted it is unnecessary for us to say.

Mrs. McBride is undoubtedly entitled to a judgment against Shelby for the amount awarded her, but the judgment is so framed that it will have to be modified. The better way would be to give each party a judgment upon her or his pleadings as the right is shown.

Upon the whole we think that the costs of these appeals should be borne equally by Mrs. McBride, Shelby and Witt.

The judgment is in each case reversed, and the cause is remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

Kentucky Central Railroad Co. v. Jacoby.

Filed February 15, 1893. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *If a passenger on a railroad train allows his hana or arm to protrude out of a window* beyond the outer surface of the car it is negligence *per se*, which prevents a recovery for any injuries sustained thereby. But where the passenger sitting, as he has a right to sit, with his arm inside the car, has it, by a lurch of the train, thrust outside and against an obstruction which the company has negligently permitted to remain in a dangerous proximity to the track, he is not guilty of contributory negligence and the company is liable.

2. *Same*—It is not incumbent on the employes in charge of a train to see that no passenger is sitting with his arm outside a window.

In this case it was error to instruct the jury that even if they should believe from the evidence that the plaintiff sat with his arm outside the coach, yet if they further believed that any of defendant's employes in charge of the train saw the plaintiff in such perilous position "or had reasonable opportunity to see him" and could, by the exercise of ordinary diligence, have prevented said injury, but failed to do so, they should find for plaintiff.

George C. Lockhart for appellant; Kennedy & Son for appellee.

Peckham & Co. v. Loch.

Evans & Co. v. Same.

Bernheim & Co. v. Same.

Filed February 15, 1893. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Property purchased by a married woman who has been made a feme sole* by a

Digitized by Google

decree of court is not liable for the husband's debts, although it was paid for with the profits arising from her general estate prior to the date of the judgment.

2. *Antenuptial contract—Separate estate*—Husband and wife may, by an antenuptial contract, secure to the wife all the property she has or may acquire to her separate use, free from the control of her husband.

By an antenuptial contract it was agreed that all the wife's property then owned by her, or thereafter acquired, was to be her separate property, free from the claim or debts of the husband, who was notoriously insolvent. The husband began at the time of the marriage and continues to labor at a small salary in the store of the wife's mother, in which the wife has, since the rendition of the judgment empowering her to trade in her own name, acquired an interest with money given her by her mother. In this action by the husband's creditors to subject certain property held in the wife's name upon the ground that it was purchased and paid for by the husband: *Held*—That, as the testimony shows that the property was purchased with the estate owned by the wife at the time of the marriage, and its legitimate earnings and increase, it can not be subjected by plaintiffs.

R. H. Cunningham for appellant; J. L. Dorsey for appellee.

Kitchen v. Commonwealth.

Filed February 15, 1893. Appeal from Lawrence Criminal Court. Opinion of the court by Judge Brent, affirming.

Indictment under statute—An indictment under section 2, article 17, chapter 29, General Statutes, for unlawfully pointing a deadly weapon at another is sufficient if it follows the language of the statute describing the offense and charges the offense so described on the accused. It is not required that the indictment should conclude against the form of the statute.

Alexander Lackey for appellant; W. J. Hendrick for appellee.

Monroe v. Brann.

Filed February 15, 1893. Appeal from Pendleton Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Sureties—Contribution—Evidence*—In this action by a surety against his cosurety for contribution, in which the defense is that the principal conveyed property to plaintiff in consideration of his agreement to discharge the note, for the payment of which he seeks contribution, the plaintiff having denied that he accepted the deed from the principal, reciting the alleged agreement, it was competent for him and the principal to testify as to the terms of their agreement about the purchase of the property as well as their conversation at the time the principal, the grantor, read the deed to plaintiff.

2. *Acceptance of deed*—The finding of the jury for the plaintiff upon the issue as to the acceptance of the deed is supported by a decided preponderance of the testimony.

3. *New trial—Newly discovered evidence*—The court properly refused a new trial, asked upon the ground of newly discovered evidence, as the new evidence was principally cumulative, and defendant failed to show any good reason why it was not discovered before the trial.

4. *The court did not abuse its discretion in keeping the jury together* a day and a half after they reported they could not agree, telling them "that the parties were entitled to a verdict," and that they should "exhaust all reasonable means" in order to find a verdict.

L. T. Applegate and Simms & Holland for appellant; John H. Barker for appellee.

Peak, &c. v. Grover, &c.

Filed February 15, 1893. Appeal from Owen Circuit Court. Opinion of the Court by Presiding Judge Yost, reversing.

1. *Liability of assignee of note—Diligence required of assignee*—The assignee

Digitized by Google

of a note, in order to preserve his recourse against the assignor, is not bound to use all possible diligence in prosecuting the obligor to insolvency, but only such diligence as a man of ordinary prudence would use in the collection of his own debt. And what is reasonable diligence in any case depends upon the facts in that particular case, there being no rule of law by which the court may be governed.

An assigned note was accepted by the assignee upon the faith of the genuineness of a mortgage lien by which the note was secured. Suit was brought at the first court and prosecuted to judgment. The judgment directed a sale of the property to satisfy first a lien which was adjudged to be prior to that of plaintiff. A sale was had at the first county court held thereafter, and the proceeds not being sufficient to pay all of plaintiff's claim, after satisfying the prior lien, execution at once issued on the personal judgment, the delay being only fifteen days from the time when execution might have been issued. *Held*—That under the circumstances the delay was not so unreasonable as to release the assignors.

2. *Same—Assignment of note in payment of legacy*—A testator provided by his will that his "good notes and claims" be paid over and received by his devisees "in payment of devises, and distributable shares under this will by my executors in the exercise of a sound discretion, and my estate will be liable for the expenses of any reasonable litigation incurred by any one of my devisees relating to the transfer of such cash notes, provided that such notes so turned over shall be collected or renewed by such devisee in a reasonable time, and that after collection or renewal no liability shall attach to my estate." A devisee having prosecuted to insolvency the obligor in a note received by her under this provision of the will brings this action against the other devisees to recover the amount she failed to make on the note. *Held*—That the plaintiff did not take the note at her own risk as to the solvency of the obligor, nor should she be held to the same strictness and diligence in the collection of the note devised as the law holds the ordinary assignee. But even if such diligence be required, the plaintiff has manifested her right to recover.

3. *Failure of title to note*—As a mortgage which purported to secure the note received by plaintiff, and upon the faith of which she accepted the note, proved to be ineffectual by reason of a prior lien upon the same property, the title of the estate to the note failed as completely as if it had not been the genuine note of the obligor, and, therefore, plaintiff is entitled to recover, even though the testator intended to guarantee only the title to the notes received by the devisees.

E. E. Settle for appellants; Lindsay & Botts for appellees.

ANDREWS, BY, &c. v. HURT'S ADM'R.

Filed February 15, 1893. Appeal from Clinton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Infants—Suit by next friend—Parties to action*—The chancellor should always look to the interest of infants, and where one suing as next friend for an infant has omitted a proper party the court should order the person omitted to be made a party to the action.

2. *Trusts—Suit by creator of trust to compel its execution*—A grandfather placed a sum of money in the hands of a trustee for his little granddaughter, providing in the deed that in the event the trust fund should for any reason become endangered it should immediately become due, and should be paid over to the judge of the county court, who was directed to place it in the hands of a guardian for the benefit of the *cestui que trust*. The trustee becoming financially embarrased, and his creditors being about to attach his property, the grandfather brought this action as next friend of his granddaughter to recover the trust fund. *Held*—That the court erred in sustaining a demurrer to the petition. It was proper for the grandfather and creator of the trust, acting as next friend, to take such steps as would secure the fund so that it could be placed in the control of the county judge; and

Digitized by Google

it was not necessary for the plaintiff to allege facts showing that he was free from disability. And though the county judge was a proper party, the failure to make him a party was not cause for dismissing the petition.

Sam C. Hardin and J. F. Montgomery for appellants; J. A. Brents for appellee.

Bentle v. Geeke Brewing Co.

Filed February 15, 1893. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, reversing.

Continuance—Departure of witness—While a party neglecting to subpœna witnesses takes the risk of their nonattendance, yet when witnesses actually attend on request the party's diligence is as complete as if they attended upon subpœna, and if the party upon whose request they attended is taken by surprise by their departure before testifying a continuance should be granted.

A defendant who was in attendance at court for the purpose of defending the action, after filing his answer, promised his codefendants, who were relying upon his testimony in support of their separate defense, that he would remain and testify for them, and relying upon that promise they did not have a subpœna issued. When the case was called two days after he filed his answer he was not present, having been frightened away by the threat of plaintiff to prosecute him for perjury in swearing to his answer. *Held*—That his codefendants should have been granted a continuance upon the filing of an affidavit stating these facts and showing the materiality of his testimony.

J. T. Simon and John H. Barker for appellant; Applegate & Colvin for appellee.

Hurst v. Anderson, &c.

Filed February 22, 1893. Appeal from Powell Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Sureties*—The fact that sureties in a note did not disclose the fact when they signed the note that they were signing merely as sureties does not make them principals. Nor does the fact that they were at the time indebted to the principal, and that he agreed that they might retain the amount of that indebtedness until the note was paid off, change their liabilities from that of sureties to that of principals. Nor did their subsequent promise to pay the note make them principals or stop the running of the statute of limitations.

2. *Exceptions*—The appellant can not complain of evidence to the admission of which he neither objected nor excepted.

3. *Instructions to jury*—As appellees were entitled to a peremptory instruction appellant can not complain of the instructions given.

W. L. Hurst for appellant; C. B. Hancock for appellees.

Illinois Central Railroad Co. v. Hobbs, &c.

Filed February 22, 1893. Appeal from Carlisle Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Carriers—Unexplained delay—In this action against a railroad company to recover damages resulting from the delay in transporting cattle which defendant had undertaken to carry for plaintiff, an unexplained delay of thirty-four hours in running a distance of "something over 500 miles" authorized the conclusion that defendant was guilty of negligence, and it devolved upon it to account for the delay on some other hypothesis; and while the employes in charge of the train testify that they were delayed by side tracking by having to wait for special trains to pass, by fear of a broken rail at a certain point, etc., yet under all the circumstances this testimony does not satisfactorily account for the extraordinary delay.

Z. W. Bugg & Son for appellant.

Digitized by Google

BARBOURVILLE REAL ESTATE CO. v. MATTHEWS.

Filed February 22, 1893. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Barbour, dismissing appeal.

1. *Service of summons on corporation*—Summons against appellant, a corporation, was returned "Executed on Andrew Johnson," alias summons was returned "Executed on E. B. Bain, Secretary Barbourville Land and Real Estate Company." *Held*—That as there is nothing to show that either of the persons on whom summons was served was the "chief official or agent" of appellant in the county where summons was served, appellant was not before the court and judgment against it is void. The recital in the judgment that the defendant "had been duly served with summons executed upon its president and secretary" did not cure the defect.

2. *No appeal lies from a void judgment* until motion has first been made in the lower court to set it aside.

A. K. Cook and W. H. Holt for appellant; John L. Scott & Son for appellee.

ILLINOIS CENTRAL RAILROAD CO. v. SANDUSKY.

Filed February 22, 1893. Appeal from Carlisle Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Passenger carriers—Negligence*—Railroad companies in the carrying of passengers are required to exercise the utmost care short of a warranty of the safety of the passengers. And this rule is not only applied to the vehicles and machinery employed in the transportation, and the employes in charge of them, but also to the roadbed over which the transportation is to be made.

In this action by a passenger to recover damages for injuries received by the derailment of a car which was caused by a misplaced switch, the misplacement being made possible by the fact that a bolt and key were out of place, the evidence was sufficient to authorize the submission to the jury of the question as to whether the employes of defendant, whose duty it was to inspect the switch, had exercised that high degree of care which the law requires.

2. *Contributory negligence*—The plaintiff had the right to occupy a car other than that to which he had been assigned, or in which he had taken a berth, and he was not guilty of contributory negligence in so doing.

3. *Same*—It is not negligence *per se* for a passenger to move from one place to another in a car.

4. *Excessive verdict*—As there was some testimony tending to show that plaintiff was seriously injured and suffered for many months, this court can not set aside a verdict for $1,500 upon the ground that it is excessive.

Z. W. Bugg & Son and W. H. Green for appellant; Charles Eaves and J. M. Nichols for appellee.

THOMPSON, SUPERINTENDENT, &c., v. BRADLEY.

Filed March 1, 1893. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, reversing.

School Commissioners—Payment—Under the school law as it existed prior to the present law, approved May 12, 1884, the school commissioner was not, in addition to the $3 allowed him for each school district reported by him, also entitled to $3 for each school visited by him, the visitation of schools being a part of his general duties, for which he was allowed $100 and one per cent. Therefore, where a school commissioner was, by mistake, allowed and paid $3 for each school visited by him for the school year ending June 30, 1884, the Superintendent of Public Schools should, in a proceeding against him by the commissioner to compel him, by mandamus, to approve and certify the plaintiff's claim for reporting schools in June, 1884, be allowed to plead as a payment the amount which was, by mistake, paid the plaintiff for visiting schools. And it is not material whether the report was for the benefit

Digitized by Google

of the school year ending June 30, 1885, or that ending June 30, 1884, as in either case it would be unjust to allow the commissioner to retain the sum mistakenly paid him for visiting a certain number of schools, and give him judgment against the State for the same sum for reporting that number of schools.

W. J. Hendrick, Thomas H. Hines and T. M. Goodnight for appellant; Thomas B. Ford, John S. Harrod and John L. Scott for appellee.

Fowler v. Broadwell.

Filed February 22, 1893. Appeal from Harrison Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Inconsistent defenses—Election*—In an action upon an assigned check the defendant having alleged in one paragraph of his answer that the check was given merely in jest, and was without consideration, which facts were known to the plaintiff, who witnessed the transaction, and alleged in another paragraph that the plaintiff and his assignor, the payee of the check, had fraudulently conspired to induce him to deliver the check, and that the assignment to the plaintiff was made with the fraudulent design to force the collection of the check from him, these defenses were not inconsistent, and the court erred in requiring defendant to elect.

2. *Assignment of check*—It was error to give an instruction which, in effect, authorized the jury to find for plaintiff, even though he knew, when he paid for the check, that it was given in jest and without any consideration. It was not sufficient to authorize him to recover that he did not know when the check was "assigned" that it was without consideration.

3. *Same—Notice of infirmity*—Where a check is purchased with knowledge that it was given without consideration, the purchaser can not recover.

W. S. Cason and Forman & Cason for appellant; J. T. Simon for appellee.

Marquis v. Temple.

Filed February 22, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Evidence sufficient to support judgment—Burden of proof—In this action to recover the price of logs sold and delivered, in which the defendant pleaded as a counterclaim the damages which he alleged he had suffered by plaintiff's failure to comply with his contract as to the number and quality of logs delivered, as the parties differed as to what the contract was and the testimony of each sustained his contention, judgment for the plaintiff was proper, the testimony of the parties themselves constituting the main evidence pertinent to the issue, and the burden of proof being on defendant.

Sweeney, Ellis & Sweeney for appellant; Geo. W. Jolly for appellee.

Jones v. Holstead.

Filed February 22, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

In this action involving a settlement of partnership accounts the evidence, although vague and unsatisfactory, was sufficient to authorize a judgment for appellee for the balance reported in his favor by the commissioner.

Kam & Hays for appellant; Birkhead & Clements for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. MAY 1, 1893. No. 21

KENTUCKY COURT OF APPEALS.

MARTIN V. MARTIN.

(*Filed Oct. 22, 1892—Not to be reported.*)

Conveyance by father to son in consideration of support—Surrender of deed—Liens—A father conveyed a tract of land to his son John in consideration of the son's agreement to support him and his wife during their natural lives. John supported his father and mother for four or five years and then left them, gave up possession of the land and surrendered the deed, which had never been recorded. A younger son supported the father for seven or eight years until his death, and to him the father executed a deed for the land in consideration of support. In this action of ejectment by the son John against the younger son, which was by consent transferred to equity, *Held*—That the surrender of the deed by John did not reinvest the father with title. The deed to John should be canceled, and he should be allowed $50 per year during the period he supported his father, and the land should be subjected for its payment.

Brafford, Golden & Davis for appellant.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Pryor.

Valentine Martin, being advanced in years and unable to support himself and wife, conveyed a small tract of land to his son, John D. Martin, in consideration that he would support the two old people during their lives. They lived together as one family under this arrangement for four or five years, when John, the son, as the weight of the testimong shows, neglected his father to such an extent as caused him to complain, this trouble resulting in John's handing back to his father the deed and his leaving the premises.

It is proper to say that John's version of the trouble is that his father wanted him to support his sister, and on his refusal he left the place with his father in possession. The father lived for seven or eight years after this, and being under the impression that the

Digitized by Google

redelivery of the deed reinvested him with title executed a deed to his son, Dan Martin, based on a like consideration.

The last son, Daniel, supported his father comfortably for seven or eight years, and, after his father's death, John, to whom the first deed was made, brought his ejectment to recover the land. The case was transferred to equity without objection and the deed to John cancelled.

We think this was error. John had kept his father for several years, and while he surrendered the deed to his father it did not divest him of title. The consideration expressed in that conveyance, however, was discharged by the appellee, his brother, under the deed made to him, and made under the belief that the surrender of the first conveyance by John restored the title in the father. That he did support his father is evident, and as all these parties are in a court of equity the chancellor should allow the appellee the sum of $50 per annum in addition to the rent of the land for the time he supported his father and subject the land to its payment.

Judgment reversed and remanded for proceedings consistent with this opinion.

L. & N. R. R. Co. v. Lewis.

(*Filed Feb.* 4, 1893—*Not to be reported.*)

Ejectment of passenger—Instructions—A passenger on a railway train was carried beyond his destination because he was so intoxicated as to render it unsafe to put him off there. The next day he boarded another train to return to his destination and was put off because he refused to pay his fare. In this action to recover damages because of such ejectment he did not claim any damages for being carried beyond his destination, nor did the evidence authorize any recovery on that account; therefore, it was error to instruct the jury that the company was liable in damages if it willfully, negligently or carelessly carried the plaintiff beyond his destination without his fault.

John McChord, Wm. Lindsay and Jeff. Henry for appellant.

John W. Lewis, Charles Pattison and Knott & Edelin for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Pryor.

The recovery of $5,000 was had below by the appellee on the ground that he had been unlawfully and wrongfully ejected from the cars of the appellant when a passenger.

He had in his possession a two-thousand-mile ticket, and boarded the train at Stanford for Williamsburg, presenting his ticket and having the coupons detached for the distance between these places. It seems that he was sleeping soundly, from his statement, when the train reached Williamsburg, and he was carried on to Jelico. The conductor and baggage master testify that he was intoxicated, and so much so that they feared to put him off as his life would have been endangered from the constantly passing trains. They both state, however, that he was awakened and notified before he reached Williamsburg that the train was approaching the place, and that when reaching the depot had again gone to sleep, when he was aroused and again told that he had arrived at his place of destina-

Digitized by Google

tion, but he refused to get off, and the conductor, under the circumstances, thought it best to take him on.

On the next day he boarded another train, returning with a different conductor, and when his fare was demanded refused to pay, alleging, as the reason, that he had been wrongfully taken by Williamsburg the night before.

After much parleying in regard to the matter, and his refusal to pay, the conductor and a brakeman took hold of him and put him off at a station a few miles north of Jelico. There is some conflict in the testimony as to his offer to pay on the train, but the proof conduces strongly to show that he was refusing to pay his fare, and this originated the trouble.

He was drinking on the train as it went south the night before, and had a bottle of whisky with him, and there is no evidence whatever conducing to show that the conductor was guilty of any neglect in failing to put him off at Williamsburg.

The conductor on the return train was not the same man, and it was the duty of the appellee to have paid his fare, and the only question really in this case is, did the employes of the company use more force than was necessary to put him off the train?

The instructions given by the court embraced the law of the case, and were to the effect that the conductor had the right to eject him from the train if he refused to pay his fare, but no more force than was necessary for that purpose should be used.

The appellee claims that he was choked by the conductor and beaten on the head by him and otherwise maltreated, and while the testimony is very conflicting on this point, if the statements of the appellee and his witnesses are to be believed, the conductor acted in excess of his authority when he undertook to beat and bruise the appellee for not leaving the train. He had the right to carry him from the train, and if, in his struggle to resist the efforts of the conductor, he injured himself, the company is not liable, but when he undertakes to strike and inflict bodily injury under such circumstances on the passenger, and not to protect himself from an assault, his company should be held responsible.

There is an instruction in this case that is erroneous for two reasons: First, because the evidence did not authorize it; and second, the plaintiff is not seeking to recover for the failure to put him off the train at Williamsburg, and counsel for the appellee, in arguing this case, asserted, which is the fact, that no claim was made for damages on account of the failure of the conductor on the southbound train to give notice of its arrival at Williamsburg; still the court told the jury that "if the plaintiff went on board the defendant's train at Stanford to be transported to Williamsburg, and paid his fare, it was defendant's duty to permit plaintiff to get off at his destination and to give him fair warning of the train's arrival, and if defendant did willfully, carelessly or negligently carry plaintiff beyond his destination, and without plaintiff's fault, you should find for the plaintiff damages not exceeding $10,000."

The conflict of testimony in regard to the assault and ejection from the train was of such a character as that a verdict would have been sustained either way if within proper limit. Several witnesses swear that the appellee was wholly to blame, while the testimony for the plaintiff is to the contrary; still by the instructions given the jury has been invited to leave the real issue in the case and permitted to consider the question as to a violation of defendant's contract as a carrier in passing the destination of the plaintiff and landing him at Jelico.

Digitized by Google

The light in which the jury may have disposed of that issue is not before us, but the instruction would indicate that the testimony showed a right of recovery for the breach of the carrier's contract, as well as a recovery for the wrongful ejection from the train, for which punitive damages were given.

The petition contained only one count, and the averments as to the manner of the trip south on the one train was not the foundation of any recovery, and if it had been there is no testimony to suitain it. It was a recital more to justify the act of the plaintiff in refusing to pay his fare on the return trip than for any other purpose.

The judgment is reversed and remanded for a new trial, and for proceedings consistent with this opinion.

RATCLIFF V. ELAM, &C.

(*Filed Feb.* 9, 1893—*Not to be reported.*)

1. *The plaintiff in ejectment must recover on the strength of his own title* and not by reason of defects in defendant's claim.

2. *Trusts—Sale of land for costs*—Certain persons claiming to act as the trustees for the owners of the legal title instituted suits to recover certain lands, which were dismissed by them without prejudice. Executions issued against them for costs amounting to $38, and the land they claimed as trustees 38,000,000 in the aggregate, was sold by the sheriff for the costs. In this action of ejectment by one claiming the legal title to the land under a purchase at such execution sale. *Held*—

First. The burden was on plaintiff to show that the alleged trustees were in fact authorized to act as such and to bind the estate of the beneficiaries.

Second. Even if the trust estate was liable for the costs it should have been subjected therefor by an order of the chancellor and not by execution sale. The sheriff's deed passed no title.

3. *Ejectment—Possessory title*—Plaintiff in ejectment is entitled to recover if, by himself or his tenants, he entered upon the land in controversy, claiming and holding the same as his own by a well-defined boundary for fifteen years before the entry by the defendants.

4. *The conveyance to plaintiff was champertous in this case*, defendant being in adverse possession at the time.

B. F. Bennett, J. D. Jones, R. C. Burns and John L. Scott for appellant.

E. F. Dulin and J. R. Botts for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Pryor.

The appellant is claiming sundry tracts of land in the county of Carter, now in the possession of the appellees, and each tract lying within the boundary of an original survey and patent, issued to one Richard Graham in the year 1785. The plaintiff also claims under a junior grant made to himself in the year 1868 by the State. This grant, however, is void, for the reason that Graham's patent covered the land at the time the appellant made his entry under the grant of 1868; but it is argued the fact of the appellant purchasing in Graham's title perfects his entry under the last grant, and, therefore, he is entitled to recover.

Digitized by Google

It is well settled that on the trial of an ejectment the plaintiff must recover on the strength of his own title, and not on the defects in the claim of his adversary.

These appellees were in possession of this land and the burden was on the plaintiff to make out his case. His paper title, if any he had, is derived through Graham, and one of the questions, and perhaps the principal question, in this case is: Did the appellant ever acquire Graham's title. For if he did not, then the question as to a possessory title having been submitted to the jury, with a verdict for the defendants, the judgment must be affirmed, as no title by possession has been made out, or, if so, the proof was conflicting as to the manner of the holding and the extent of the possession by the plaintiff and his tenants.

Then as to Graham's title: It appears that Sutton, Henderson and others, who claimed to be trustees holding this land for Graham, brought various actions at law, which were dismissed or discontinued, and that executions for costs, amounting in all to $38, were levied on all the land within the Graham patent, the number of acres exceeding 38,000, and the entire patent boundary was sold for this costs, under executions against Sutton, Henderson, etc., trustees of Graham.

There is nothing in this record showing they were even trustees of Graham, in the first place, or that any right or authority had been vested in them by which they could prosecute such actions and subject the estate of the beneficiary to sale under an ordinary execution against the trustees for these costs.

If the beneficial interest was liable the trust estate was subject to sale by the chancellor, or so much as might be necessary to discharge the liability. The sheriff's deed passed no title to Ward, under the circumstances, and, therefore, the deeds made by him or his heirs at law to the appellee passed none, unless the possession under them had ripened into a title, and this was the issue that was tried by the jury and a verdict returned for the defendants.

It is conceded by counsel for the appellant that with the deeds out of the case the appellant is not entitled to recover, and it is manifest that no paper title has been exhibited. There was an effort to show that Graham had divested himself of title by sale and conveyance, and if the testimony had been admitted, its effect would have been to divest the appellant of title as well as the appellees. It further appears that Ward had instituted various actions in ejectment against tenants in possession of this boundary many years ago, and that his actions, some of them, had been dismissed, and in others verdicts returned for the adverse holders; and also that the defendants, or those they claim under, entered under Graham many years before this action was brought, nor was it necessary for them to make out a perfect title; they were in the possession and the plaintiff was required to show his title, and this he failed to do.

The deeds offered as evidence were permitted to go to the jury, not as evidence of title, but to show the extent of appellant's possession and the manner of his entry.

There was one instruction that embraced the whole law of this case, and that was: "If the plaintiff, by himself or tenants, entered on this land in controversy, claiming and holding the same by a well-defined boundary for fifteen years before the entry by the defendants, then, and in that event, they should find for him."

The deed to Ratcliff, made by Womack and wife, the heirs of Ward, was in fact champertous, because Pope, who claimed under Graham, was in the possession of this land, holding adversely to

Digitized by Google

Womack and wife, when Ratcliff purchased and obtained his deed. The jury so found, and there is but slight testimony upon which to base a recovery against these claimants, who are in the actual possession of their homes, and have been undisturbed for years, and when Ward attempted to assert his right under this same claim of title that the plaintiff sets up, the possession was then adverse to him, and in fact the failure to recover in his action broke what is now claimed to have been a continuous possession in him and those to whom was passed his right, whether by descent or purchase. In fact those who entered under Ward were restricted as to their possession, but, if not, the question of possession and its extent was left with the jury, and their verdict is sustained by the evidence. The instructions were proper and as favorable to the plaintiff as the facts authorized.

We have not noticed the evidence on the motion for a change of venue, as the action of the court below is final and not subject to an appeal. (General Statutes, page 235.)

Judgment affirmed.

GATEWOOD V. LONG, &C.

(*Filed Feb.* 28, 1893—*Not to be reported.*)

Conveyance by brother to sister—Evidence—The evidence shows that the brother conveyed his undivided interest in land to his sister in 1882, in consideration of his affection for her; this he had a right to do; and even if the deed for a designated part of the land to him, on its partition among the joint owners in 1885, had been accepted by him, it would have inured to the benefit of his sister. The conveyance to the sister was executed and absolute, and the brother can not now claim against his own deed.

Lewis McQuown for appellant.

Thomas H. Hines, Geo. T. Duff and T. T. Reynolds for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hazelrigg.

The deed of October 16, 1882, from the appellant to his sister, Fannie, evidenced an executed contract. Discussion as to whether or not the consideration of the conveyance was "valuable" is immaterial. The brother had the right to convey the land, and did so voluntarily.

There is no evidence that she agreed to hold the title for him. There are fugitive declarations in proof, made by her, that if Charles wanted it back she would give it to him.

The conveyance was of an undivided one-fourth interest, and the deeds of partition, in 1885, were for the purpose of localizing the lands of each; and if a deed was made to Charles the title thus obtained from his brothers inured to the sister's benefit; but the conveyance was never delivered to him or demanded by him at the time.

Indeed we find him, in September, 1888, in an action directly involving his ownership of this land, testifying that he did not own this land in 1885, but had deeded it to his sister in 1882. This was some eight months after her death, and some three years after it is

Digitized by Google

contended for him that he received a deed under this partition. He also swears in that same suit that he received no deed or land in any division, and that Long, the husband of Fannie, was in possession of it.

He is quoted in this record by several witnesses as asserting that the land belonged to his sister and to appellee, A. B. Long. He sets up no claim when told he was about to trade for it. In the face of all this testimony, directly and fatally repugnant to the establishment of his claim, he does not testify in this action or attempt to explain his inconsistent statements.

It is manifest that he parted with his patrimony without pecuniary compensation. Had his sister lived her affection for him would doubtless have led her to reconvey it to him. But he made her the object of his affectionate bounty in her lifetime, and must now be satisfied to see her children (his nephews) enjoy the fruits of his generosity.

The judgment below dismissing his petition must be affirmed.

BAUGHMAN, &C. v. L., E. & ST. L. (CONSOLIDATED) R. R. CO.

(*Filed Mar.* 9, 1893.)

1. *A common carrier can not, by contract or otherwise, obtain exonoration from loss which has been the result of its own neglect.*

2. *When a loss of goods results from the carrier's neglect the shipper is not bound by a contract fixing an agreed value on the goods*, beyond which the carrier was not to be liable; the full value of the goods may be recovered.

Muir, Heyman & Muir and E. F. Trabue for appellants.

Humphrey & Davie for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is an appeal from a judgment rendered in an action by Baughman & Lasley against Louisville, Evansville & St. Louis Railroad Co. that was tried at the same time and together with three others against the same defendant.

It is stated substantially by plaintiffs that they delivered to defendant, to be shipped on its road from Louisville to St. Louis, Missouri, a horse, of which they were owners, named "Hart Wallace," of the value of $25,000; but that while the train was en route defendant's servants in charge negligently placed the car containing the horse and about a dozen others in such position that it collided with another train and was wrecked, whereby the horse was injured and plaintiffs were damaged the sum of $1,500.

Before and after filing its answer defendant moved the court to consolidate the action with the three others mentioned, in each of which damage is prayed for by the respective plaintiffs, on account of injury done to their horses while on the same car, and that the four actions be removed to the United States Circuit Court, but that motion was overruled. However, subsequently the four actions were, without objection, tried together, and, under instruction of the court, a separate verdict was returned by the jury in favor of the plaintiffs in each action; though as to each the amount

Digitized by Google

of recovery was limited to the maximum sum of liability fixed by the bill of lading.

It seems to us the motion to consolidate the four actions, against objection of the parties plaintiff in each case, was properly overruled.

The general rule prescribed in section 18, Civil Code, is that "every action must be prosecuted in the name of the real party in interest;" and by section 22 "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs."

Therefore if the plaintiffs had all united originally in one action the defendant would have had cause of demurrer. For although the contract for shipping the horses was made with the defendant and signed by one Weatherford as owner and shipper, he was, in fact, merely agent of the several firms to whom the animals respectively belonged, and neither could he have maintained an action, nor could any one of the four firms have sued for or recovered damages suffered by the others.

The subject of each one of the actions was the injury done to the property of and consequent distinct damage to the plaintiffs, who brought it; and the plaintiffs in the other actions did not have any interest in the subject, or in obtaining the relief therein demanded. If then the plaintiffs need not nor could have united in the same action, nor were indeed compelled to bring the different actions at the same time or in the same court, we do not see by what right the defendant could demand a consolidation of the actions after they are brought.

The main question is whether the following stipulation in the contract of shipment is binding upon the plaintiffs: "And it is further agreed that should damage occur, for which the said party of the first part may be liable, the value at the date and place of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, $200; for a horse or a mule, $100; cattle, $30 each; other animals, $5 each; which amounts it is agreed are as much as such stock as are herein agreed to be transported are reasonably worth.

The plaintiffs offered to prove, and averred in writing, the witnesses introduced would prove the following facts: That they are owners of the horses mentioned; that he was injured by the gross negligence of defendant's servants, as alleged in the petition, and that said injury was the sum $1,975. But the court sustained defendant's objection to the evidence, and thereupon instructed the jury to find for the plaintiffs only the sum of $200, previously tendered by defendant, and the verdict was so returned.

It has been distinctly held by this court that a common carrier can not, by contract or otherwise, obtain exoneration from loss which has been the result of the negligence of himself or his agents (L. & N. R. R. Co., 14 Bush, 600); and the doctrine seems to have been generally sanctioned in this country upon the ground public policy forbids an enforcible stipulation for exemption by a common carrier from the consequences of his own negligence or that of his servants. (Hart v. Pennsylvania R. R. Co., 112 U. S., 331, and authorities there cited.)

But whether a contract limiting the value of goods beyond which a common carrier is not to be held liable to the owner can be given effect, when the loss was occasioned by negligence of the carrier or his servants, is a question upon which courts of this country are divided; though, as said in Hutchison on Carriers, 260, the

Digitized by Google

weight of authority is in favor of holding him to full responsibility, without power by contract or in any other mode to relieve himself of it; and to that effect is decision of this court in L. & N. R. R. Co. v. Owen, 14 KY. LAW REP., 118.

We do not in fact see how, if it be admitted, as seems to be generally done, that a common carrier can not obtain exemption by contract from the general consequences of his negligence, he can make a valid and enforcible contract by which he may be exempted from paying full value of goods of the shipper destroyed or lost by his negligence. For if public policy forbids enforcement of a contract of exemption, when loss is occasioned by negligence, it logically requires full, not partial, measure of compensation to the owner of goods so lost or destroyed.

It seems to us a common carrier can not be injured or unfairly dealt with if simply required, in the usual course of business, to deliver the goods at the place of destination, or account to the shipper for their full value in case he, in violation of his contract and by his own negligence or that of his servants, has lost or destroyed them. For if the goods are of high value, or the owner or bailor shall fix a high value upon them, it is always competent for the carrier or bailee to use care and expense, and then demand compensation for their carriage proportioned to such value.

The shipment of the horse in this case was in the usual course of business, and the bill of lading signed by the agent of plaintiffs contained none other than the ordinary stipulation. It is not alleged the plaintiffs or their agent deceived defendant as to the value of the horse. Nor, though so argued by counsel, was the rate of freight lessened in consideration of the agreement of plaintiffs to accept less than actual value of their horse in case of loss or injury by negligence of defendant. The contract can not be fairly construed to mean that the reduction of freight rate was made from such consideration or inducement, nor is it even so alleged in defendant's answer. But the reduction of the freight was manifestly made by reason of the shipment of a dozen or more horses, including that of plaintiffs, in the same car, under one contract and one consignment of the goods.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

THE FIDELITY TRUST & SAFETY VAULT CO., &C. V. MCFERRAN, &C.

(*Filed Mar.* 16, 1893—*Not to be reported.*)

Construction of devise—Trusts—Under a devise by a father to a trustee for the benefit of his son and the son's children it was evidently the divisor's intention to provide for both the son and the children, and to authorize the trustee to so apply the income of the estate as to maintain both. And where the son and his wife were separated and divorced after the will was probated and the wife given the custody of the children, the chancellor, when applied to, should direct the trustee to pay a part of the income of the estate to the mother for the benefit of the children and the remainder of it to the father. And since the mother has no resources for providing for the children an allowance of $1.200 for the benefit of the two children out of the $4,000 income of the estate was reasonable and just.

Goodloe & Barr for appellants.

Digitized by Google

Stone & Sudduth for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

James C. McFerran died in the year 1885, leaving a last will and testament, containing certain provisions in regard to his son, James C. McFerran, jr., and his children, that are the subjects of this controversy.

He owned a large estate, and secured the estate, or that portion of it intended for his son James and his children, by placing the title in a trustee, John B. McFerran, who was also a son of the testator.

The devise reads: "All that portion of my estate which I have designated as designed for the benefit of my son, James C. McFerran, jr., and his children, I do hereby give and bequeath to and invest in my son, John B. McFerran, as trustee, to have and to hold upon the following trusts, confidences and limitations, to-wit: He shall manage the lands in person or by agent, and shall invest the moneys of the trust. He may, in his discretion, pay out the income to James McFerran, jr., or to the children of James McFerran, jr., or in such ways or to such persons and in such sums as in his own judgment may be best for them, or he may, if he thinks it best, invest any part of the income so as to increase the fund. He shall not be compellable to pay any part of said trust estate or its income or increase to said James C. McFerran or any child of his, but shall see that they do not suffer want.

"He may, in his own discretion, pay out the entire income, or any part thereof, to James C. McFerran, jr., upon his own receipt, but shall not be compellable so to do. He may, at his own discretion, at any time pay over any or all or any portions of money of the trust, whether principal, accumulations, income invested or reinvested to James C. McFerran, jr., but shall not be compellable so to do.

"I have named my son, John B. McFerran, as trustee, and given him the powers aforesaid. I have vested in him the largest and uncontrolled discretion, and I insist that by discretion I mean his own uncontrolled notion and conclusion of what he thinks best. If my son, John B. McFerran, by death, inability or refusal to act, cease to be trustee of and for the trust in this item mentioned, then a new trustee shall be appointed, who shall have and exercise all the powers and discretions herein accorded to John B. McFerran."

John B. McFerran resigned the trust, and the appellant, the Fidelity Trust & Safety Vault Co., qualified as the trustee, but to what extent the chancellor empowered this corporation to act in reference to the discretionary power conferred upon the original trustee does not appear, nor do we deem it an essential inquiry in determining the questions involved in this case.

The testator evidently intended that the children of his son James should become the beneficiaries, in conjunction with their father, of the trust estate. In the seventh clause of his will he directs the *fourth interests for the benefit* of his *son James* and his children to be held in trust as in item eleven, already given; and while he designed that their father should have the larger part of the income, as he was the principal object of his bounty, he nevertheless intended to provide the children born and unborn against want, and this means an adequate sum out of the income for their support, maintenance and education.

After this will was executed the wife of James C. McFerran, by a proper proceeding in the Louisville Law and Equity Court, obtained

Digitized by Google

a divorce from her husband, and was given, by the judgment of that court, the custody of her two children, but no alimony seems to have been awarded her or any allowance for raising and educating the children.

The income of her own estate is scarcely sufficient for her own necessities, and as the next friend of her two children this action has been instituted for the purpose of enforcing the trust created by the will of their grandfather and to obtain from the trustee a sum sufficient to supply their wants and to enable the mother to raise them in a proper way by making only such an expenditure of the income of the trust fund as is necessary for that purpose. The care and custody of the children having been confided to the mother, and the separation between their father and mother being final, a resort to a court of equity is made necessary that the rights of these beneficiaries may be settled.

The devisor, when executing the will by which this trust is created, never contemplated a surrender by his son of the care and support of his offspring, and while the children were in his custody but little trouble could have arisen as to the disposition to be made of the income of the trust estate, as their support and maintenance by him would have carried out the purpose of the testator. His desire seems to have been to keep the estate in his own family, and at the same time provide for the wants of his son's children and to give to them finally the estate devised after his son's death.

The trustee named in the will was given the unlimited disposition of the income of the estate, and stood in *loco parentis* as to both Jas. McFerran and his children, and whether or not the corporation, now made the trustee, can exercise like powers in disposing of the trust funds, because the will vests in the successor similar power, is not material, as the chancellor is now asked to determine only the amount necessary to supply the wants of the children. It is plain that the amount now allowed them would be sufficient to clothe, educate and support them in the home of their mother, but with an income exceeding $4,000 their wants and necessities must, to a great extent, be measured by the value and productions of the trust property.

The trustee named in the will was invested with the right to give all the income to the father of these children, or to take the entire income from the father and give it to the children, showing plainly a purpose that all should be provided for, and this unlimited control was given more to show an intention not to make the trustee liable in any event than to take all from one of the beneficiaries and give it to another.

It will scarcely be insisted that the chancellor, seeing that the marriage relation between the father and mother has been severed, and the mother with no means of supporting the children, would permit the entire income to be paid over to their father and the children deprived of all the benefits of this trust. Is it, therefore, unreasonable to allow to these children $1,200 out of a $4,000 income, to be expended by the mother in their raising and education, and while her maternal obligations would impose on her the duty of providing for them from the results of her own labor, why should this burden be imposed upon her, and the father given the entire income of the estate? The ability of the father to provide for the children is ordinarily greater than that of the mother, and while the tie that bound the parents of these children together as man and wife no longer exists, the natural and legal obligations of the father to provide for the children has been in no wise diminished, and the equitable

Digitized by Google

apportionment of the income of the trust fund, as made by the chancellor, must be upheld. There is, in fact, nothing before us except the question as to the annual allowance to be made these children under the circumstances now surrounding all the parties. These circumstances may change. The father may have other burdens upon him that would lessen the allowance to the children, and on the other hand the income of the trust fund may increase so as to require another application to the chancellor either to reduce or increase the allowance. The trust is of that character as brings the case within the power of the chancellor from time to time, that the trust fund may be applied as directed by the devisor.

Judgment affirmed.

ROWE V. SIMMONS, &c.

(*Filed Mar.* 18, 1893—*Not to be reported.*)

Mortgages—Priorities—A debtor mortgaged certain property to his surety as indemnity. He then conveyed part of the property to his wife for an inadequate consideration. Subsequently the surety, without actual notice of the conveyance to the wife, became bound for other debts of the debtor and took a mortgage on the same property as indemnity. The proceeds of the second debt were applied to the partial payment of the first one. In this controversy between the surety under his second mortgage and the claimant under the conveyance to the wife it is held that the mortgage, although subsequent in date, must prevail over the conveyance, since it would be inequitable to allow the debtor to convey the property to his wife and then induce the surety to become further involved on the faith of a lien on the same property without actual notice of the previous conveyance.

John B. Grider and W. B. Gaines for appellant.

John M. Galloway, Clark & Clark and Wright & McElroy for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

It seems to us the chancellor below has reached the equity of this case by the judgment rendered.

The appellee, Simmons, became the surety of one John L. Rowe for large sums of money, exceeding in amount the value of Rowe's estate, and from time to time took mortgages upon what property Rowe had to secure the payment of the debts for which he (Simmons) was bound. After the appellee had taken some of these mortgages, and made himself liable for large sums of money, Rowe, in an indirect way, had conveyed to his wife the one-fourth of the realty that had been or was embraced by the mortgages executed to Simmons.

The consideration for the conveyance to his wife was a tract of land that belonged to the wife under a devise to her by her father, to be held during life and at her death to her children, with the power to sell on certain conditions. The land was sold and there was conveyed to the wife in lieu of it the one-fourth interest in the real estate that had been mortgaged to Simmons, this one-fourth being more than five times the value of the wife's land. The deed to the wife was recorded, and by its terms she was to hold it in the same manner as she held the land devised to her by her father.

Digitized by Google

After this deed was executed to the wife Simmons, the appellee, placed his name on other paper as the surety of Rowe, and took, as he had previously done, mortgages on the land, executed by both the husband and wife, to secure him in his liability as surety.

He seems to have been ignorant of the execution of the deed to the wife, and no disclosure, except the fact of that deed being recorded, was made to Simmons until after the death of Mrs. Rowe. She died, leaving a child who claimed the one-fourth of this realty under the deed to the mother by reason of the limitation placed upon the right of the mother in the devise to the latter of the land that had been exchanged for the one-fourth interest in the realty of John Rowe, her father.

This realty consisted of a small tract of land with a mill upon it, and was regarded as valuable property. After the execution of the deed to the wife of John Rowe (the mother of appellant) the appellee became the surety of Rowe for a trust fund of $6,000 that belonged to his wife, and that passed to the daughter from the mother, and for which the appellee is liable, and a mortgage was taken to secure him in this liability also.

It is now claimed that the one-fourth interest in the mill property or its proceeds, after satisfying the first mortgages that were executed to the appellee, and of prior date to the deed to Mrs. Rowe, should go to her daughter, the present appellant, because, when the subsequent mortgages were executed, her mother was invested with the title to one-fourth of the land. This is not just or equitable for two reasons. In the first place it is manifest that the money borrowed subsequent to the date of the first mortgages, and for which the appellee was bound, was applied to the extinguishment of the debts secured by the first mortgages, and in this manner, the first mortgage debts being reduced, left but a few thousand dollars of them unsecured.

If, however, the money subsequently borrowed was applied by John Rowe to the payment of these debts, why should not Simmons, as the surety in all the debts, be protected in equity as against the claim of the wife or daughter by reason of the intervening deed to the wife?

To illustrate: The husband, John Rowe, borrows $10,000, with Simmons as surety, and executes to Simmons a mortgage on all his estate, consisting of realty, and worth from $15,000 to $20,000. He then, for the consideration of $500, conveys to his wife the one-fourth of the realty, with a limitation over to her children, and subsequently borrows other money, with Simmons as surety, applying it to the payment of the first mortgage debts, and so reducing those debts as to leave a surplus after their payment; under such circumstances ought any chancellor to hold that the rights of Simmons, as the surety of the debtor in the debts secured by the last mortgage, are subordinate to the rights of the wife or her children? We think not.

It may be contended that the evidence is unsatisfactory as to the manner in which the money from the subsequent borrowing was applied, and to such a response it is sufficient to say that, under the circumstances, it was the privilege and duty of John Rowe to make all these transactions plain, and to remove all doubt as to the appropriation of these moneys. He was a witness and conversant with the transactions out of which springs the liability of this confiding surety; and if thus unexplained, it seems to us, although this deed to the wife was of record, for both husband and wife to execute these subsequent mortgages on the whole estate, when this deed had

Digitized by Google

been made to the wife and then to her children without disclosing that fact, connected with the inadequate consideration, is sufficient of itself to defeat the claim of the daughter, who is now claiming that the mortgage to the appellee to secure the trust fund to the mother, and to which the daughter is now entitled, being subsequent to the deed, the surety must pay this trust debt, and, in addition, she is entitled to one-fourth of the realty, or, it having been sold by consent, to one-fourth of the proceeds. Both equity and good conscience requires that this should not be done.

Judgment affirmed.

HENDERSON, &C. V. PERKINS.

(*Filed Mar.* 25, 1893.)

1. *Local actions*—The general rule is that an action to enforce or rescind a contract is local. But an action to enforce a contract, which seeks a sale of land to satisfy a lien thereby created, is local and must be brought in the county where the land is located.

2. *Statute of frauds*—The written contract of the sale of land in this case is a sufficient written memorandum thereof, although the description of the land sold is somewhat defective.

3. *Specific execution—Defective title*—Although the plaintiff's title was defective on the day he was by the contract to convey the land, yet he is entitled to have the contract specifically executed, it appearing he has since perfected his title.

4. *Same*—The fact that a building on the land sold was destroyed by fire before the day the premises were to be delivered, does not release the vendee from his contract and he must accept the land.

5. *Same—Husband and wife*—Where the wife of a vendor was not a party to the contract of sale made by her husband it is error for the chancellor, in ordering the specific execution of the contract, to direct the wife to unite in the conveyance so as to compel her to part with her dower interest.

Lewis McQuown for appellants.

W. E. Settle and E. W. Hines for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, L. D. Henderson, was the owner of a farm of 110 acres, situated in Barren county, Ky., and the appellee owned a storehouse and lot at Rocky Hill Station, and lands adjoining to the extent of some fifty acres situated in Edmonson county. By written contract of December 13, 1889, Perkins sold his property to Henderson, in consideration of the sum of $4,000 and the latter's farm of 110 acres. One thousand dollars was to be paid down and balance on February 25, 1890, when possession was mutually to be given, Perkins covenanting to make deed of general warranty when the purchase money was fully paid. Henderson paid the $1,000 down, and also an additional one thousand in a few weeks after the trade.

On January 31, 1890, the storehouse burned, and the appellee, after unavailing effort to carry out the contract, brought this action against Henderson and his wife in the Edmonson Circuit Court to enforce the contract, and to that end asked that his lien for the remaining unpaid purchase money be enforced by a sale of the Edmonson county lands. He tendered a deed for the lands he had contracted to convey.

Digitized by Google

The defendants, having been summoned only in Barren county, pleaded to the jurisdiction, controverted the statements of the writing, set up that Perkins had no title in fee or otherwise to the land, and, further, that the contract should not be enforced, because Perkins had burned his storehouse to get the insurance on his goods therein, or else it was burned by his negligence.

The lower court sustained a demurrer to the plea of want of jurisdiction, and, on hearing, gave judgment for the enforcement of the contract, adjudged a sale of the Edmonson county lands for the unpaid purchase price, and adjudged that Henderson *and wife* should convey the Barren county lands to Perkins.

The grounds relied on by Henderson to reverse this judgment are: First, the Edmonson court had no jurisdiction; second, the contract is within the statute of frauds; third, Perkins had no title to the property; fourth, he burned his storehouse to get the insurance on the goods; fifth, the judgment erroneously directs Henderson and his wife to convey the Barren county lands to Perkins.

On the subject of jurisdiction it may be said that the general rule is undoubtedly that actions to enforce contracts or to rescind them are transitory and not local; yet, when the enforcement involves a sale of the land to satisfy a lien thereon, it has been the rule to regard section 62 of the Civil Code as localizing the action. That section provides that actions must be brought in the county in which the subject of the action, or some part thereof, is situated * * for the sale of real property * * * under a mortgage, lien or other encumbrance or charge, except for debts of a decedent; and such was the precise question decided in Collins v. Park, 13 Ky. Law Rep., 905; Ducker & James v. Gray, 3 J. J. Mar., 163.

2. The writing evidencing the contract, and which was signed by the parties, is as follows: "Know all men by these presents, that I, W. C. Perkins, of Rocky Hill Station, Ky., have this day sold, and, by these presents, do sell, my home place and storehouse to L. D. Henderson, of Rocky Hill, Barren county, Ky., for and in consideration of $4,000," etc., followed by a specific statement of the terms of the trade.

We think this a sufficient memorandum of the contract to take it out the statute. There was a partial execution of it, and the description of the land, although defective, was sufficiently full for easy identification. (Ellis v. Deadman, 4 Bibb., 467; Hanly v. Blackford, 1 Dana, 1.)

3. The answer alleges that on the 25th of February, when the deed was tendered by him, the appellee did not have any title in fee or otherwise to any of the lands described; that the storehouse had then been burned and it was impossible to deliver said premises to him in accordance with the contract.

It will be observed that while possession was to be given on the 25th of February, the deed was not to be made until the payment of the balance of the purchase money. We may suppose these acts were to be cotemporaneous, and there was no tender of the money. The appellee, however, did have title, though it was defective, and as the defects have been cured, we do not perceive that the appellee has any ground of complaint on this behalf. It is quite evident that the cause of the appellants' hesitancy to comply with the contract was the fact that the storehouse had been burned, and from this loss we can not relieve him. There is no grant shown from the State, but the chain of title begins in 1835, and the appellee and those under whom he claims have had continuous adverse possession for

Digitized by Google

at least forty years, and a grant from the Commonwealth will be presumed.

4. There is no evidence whatever tending to show that the appellee burned the house, or had any motive to do so, or that it was occasioned by his negligence. But the wife was no party to the contract, and had she been, we do not see upon what principle the court could have adjudged a conveyance of her dower in the Barren county lands; and as this was error the judgment must be reversed, with directions to have it otherwise enforced.

CONYERS V. SCOTT.

(*Filed Feb.* 25, 1893.)

Right of way—Adverse use—A presumption of a grant of a right of way will not arise from the use of the way, however long continued, unless the circumstances attending such use show that it was adverse and claimed as a matter of right, and was not merely permissive.

In this case for forty or fifty years ways through an uninclosed woodland had been used, but they were closed from time to time as the owner cleared and inclosed the land; and the last one of these ways was so obstructed by the owner of the land shortly before this action was instituted, until which time no one had ever asserted any adverse right to its use. It being clear that the use was permissive merely, no presumption of a grant can arise from it, and the owner of the land had a right to discontinue it.

R. B. Dohoney and James Garnett for appellant.

J. W. Compton, A. W. Scott and Lewis McQuown for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action for judgment compelling appellee to remove fences recently built across a passway and enjoining him thereafter obstructing it.

It appears that appellee owns and occupies a tract of land, the north and south lines of which are parallel, the former for about half its length bordering on a public road, the latter being north boundary of a tract of land appellant owns and resides on. The passway in question extends northward, though not in a straight line, to the public road dividing the land of appellee in two about equal parts. Appellant owns and cultivates another tract north of and binding on the public road mentioned, to reach which from his home place the passway is the nearest and most direct route. He has no outlet at all from his residence except on lands of others, though he might have a way to a public road by going a greater distance upon his own land and less upon land of another than is the case of the passway in dispute.

It does not appear the lands of the two parties ever belonged to the same owner, consequently appellant does not claim the right of way as a necessary incident of the grant of the land by his vendor; nor does he contend the easement exists in virtue of an express contract; but he bases his claim upon uninterrupted use and enjoyment by himself and his vendors so long as to establish his right to the passway.

Digitized by Google

The enjoyment of an incorporal hereditament for as much as fifteen years creates a presumption of legal title. But in such case the time of enjoyment is used merely as evidence to raise the presumption of a grant; and the manner of enjoyment, whether by mere *favor* or under a claim of *right*, may be used as evidence to rebut the presumption. (Hall v. McLoud, 2 Met., 98.)

"To create the presumption of the grant of the right of way the circumstances attending its use must be such as to make it appear that it was established for benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege revocable at the pleasure of the owner of the soil." (Bowman v. Wickliffe, 15 B. M., 98.)

The evidence shows that for many years, according to some of the witnesses, as much as forty or fifty, there were several passways over the land of appellee used by the neighbors generally, at least two of them running in the same general direction as the one in question, and one or two in different directions; but they were discontinued from time to time as the owner cleared and inclosed his land for cultivation without question of his right to do so. And the one in question was in the same way stopped by fences erected to inclose woodland hitherto uninclosed.

No witness testifies he or any other person ever claimed the right to use either the passways that had been previously fenced up or the one now in dispute; nor does appellant state he ever claimed the right to use it adversely until this action was commenced. The uncleared and uninclosed condition of the land where the passway is located, the recognized right of the owner to change and to discontinue at will the different passways over his land, and the customary and free use of passways through appellee's woodland, make it evident no person ever treated or regarded their use of the passway in dispute as anything more than a permissive use, which the owner might revoke at any time.

The case of Bowman v. Wickliffe is very much like this, and there the court used this language, which is applicable here: "It has been usual and customary in this State to travel over uninclosed woodland without asking permission of the owner, and, considering the extent and universality of this custom, it tends strongly, if not conclusively, to repel any presumption that might otherwise arise in such a case from long continued use of the grant of the right of way by the proprietor of the land. The mere use of this road, then, during the period of time that the land through which it passed was uninclosed woodland, can not be regarded as proving anything detrimental to the rights of the proprietor of the land."

In this case the effect of keeping the alleged passway open is to divide appellee's land into two parts, necessitating additional fencing or erection of gates in order that appellant may exercise as a right what heretofore he never was authorized or justified in regarding as more than a favor that appellee could at any time withhold.

The case of O'Daniel v. O'Daniel, 88 Ky., 185, cited by counsel is, in the character and location of the passway, the relative attitude of the two land owners and situation of their tracts, entirely unlike this, because there the passway had not only been practically upon the same ground for many years, but the circumstances of its locality and constant and necessary use made it evident that it had

Digitized by Google

been used adversely and under a claim of right. And the difference between that case and Bowman v. Wickliffe, which in all essential particulars is like this, was then recognized, this language being used: "In that case (Bowman v. Wickliffe) the passway was through uninclosed woodland, and in this same woods divers other passways ran that had been changed and stopped from time to time by the owner at his pleasure." And besides, said the court, the use of the passway was at no time, until within a few years, claimed as a right, but regarded as a privilege allowed by the owner, which he might withdraw at pleasure.

It does not seem to us that the use of a way by one person over the land of another under circumstances showing it so conclusively, as is done in this case, to be exercised merely permissively and as a favor, however long time it may exist, can ever become a right, for, as said in Hall v. McCloud, "it can not be admitted that where the proprietor of land has a passway through it for his own use that the *mere permissive use* of it by other persons for a half century would confer upon them any right of enjoyment. So long as its use is merely permissive it confers no right, but the proprietor can prohibit its use and discontinue it altogether. A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it was once understood that a man, by allowing his neighbor to pass through his farm without objection over the passway which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the passway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue."

Judgment affirmed.

WILLIAMS V. WATSON.

(*Filed Feb.* 9, 1893—*Not to be reported.*)

Judicial sales—Agreement by purchaser to allow owner to redeem—Evidence— Appellant's farm was sold in 1879 to satisfy a mortgage lien held by appellee and was purchased by appellee for her debt and costs. In this action, commenced in 1889, appellant claims that prior to the sale appellee agreed to buy the land for his benefit and permit him to redeem it on certain conditions. In this action it is held that the evidence shows that no agreement to allow appellant to redeem was made, and that he is entitled to no relief against appellee.

E. F. Dulin, J. R. Botts, Samuel J. Pugh and Geo. F. Halbert for appellant.

H. D. Gregory and R. D. Davis for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, Williams, was the owner of about 223 acres of land in Carter county, Ky., upon which, in 1873, he had executed a mortgage for $600 to the appellee or to her son for her.

At a decretal sale of this land, made November 10, 1879, under a judgment of the Carter Circuit Court, made to satisfy this mortgage and another debt, the appellee by her attorney became the purchaser thereof at the price of $1,076.13, that being the amount of the judgment claims thereon.

Digitized by Google

At the succeeding March term, 1880, of the court the appellant filed exceptions to the report of sale, because "the commissioner failed to comply with the judgment and the law, and because the land was not appraised for its value by at least $500."

Upon proof heard in open court the exceptions were overruled, the report of sale confirmed, conveyance was ordered made to the purchaser, and a writ of possession directed to be issued after December 1, 1880.

To all this the appellant excepted. The writ issued and he was dispossessed by the sheriff in April, 1881. Immediately thereafter, by a written contract, he rented the farm, or a part of it, from the appellee's agent for a term of one year, and reoccupied the premises.

He thereafter continued to rent some portion of the land by annual contracts until March, 1889, after which forcible detainer proceedings were instituted against him and he was again dispossessed. He traversed the finding in the country and, pending the case in the circuit court, he, on June 17, 1889, instituted this action in equity against the appellee, asserting that prior to the decretal sale in 1879 she had agreed with him that she would buy the land in at its sale for his benefit, and give him the privilege of redeeming it at any time upon the payment of the purchase price and legal interest thereon; that it was so bought in; that he was entitled to the privilege contracted for, and that he had thereafter consented that she might sell fifty acres of the land to Dr. York for $500, and finally that he had tendered the balance due her, after deducting the York purchase money. All this the appellee denied, and the issues were subsequently completed by appropriate pleadings.

On February 10, 1890, the appellee instituted her action in equity, and by proper averments obtained an injunction against the appellant and others alleged to be acting with him, restraining them from cutting timber, making staves, or otherwise committing trespass on the land in question.

The case upon the traverse, the action of Williams v. Watson, seeking the redemption of the land under the alleged contract, and the injunction proceedings were consolidated, and after elaborate preparation the chancellor, on final hearing, dismissed appellant's petition, established the verity of the inquisition and perpetuated the injunction against the appellant. From this judgment he has appealed, and it is manifest that his whole case rests upon the establishment of the alleged agreement in 1879, by which he acquired or claims to have acquired the right to redeem the land on the terms indicated.

He proves by himself and son, Robert, that in October, 1879, they visited the appellee, then a very old woman and a confirmed invalid, and found her alone; that she agreed that she would buy the land for appellee's benefit and let him redeem it by "paying her judgment, $40 or $50 along at a time as it suited his convenience."

He also testified that he had executed the leases and paid divers sums for rent, without setting up the agreement as to the alleged redemption right, because he needed a place of shelter.

By others he proved that appellee was often heard to say, during the years from 1881 and on, "that she had rather have the money than the land;" "that Williams owed her money and would not pay it;" that he tendered her money on at least two occasions and she refused to take it, saying she would have to see her son-in-law, Armstrong.

The appellee testified that she never made any such agreement; that she knew nothing of the sale of the land or its purchase by her

Digitized by Google

attorney for her until some time afterwards, when she received a letter from Davis, her attorney, to that effect, and in this she is corroborated by Davis. She is shown to have been very old and infirm, and that all her business was transacted by her son-in-law, Armstrong, and her attorney; that the sale of the fifty acres to York was made without any conference or consultation with appellant, and that appellant never, in any of his leases, mentioned or set up such an agreement.

While, therefore, we have from the record the testimony of two witnesses establishing the contract of redemption against the appellee's denial, the circumstances are strongly against the appellant's claim. One of the strongest of these is the fact that after the purchase was made *for his benefit*, as he alleges, at the first opportunity he had thereafter he assailed it and attempted to set it aside by filing exceptions to the master's report, offered proof in court in support of his objection, and excepted to the action of the court in sustaining the sale.

Why seek to set aside a purchase made for his own benefit? His action was wholly inconsistent with his own interest, if he had such interest as he contends for under the contract. It was a complete repudiation of the alleged agreement.

Shall one who deliberately in open court disaffirms and repudiates a contract by assuming a position wholly inconsistent with its reasonable requirements afterwards be heard to assert a claim based on the contract?

On the motion of appellee to confirm the sale the appellant had two courses before him: To seek to carry out the alleged agreement to have the sale confirmed and get the benefit of the arrangement by which he could again own his land, or to seek to set aside the sale and profit by the delay occasioned by additional and continued procrastination.

These courses were radically inconsistent, and having made a choice of one between two inconsistent or alternative rights or benefits, can he now justly assert or claim the benefit of the other? (Thompson v. Fuller [Sup. Ct.], 41 N. Y. S. R., 224; 16 N. Y. Supp., 486.)

Whether such conduct constitutes an estoppel need not be determined. It is easily a strongly discrediting circumstance, determining this case against the establishment of the appellant's already otherwise questionable right to redeem the land in contest.

Wherefore, the judgment is affirmed.

WRIGHT v. C., N. O. & T. P. RY. CO.

(*Filed Feb.* 25, 1893.)

A failure to stop and listen before crossing a railroad track on a public highway is not necessarily *per se* negligence. In nearly every case it is a mixed question of law and fact to be determined by the jury under proper instructions as to whether the party about to cross the track used reasonable care for his own safty before crossing.

One traveling over a highway running parallel with the railway track for about one mile was not, as a matter of law, guilty of negligence in failing to stop and listen just before crossing the track, it appearing that he had looked back three times when from 75 to 200 yards of the crossing, and where he could see down the track for one mile, and that he was injured by a train running very rapidly to make up lost time, and that the train gave no signal of its approach to the crossing.

Digitized by Google

W. G. Welch and M. C. Saufley for appellant.

C. B. Simrall and J. W. Alcorn for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

In the month of July of the year 1889 the appellant, in company with a friend, was in his buggy on his way to the Danville Fair, and in crossing the railway track of the appellee his buggy was struck by a passing train that demolished it, throwing appellant to the ground and seriously injuring him.

He instituted this action against the railway company, alleging that his injuries resulted from the negligence of its employes, and upon the trial in the court below the jury was instructed to find for the defendant, and this is the error complained of on the present appeal.

At a former trial of this case a verdict and judgment was rendered for the present appellant for $1,000, and that sum being within the jurisdiction of the Superior Court an appeal was taken to that court, and the judgment reversed upon an error committed by the trial court in requiring the defendant to elect whether it would rely on the general denial of any neglect as a defense to the action, or on the plea of contributory neglect on the part of the plaintiff. The Superior Court held that the pleas were not inconsistent, and that both defenses could be relied on, which we think was proper.

On the return of the case, a nonsuit having been ordered, and the sum claimed as damages being within the jurisdiction of this court, the case is now heard.

It seems that the turnpike and the track of the railroad run parallel for some distance, and where or near the point at which the appellant started on his journey is a small village called Moreland, and about one and a quarter miles of Moreland is another small village called Milledgville. The railway track crosses the turnpike twice between these villages. Moreland is south of Milledgville, and the appellant was traveling north when the train struck him. Starting then from Moreland, when you get 800 or 900 yards from that town, the track of the railway crosses the turnpike, and about 700 or 800 yards from this first crossing the railway track again crosses the turnpike, about 300 or 400 yards from the village of Milledgville.

It is a level country and the track of the road is in plain view for over a mile from the last crossing back towards Moreland, whether on the turnpike or railway, until you get within about ninety feet of the second crossing, where the accident happened. For this ninety feet there is a side cut in the turnpike that obstructs the view south towards Moreland. The train that did the injury was going north, in the same direction the plaintiff was traveling.

The testimony shows that after leaving Moreland, and when approaching the first crossing, the appellant looked back to see if there was a train behind him, and seeing none passed the first crossing safely. In approaching the second crossing, and when within 200 yards of it, he looked back again and there was no train; and again, when within 75 or 100 yards of the second crossing, looked again and saw no train, and then drove on to the track without looking any more, traveling, as we conjecture, at the rate of six or seven miles an hour, and as soon as the buggy was on the track the train struck it.

Digitized by Google

The train was past due and was running at a rapid rate of speed to make up for lost time, and must have been going at the rate of sixty miles an hour or at a greater speed. If the distance from where the last look was made is only 75 or 100 yards from the crossing, the buggy could have been driven and passed the crossing before the train could have reached the crossing, if going at the rate of fifty miles an hour, for if the testimony of the plaintiff and his friend is to be believed there was no train to be seen at Moreland or near that village when the last attempt was made to see if there was danger.

It is in proof that the appellant knew the time the train usually passed, and whether or not he had been informed that it was behind does not appear.

It is also shown that no signal was given of the approach of the train. This fact appears by several witnesses for the appellant, when four or more witnesses for the appellee swear that signals were given, so as to the warning given by the approaching train there is such a conflict in the testimony as required that question to go to the jury, if a controlling fact in the case.

It is insisted by counsel for the railway company that it is the duty of one on a highway, crossing the track of a railway, *to stop and listen*, in order that he may know it is safe to cross; and if he had stopped and listened when he reached the track, before going upon it, he might have seen the train or heard the rumbling noise of its approach, or the sound of its whistle; and if he failed to do so it is such contributory negligence as bars the recovery and authorizes a nonsuit, although the railway company may have been guilty of neglect.

It is true that the appellant, being within thirty yards of the crossing when reaching the cut, might have looked back and seen a train nearly a mile off, but having exercised the precaution that he did it seems to us to be a question for the jury to determine whether or not he exercised the proper care and diligence for his safety.

If one approaches a railway track and attempts to cross without looking the one way or the other, no other fact appearing, and is injured, no recovery can be had, unless the danger is discovered and could be averted by the exercise of ordinary care; for if the facts are such as that rational minds, or men formed of ordinary judgment, must say that the *man's* own neglect caused the injury, then a nonsuit is proper.

It must be conceded that many of the authorities referred to by the appellee sustain the view of the court below: that it is negligence *per se* not to stop and listen before going upon a railway track, unless the evidence shows that it did not proximately contribute to the injury. This court has not followed or adopted such a doctrine, but on the contrary has held that where the circumstances under which one attempts to cross the track of a railway show that degree of care that prudent persons would ordinarily exercise under like circumstances, the negligence resulting in injury from the passing train ought not to be attributed to the party injured.

It is, therefore, in nearly every case a question of both law and fact, the province of the jury being to pass on the facts under proper instructions from the court.

In the case of Cahill v. C., N. O. & T. P. R. R. Co., 13 Ky. Law Rep., 714, where the injury occurred at a private crossing, where those crossing the track were warned of the approaching trains by signals given at a depot near to but not at the crossing, this court said: "But to decide that the failure of one to look along a railroad before at-

Digitized by Google

tempting to cross it is under all circumstances and necessarily negligent would be arbitrary and without reason, for there may be evidence sufficient to satisfy one of ordinary prudence the track is clear without taking that precaution, as when he knows it is not usual train time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, can not upon principle be regarded as negligent when injured by a passenger train running at an extraordinary rate of speed, hours behind time and without any signal of its approach at the regular station."

On the facts presented by this record it is not by any means certain the appellant acted so negligently as to preclude a recovery, and while the accident might not have happened if he had stopped at the track and listened, men of ordinary judgment might well conclude that the appellee, in looking back as often as three times, and the last time when within 100 yards of the crossing and seeing no train for a mile back, had a right to believe, as a reasonably prudent man, that he could cross the track with safety, and particularly when he had reason to suppose the train inflicting the injury had passed, and, if not, that the blowing of the whistle would warn him of the danger.

The train must, in order to regain its lost time, have been running at a speed of one mile in a minute, and to say that men might not arrive at different conclusions as to whether the appellant was or not negligent would be to leave all such questions to be decided by the court and not by the jury.

It is plain that the crossing where the accident happened is a dangerous one, and it may, therefore, be said that greater care should have been exercised by both the appellant and the appellee, but still the question as to whether the appellee acted with proper vigilance for his safety is with the jury; and if he did, then if there was an omission of duty on the part of the appellee in failing to give proper signals by blowing its whistle as it approached this crossing with such a rapid movement of the train, thereby causing the injury, it is liable.

Where there is any uncertainty as to the facts establishing negligence, such as if found to exist would bar a recovery, it becomes a question for the jury, and as said by Mr. Justice Cooley, in the case of the Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich., 99, although the judge may fix in his own mind the standard of ordinary prudence, "it is quite possible, if the same question of prudence was submitted to a jury collected from the different occupations of life, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the standard of proper care. The next judge trying a similar case may also be of a different opinion, and because the case is not clear hold that to be a question of fact, where the first has ruled to be one of law."

There are but two questions in this case: Did the appellant exercise such care under the circumstances as an ordinarily prudent man would have exercised for his own safety? If not, the verdict should be against him; if he did, then the inquiry arises: Did the appellee by its employes give proper warning of the train's approach by blowing its whistle, such as would notify one exercising reasonable care for his own safety of the danger?

The care exercised by the appellant and that of negligence imputed to the company are the questions to go to the jury, and the facts in this case will not authorize the court to say, as a matter of law, that either existed.

Digitized by Google

The judgment below should be set aside and a new trial granted. Reversed and remanded for that purpose. (Cleveland R. R. Co. v. Crawford, 24 Ohio St., 631; Coply v. Newhaven R. R. Co., 136 Mass., 6; Tyler v. New York R. R. Co., 137 Mass., —; Detroit R. R. Co. v. Van Steinburg, 17 Mich., 99, etc.)

GARNER, &C. V. JONES, &C.

(*Filed March* 2, 1893.)

1. *A claim for unliquidated damages can not be pleaded as a set-off* in an action in equity when defendant has an adequate remedy at law against plaintiffs therefor.

In this action for a settlement of a partnership, in which it is claimed that the defendant partner is indebted to the partnership, the defendant can not plead, by way of set-off, a claim for unliquidated damages against his plaintiff partners, growing out of a transaction occurring before the partnership was formed, it appearing that one of the plaintiffs is solvent and a resident of the State.

2. *The settlement of the partnership accounts* by the special commissioner in this case was proper and authorized by the evidence.

Geo. B. Nelson for appellants.

L. H. Jones for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Lewis.

This is an action to settle a partnership in the business of operating a bluegrass seed cleaning mill for the year 1886, of which the firm of Garner & Bro., owning one-third interest; H. C. Foster, owning one-third, and H. and T. B. Jones, jointly owning one-third, were members.

It appears that H. and T. B. Jones, defendants to the action, had management and control of the business, and in the petition it is alleged they are indebted to the firm by reason of their failure to charge themselves with and account for a large amount of seed cleaned which they owned individually, and because they charged the firm with a larger amount for operating expenses than necessary.

The defendants controverted the alleged indebtedness and also asked judgment over for damages on account of alleged breach of warranty on part of the plaintiffs, original owners of the mill, in sale of one-third interest thereof to the defendants, and also on account of a large amount of seed belonging to defendants having been, in the year 1885, before they purchased an interest in the mill, so defectively and improperly cleaned as to greatly injure sale of the seed.

The action was referred to a special commissioner, who, after taking a large amount of proof, reported that plaintiffs had not made out any cause of action against the defendants, and the latter had likewise failed to show a right to recover damages on account of either the alleged breach of warranty, pleaded as counterclaim, or injury done to the seed by defective and improper cleaning in 1885, which was pleaded as a set-off.

Exceptions to the commissioner's report were filed by both par-

Digitized by Google

ties, but all were overruled and the report confirmed by the court, except that it was adjudged the defendants recover on their set-off the sum of $540.14 damages for failure of plaintiffs to properly and according to contract clean the seed in 1885.

From that judgment the plaintiffs have appealed, and defendants have entered a cross appeal.

We see no reason for disturbing the finding of facts by the special commissioner, particularly as it was confirmed by the chancellor. Nor does counsel on either side show sufficient reason for disturbing it. Consequently the only question we need consider is whether the demurrer to the paragraph in which defendants pleaded the set-off was properly overruled. And thus arises the question whether, in an action in equity, unliquidated damages can, under the Civil Code, be pleaded as a set-off.

The cause of action for breach of warranty in sale of one-third the mill by plaintiffs to defendants was connected with the subject of the original action, and, therefore, the defendants had the unconditional right under the Code to plead it as a counterclaim, though it was not, as before stated, sustained by the proof. But it has been fully settled by this court that a demand for unliquidated damages is not the proper subject of a set-off under the Civil Code where there is an adequate remedy at law which can be prevented by the fact of insolvency or nonresidence of the plaintiff. (Schropshire v. Conrad, 2 Met., 146; Forbes & Bro. v. Cooper & Co., 10 Ky. Law Rep., 865.)

In this case one of the plaintiffs, Foster, is shown to be nonresident of the State, but Garner & Bro. are not alleged or shown to be either nonresident or insolvent. It would, therefore, seem that the defendants still have an adequate remedy by separate action for the cause pleaded in his set-off, and consequently no reason exists here for making an exception to the general rule denying the right to plead as a set-off unliquidated damages. It thus follows the demurrer to that paragraph of the answer containing the sett-off for damages on account of a transaction prior to and not connected with the subject of plaintiffs' action ought to have been sustained. But while such ruling of the lower court would have prevented any recovery on the set-off, it would not have concluded defendants' right to maintain a new and distinct action for the same cause.

Wherefore, the judgment on the appeal is reversed and cause remanded for proceedings consistent with this opinion, but, for reasons already stated, it is affirmed on the cross appeal.

NEWMAN, &C. V. ECTON, &C.

(*Filed March* 2, 1893—*Not to be reported.*)

The Civil Code does not repeal the provisions of remedial acts found in the General Statutes unless a remedy for the enforcement of the right is afforded by the Code.

The provisions of the General Statutes found in chapter 66, article 6, authorizing the sale of contingent or defeasible interests in land are not repealed by the Civil Code.

Morton V. Joyce for appellants.

C. B. Seymour and Lane & Burnett for appellees.

Digitized by Google

Appeal from Jefferson Circuit Court, Chancery Division.

Opinion of the court by Judge Pryor.

In the case of Ecton v. Smith, decided in September, 1884, it was held that the character of estate held by Alice Ecton, etc., under the will of her father was a defeasible fee. (6 KY. LAW REP., 216.) At the suit of Ecton and his wife, Alice, this estate, or a part of it, was sold in a proceeding conforming to the requirements of chapter 63, article 6, General Statutes, and the lots purchased by the appellant.

It is insisted that the adoption of the Code of Practice repealed the General Statutes in so far as it affected sales of contingent interest in land or of interests subject to be defeated in the event of the happening or nonhappening of a certain event.

This court, in the case of the Commonwealth v. Watts, 84 Ky., 537, expressly held that the repealing clause of the Code is to be understood as repealing all acts in relation to cases that are provided for by the repealing act, and, if so, this leaves the General Statutes in force under which this proceeding was had. There is both a right and a remedy to enforce it created by this statute; and while the Code is intended to furnish the remedy there are many rights created by it other than mere remedy; and finding such an intermingling of rights and remedies in the Code and statutes, this court holds that a remedial act found in the General Statutes is not repealed unless a remedy for the enforcement of the same right is found in the Code of Practice. This being the case, the chancellor was authorized to adjudge the sale.

The trouble in this case is that no such statute referred to by appellant is found in the edition of the General Statutes of 1888, but in the statutes of 1883 the sale of contingent interests is authorized, and that statute stands unrepealed.

LEBUS, &C. V. THE WAYNE-RATTERMAN CO., &C.

(*Filed March* 2, 1893.—*Not to be reported.*)

In computing the time within which a mortgage or transfer of property may be assailed as an unlawful preference, under the act of 1856, the day on which the deed was lodged for record must be included as the first day. Therefore, where the mortgage was lodged for record September 22, 1886, and the action assailing it was not commenced until March 22, 1887, it can not be maintained under the act of 1856, the six months *after* the mortgage was legally lodged for record having expired on the day previous to commencement of the action.

J. Q. Ward, J. T. Simon and W. S. Hardin for appellants.

J. Irvine Blanton for appellees.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Pryor.

The mortgage to Clarence Lebus was lodged for record on the 22d of September, 1886, and on March 22, 1887, this action was filed and the mortgage attacked as being within the act of 1856. There is no actual fraud proven in the case, and none in fact exists, and if con-

Digitized by Google

structively fraudulent the action must be instituted within six months *after* the mortgage or transfer is legally lodged for record. Where the computation of time is from an act done, the day on which the act is done is to be computed; and in Chiles v. Smith's heirs, 13 B. M., 460, it is said: The day on which the decree was rendered must be included and regarded as the first day of the three years, and, therefore, the limitation expired on the day preceding the one on which the writ of error was sued out. The statute provided "that no writ of error shall be sued out except in three years next *after* the judgment or final decree."

In that case the decree was rendered on the 18th of October, 1848, and the writ of error sued out on the 18th of October, 1851. (See also Long v. Heyes, 1 Duv., 387; White v. Crutcher, 1 Bush, 472.)

If the statute had read six months after the day the mortgage is legally lodged then this suit would have been filed in time.

Authorities referred to by counsel from other States, where a a different rule prevails, can not be adopted by this court. The rule is understood, and the one works no greater hardship than the other. The action not being brought in time, the money actually advanced on the loan must be accounted for and the appellant given preference by reason of his mortgage.

We are inclined to think that some of the items charged against Lebus as having been paid on the mortgage debt had already been credited; but this matter is left open for further investigation, as the case should go back to the commissioner for a restatement of the accounts. That Lebus paid considerable sums of money for Arnold is evident, and if the purpose was to give a preference it was not actually fraudulent, but made constructively so by the act of 1856. The proof, we think, conduces to show that both Lebus and the appellees thought the moneys advanced would pay Arnold's debts at home and the tobacco in the hands of the appellees would satisfy these debts. There was no motive on the part of the elder Lebus to defraud the appellants or even to secure his own debt of $600. That was already secure, and the loan of his son's money must have been made on the idea that it was a safe investment.

He swears that it was his son's money and that his own debt was not secured or intended to be secured by the mortgage, and we see no reason for disregarding his statements.

The judgment below is reversed and remanded for proceedings consistent with this opinion.

DODGE, &c. v. KENNEDY, &c.

(*Filed March* 2, 1893.—*Not to be reported.*)

Distribution of proceeds held under a certain conveyance—A brother conveyed a home worth $950 to his three sisters, L., S. and M., in consideration of $200 paid by each, and the further consideration that F., an imbecile sister, was to have a home with the tree sisters during her life, and that a niece was also to have a home there until her death or marriage. It was further provided that if either of the three sisters first named married such party should give to the other sisters her interest in the property on being paid her $200. The brother died shortly after executing the conveyance and the niece married and moved away. The four sisters expended $1,000 in improving the place. One of the sisters, M., died, devising her interest to L. Subsequently L. married and S. then claimed she and her husband had no right to live in the house. F., the imbecile sister, refused to live with S. To-

Digitized by Google

make a division of the property it was sold for $1,550, S. being unable to pay the other sisters for their interest therein. *Held*—That the proceeds of the sale should be divided as follows: $400, put in originally by M. and L., should go to L., who is also entitled to one-half ($350) of the increased value ($700) of the property by reason of the improvements. S. is entitled to $300 and $150, and F. to $150, and the remaining $350 should be divided between F. and S.

Hobson & O'Meara for appellants.

D. C. Haycraft and Jas. Montgomery for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

Simeon Vernon, by deed of September 2, 1876, conveyed to three of his unmarried sisters, Sophronia Kennedy, Lucinda and Mary Alice Vernon, a house and lot in Elizabethtown, Ky., in consideration of love and affection and the sum of $200 paid to him by each of them. The conveyance was on this condition: "That Frances Vernon is to have a home with the second parties during her life, and Emma Kennedy is also to have a home there during her life, or until she marries, and should either of the second parties marry during the life of Frances Vernon, or during the life of Emma Kennedy and before she marries, then such party so marrying shall convey to the other parties her interest in the lot of ground hereby conveyed on being paid the $200 invested in said lot."

Frances was an imbecile sister and Emma Kennedy a neice. The grantor died in December following. Emma Kennedy married in June, 1878, and moved off the premises. The sisters lived together until February, 1890, when Mary Alice died, devising her property to Lucinda. In the meantime the four sisters had expended some $1,000 in improving the place.

In January, 1891, Lucinda married Wm. G. Dodge, and upon his coming there to live Sophronia took affront and left, claiming that their brother had provided that the one marrying must get out and not move in her husband. She instituted this action for the property, conceding Mrs. Dodge's right to withdraw her $200, and offering also, by way of compromise, to let her withdraw the $200 put in by Mary Alice. All the parties interested being before the court, it was adjudged that Sophronia was entitled to the property, but must pay Lucinda $625, of which the sum of $400 was what she and Mary Alice had put in, and also $225 for the one-half of the enhanced value of the property due to the improvements put on it. This enhancement being estimated by the court at $450, rating the place at $1,400, that she must pay also to Frances the sum of $112.50, or one-fourth the improvement money; and it appearing that Frances could not or would not live with Sophronia, she was given $150 in lieu of her right of residence in the property. A lien was given on the property for these sums, and if not paid off by Sophronia the place was to be sold. The payments were not made, and the place was sold by the commissioner for the sum of $1,550, and bought by Sophronia.

Of this judgment all the parties complain and prosecute an appeal and cross appeal, and the problem for the court's solution is an adjustment of the rights of the parties on equitable principles and in accordance with the intent of the deceased brother.

The property was worth only $950 when deeded, and as Simeon was paid $600 there was left only $350 as a gift or as an earnest of his

Digitized by Google

love and affection by means of which he imposed these trouble-breeding conditions.

Evidently the place was intended as a home for such of the sisters as remained single, but as the improvements were made by common consent it would be unjust to confiscate the contribution made for that purpose by one who married, just because she married and must, therefore, move away.

The brother did not mean to impose a penalty on marriage or confer a premium on celibacy. To provide a home for the sister remaining single and for the imbecile was the mainspring of his benevolence. And these two remaining residuary beneficiaries, so to speak, are Sophronia and Frances, and but for their perverse incompatibility the untangling of the web would be the easier.

The chancellor appears to have adopted substantially the correct view, but in determining the amounts coming to the withdrawing parties he was forced to estimate from proof and not from knowledge the value of the property and its enhancement by reason of the improvements. This enhancement is not the difference between $950 and $1,400, but between $950 and $1,550, hence Lucinda is entitled to withdraw the purchase money she or her sister, Mary Alice, put in, viz: $400, and also two-fourths—that is, her own fourth and that of her said sister—of this enhancement; that is, $300, in all $700. Sophronia is entitled to withdraw or get credit on the bonds for the sum of $200 and $150, or what she originally put in, and one-fourth of this enhancement. Frances should have her share, or one-fourth the improvement fund, or $150. She paid in nothing originally, but only contributed to the improvement. This leaves the sum of $350 undistributed of the purchase money, which corresponds with the original sum supposed to have been intended by the grantor, as we think, for the surviving and remaining single sister and the imbecile—that is, Sophronia and Frances—and this sum should be divided equally between them. In no other way can the evident intention of the grantor be more satisfactorily carried out than by this process.

To effectuate this adjustment, the judgment below is reversed and cause remanded with instructions to proceed as herein indicated.

WOODSON v. COMMONWEALTH.

(*Filed March* 4, 1893—*Not to be reported.*)

Criminal law—Instructions—On the trial of appellant for the willful and malicious striking and wounding another with a deadly weapon, with intent to kill, it was error for the court to assume in the instructions that the iron poker, with which the alleged crime was committed, was a deadly weapon. The jury should have been told that the defendant was not guilty of the offense charged unless the striking and wounding was maliciously done.

D. H. Smith for appellant.

Wm. J. Hendrick for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant and another negro, Tyler Barnes, who was his intimate friend, met in the back room of a saloon and had some hot words over a trivial matter. Barnes stepped into the front room

Digitized by Google

where a white man directed the bar keeper to let him have a drink, hearing which appellant came forward and leaned in the doorway of the partition, saying to the bar keeper, by way of asking for a drink, "Boss, what's the matter with me?" He was at once told by Barnes not to come in. He responded that he wasn't bothering any one, whereupon Barnes picked up a beer glass and threw it violently at the appellant, who, however, dodged, dropped back to the stove, picked up an iron poker, came forward and struck his assailant, knocking him down and cutting a gash in his head, but, of course, breaking no bones. He dropped the poker and ran, followed by Barnes.

At the following term of court the appellant was indicted for willfully and maliciously striking and wounding with a deadly weapon with intent to kill, was convicted of a felony and sentenced to the penitentiary for two years.

He complains of the instructions of the court, by the first one of which the jury was told that if they believe l from the evidence, "beyond a reasonable doubt, that the defendant, in Larue county and before the finding of the indictment read to them, struck the witness, Tyler Barnes, with an iron poker with intention to kill said Barnes, they should find him guilty as charged in the indictment and fix his punishment at imprisonment in the penitentiary, etc."

Here the court assumes that the iron poker as used was a deadly weapon, and that question, considering its size and the manner of its use, should have been left to the jury. Moreover, it was as necessary that the jury should believe that the striking was done *maliciously* as that it was done at all.

The jury are told to convict of a malicious striking, and, therefore, of a felony, although they may have believed the blow to have been inflicted in sudden heat and passion or in sudden affray, in which event it would have been in law a misdemeanor only. No instruction was given as to a sudden affray.

The appellant was, in fact, guilty of a breach of the peace, or, at most, of an assault and battery, provided he did not act in self-defense. The judgment below is reversed and cause remanded, with instructions to proceed as herein indicated.

SHAKE V. FRAZIER.

(*Filed March* 4, 1893.)

The private property of a citizen can not be taken for the private benefit of another, however useful or beneficial it may be to the person to whom it is transferred. Therefore, a right of a private passway through the lands of one citizen can not be conferred on another for his private benefit alone by virtue of any exercise of the right of *eminent domain* by the Commonwealth.

Wm. Lindsay and Sam C. Hughes for appellant.

H. D. Allen and D. W. Lindsey for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Pryor.

The property of the citizen may be taken by the sovereign power for a public use upon compensation being first made, and this is called *eminent* domain; but the taking of the private property of

Digitized by Google

one for the private use of another, however necessary it may be for the use and enjoyment of the person to whom the right of property is transferred, was invariably held unconstitutional. Statutes authorizing the creation of private passways over one's land for the benefit of another have been sustained, for the reason the public is directly interested in their establishment to enable the citizen to discharge the duties he owes the State. When summoned as a witness or juror he is entitled to a way out from his premises that he may obey the demands of the public upon him; and also, as said in Robinson v. Swope, 12 Bush, 21, the public has an interest in his attendance at elections, "places of public worship, and that he shall be provided a way to market that he may buy and sell so as to provide himself with those things without which he could not discharge his civil and social duties."

The statute of this State in regard to passways provides, among other things, that a passway may be established to enable the applicant to pass from *one tract of land to another, owned by him*, and this part of the statute was held in the case cited to be unconstitutional for the reason that it was taking the private property of one for the mere convenience of another.

The appellee is attempting to avoid the effect of that decision by showing that the outlet is necessary to enable him to get to his county seat or to his mill, or to some other public place, when it appears there is no one living on this tract of land and no reason for taking appellant's property and giving it to the use of the appellee except as a matter of great convenience to the latter.

The appellee is living on another tract of land where there is every facility afforded him for going to his county seat and other public places in the discharge of either his public or private duties. Besides, he has a passway equally as convenient, under it is true a mere permissive use, enabling him to go to and from this tract, and if he is permitted to show that he wants an outlet from this separate tract to get to his mill or county seat, when there is neither dwelling nor tenant upon it, then no case could well arise where the right to make his neighbor's land subservient to his own use could be withheld. Mr. Mills, in his work on *Eminent Domain*, says: "The use to which property is condemned must be public. As between individuals no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offer of compensation, however extravagant, can compel or require a man to part with one inch of his estate." (Section 22.)

The Legislature is without power to take appellant's land for the use of the appellee. No one resides on the tract from which the proposed passway is to run, and, therefore, the public has no interest in the convenience it will afford the appellee in hauling his produce or in reaching this land from the tract upon which he resides.

Courts can not be too careful in determining the interest to which private property may be taken for the benefit of another, even when clothed with a public interest, and however great the inconvenience resulting to the applicant in refusing this right, it seems to us it would be a palpable violation of the constitutional rights of the appellant to make his land subserve the use of the appellee, however great the compensation tendered.

Judgment reversed and remanded, with directions to dismiss the proceedings at the cost of the appellee.

Digitized by Google

MUTUAL LIFE INS. CO. OF NEW YORK V. THOMSON, &C.

(*Filed April* 8, 1893.)

1. *The contract of life insurance is completed and binding on both parties* after the applicant has paid the amount of the premium to the agent of the company, and the company has accepted the application and issued a policy and sent it to its agent to be delivered to the applicant. And when the applicant dies before the agent delivers the policy to him the beneficiaries named in it are entitled to a delivery of it.

2. *Same—False statements by applicant as to temperate habits*—A statement by an applicant for life insurance that he is, at the time of the application, temperate in his habits as to use of intoxicating drinks is necessarily material to the risk, and if such statement is false the contract of insurance is void, whether or not the applicant's intemperate habits impaired his health in any degree.

But a false statement by the applicant that his habits as to the use of intoxicating liquors previous to the time of the application had been temperate is not so material and will not render the policy void unless his previous intemperance has been so great as to affect his health or physical condition and make him an unsatisfactory subject for life insurance.

3. *Same—The verdict of a properly instructed jury* will not be set aside on appeal unless flagrantly against the evidence.

The finding of the jury on the issue of facts as to the habits of the insured respecting the use of intoxicating liquors is supported by some evidence and can not be set aside, although the preponderance of the evidence may be against it.

4. *The refusal of the court to permit a witness to testify* after all the evidence for the other side had been heard was not an abuse of its discretion, nor did appellant exercise proper diligence in endeavoring to sooner coerce the attendance of said witness.

Breckinridge & Shelby and G. C. Lockhart for appellant.

Wm. Lindsay for appellees.

Appeal from Fayette Court of Common Pleas.

Opinion of the court by Judge Lewis.

Margaret Thomson, widow, and Rodes, C. H. and C. E. Thomson, infant children of Rodes Thomson, now deceased, brought this action to recover of the Mutual Life Insurance Co. of New York $10,000 which, by a policy on the life of the deceased, issued November 15, 1887, the defendant promised to pay the plaintiffs; and this is an appeal from a judgment for the amount sued for.

The two main grounds of defense to the action now urged by counsel are: First, that the policy had never been, in fact, delivered prior to death of the insured, and the contemplated insurance did not, therefore, take effect; second, that the contract of insurance, even if completed, was rendered void by various false statements made by the deceased in his written application for the policy.

It appears that November 12, 1887, he applied to one Cochran, an insurance broker in the city of Lexington, for the purpose of procuring a policy of insurance from some company, and the amount of it and of the first premium having been agreed upon, they went together to the office of Dr. Todd, who had been previously appointed by defendant as one of its medical examiners, by whom an examination of Rodes Thomson was then made, and a written application, embodying answers or statements by the physician as well as by Thomson, made out and signed by them.

Digitized by Google

The application thus prepared was on the same day delivered by the physician to Buckley, authorized agent of defendant at Lexington, who had furnished the blank form, and by him sent to the principal office of the company in the city of New York; and November 15th, or in due course of mail thereafter, the policy in question was received by Buckley, and by him placed in the hands of Cochran, to be by him delivered to Rodes Thomson, amount of the premium having in meantime been put in bank to the credit of Cochran. It was, however, not delivered to Rodes Thomson, who died November 28th, but to his wife subsequent to that event.

It seems to us the contract of insurance must, under such circumstances, be regarded as completed and binding on the parties before death of the assured, and that it was both the right and duty of Cochran to deliver the policy as was done. For not only was it placed in his hands by Buckley for that purpose, but the latter received and appropriated to use of the company amount of the premium that had been placed to credit of Cochran. The lower court did not, therefore, err in assuming and instructing the jury that the policy had been delivered.

The statements or answers to questions in the application, which it is alleged in the answer were falsely and fraudulently made by Rodes Thomson, are as follows: First, that he had not previously any serious illness, constitutional disease or injury; second, that he did not drink wine, spirits or malt liquors daily or habitually; third, that to the question if he drank, to what extent? the answer was temperate; fourth, the same answer was given to the question as to his former habits of drinking spirits or malt liquor; fifth, that he had not been attended by a physician for any serious cause for ten years; seventh, that he never had any of certain enumerated diseases, including diarrhœa; and eighth, that he was temperate in his habits and, to the best of his knowledge and belief, in sound physical condition and satisfactory subject for life insurance.

It is contended by counsel plaintiffs failed to deny an allegation in the answer that the statement of Rodes Thomson, in regard to his former habits of drinking liquor, was false and fraudulent, and that, consequently, the lower court erred in overruling defendant's motion for judgment, notwithstanding the verdict.

It appears to us after inspecting the transcript that allegation was substantially denied; besides, evidence on the issue was offered by both parties. But a question does arise whether the lower court correctly and fully enough instructed the jury on that subject. The instruction bearing on that issue is as follows: "If the jury believe from the evidence that Rodes Thomson had a habit of intemperately using intoxicating liquors prior to his application for the insurance in question, and that such habit existed at such a time and to such an extent that it might reasonably have injured or impaired his health at the time of the application, then they should find for the defendant."

It is provided by section 22, chapter 22, General Statutes, that "all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, and that no representation, unless material or fraudulent, shall prevent a recovery on the policy." Therefore, unless the fact of a former habit of using intoxicating liquors be considered a material inquiry at the time of an application for life insurance, whether his health may or may not thereby have been impaired or injured, the instruction quoted presented the issue in that respect fully and correctly.

Digitized by Google

It is of vital importance for an insurance company to know before issuing a life policy whether the applicant is then temperate in his habits; for obviously he would not be a fit subject for insurance, nor could a company prudently issue to him a life policy, if he was not then temperate in his habits of drinking intoxicating liquor; and, consequently, if he had made a false statement in that particular it would be no answer to say the habits were not such as to injure his health, because insurers have a right to protect themselves by guarding against the risk of pernicious habits. (May on Insurance, section 290.)

But it seems to us an inquiry in regard to previous habits of drinking intoxicating liquors is not material unless they existed to such an extent as to affect the health or physical condition of the applicant and thereby render him an unsatisfactory subject for life insurance.

The issues involved as to verity of each one of the other statements made by Rodes Thomson in his application for the policy were, we think, fully and correctly presented by instructions to the jury. But it is earnestly contended the verdict is, in language of counsel, such a monstrous perversion of justice that we should set it aside. The rule by which this court has been uniformly governed in revising the verdict of a jury is that it must be flagrantly against the evidence to justify setting it aside.

We do not, therefore, say whether the verdict in this case is such as this court would have rendered upon the bill of evidence as presented. It is sufficient that, in our opinion, there is evidence conducing to support it, and it may be, if we had heard the evidence face to face with the witnesses, our finding would not have been different from that of the jury. The most important witness for the defendant on the trial was the grandfather of the infant plaintiffs, two of his sons also testifying to the same purpose, and not only did he exhibit an apparent desire for defendant to succeed, but it appears probable the insurance company would not have resisted payment of the policy but for his voluntary and active interference.

It is not, therefore, surprising that the jury failed to give full credit to witnesses occupying such a hostile and unnatural attitude as did the grandfather and his two sons, who came from adjoining counties to testify against their nephews.

There being evidence showing or tending to show that Rodes Thomson was, at the time he made the application, a man of temperate habits, in sound physical condition and a satisfactory subject for life insurance, we do not feel authorized to disturb the verdict upon what at best is a mere preponderance of the evidence in favor of the defendant.

Another ground for reversal is refusal of the court to permit a witness for defendant to testify, who appeared in court for that purpose, after plaintiffs had closed their evidence, that of defendant having been previously given, upon the issue in regard to statements of Rodes Thomson in his application for the policy.

Although that witness was present and sworn at beginning of the trial, the ruling of the court, we think, was not an abuse of discretion. For defendant did not exercise proper diligence to procure the coerced attendance of the witness after discovering his absence; his testimony, as shown by defendant's affidavit, would have been simply cumulative; and, as stated by the judge, economy of time was necessary in order to complete trial of the case before expiration of that term of court.

Digitized by Google

It seems to us the issues of fact were properly presented to the jury by instructions of the court, and as there was no error of law to the prejudice of defendant's rights the judgment must be affirmed.

CENTRAL PASSENGER RY. CO. V. STEVENS, &c.

(*Filed April* 13, 1893—*Not to be reported.*)

Contributory neglect—Instructions—In an action against a street railway company to recover damages for an injury alleged to have been caused by its neglect, when contributory neglect on plaintiff's part is pleaded as a defense, it is error to instruct the jury that plaintiff can not recover if the injury complained of was "*caused*" by her own negligence.

Humphrey & Davie for appellant.

Stone & Sudduth and J. M. Chatterson for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

The appellees, as husband and wife, sued the appellant, a street car railway company, to recover damages for an alleged injury received by Mrs. Emma L. Stephens, resulting from a fall in attempting to alight from appellant's train, which fall was caused, as alleged, by the sudden jerk of the train.

The appellant denied the alleged negligence, and relied on contributory negligence by Mrs. Stevens as causing the fall and injury, the negligence consisting in the fact that she attempted to descend the steps of the train face foremost and with her child in one arm and some bundles on the other, which rendered her incapable of holding on to the instruments fixed for that purpose, and incapable of managing her dress skirt so as to keep her feet from getting tangled and the dress from getting fastened to the steps, etc., and that her dress did get fastened to the steps and did tangle her feet, whereby she fell. It is sufficient to say that there was some evidence before the jury tending to establish the foregoing facts; and the court, in view of it, gave the jury the following instruction as to contributory negligence: "If the jury shall believe from the evidence that the injuries to Mrs. Stevens complained of in the petition were caused by her own negligence or want of care when leaving the car, then the law is for the defendant, and the jury should so find."

It seems to us that the average juror would understand this instruction to mean that the plaintiff's negligence was the sole cause of the injury before they could find for the defendant. Indeed the language employed implies as much. But that is not the correct rule. The rule in reference to contributory negligence is that both plaintiff and defendant must, by their negligence, have contributed to the injury. In other words the injury must have been the result of the concuring negligence of both. Then in that case neither party can recover damages for such injury unless it appears that the injury would have happened to the plaintiff by the defendant's negligence if the plaintiff had not been guilty of any negligence; or, in other words, unless, for the plaintiff's own contributory negligence, the injury would not have occurred. (Sullivan's adm'r v. Louisville Bridge Co., 9 Bush, 90; Paducah & Memphis R. R. Co. v. Hoehl, 46.)

Digitized by Google

We think the error in said instruction is prejudicial to the substantial rights of the appellant, but the other errors complained of we do not think it necessary to notice.

The case is reversed, and it is remanded for a new trial.

VINSON V. GENTRY.

(*Filed March* 9, 1893—*Not to be reported.*)

1. *The potential right of dower of a wife in her husband's land* was not lost or transferred by the sale of the land to satisfy a judgment against the husband as surety on the bond of a sheriff for the collection of revenue.

2. *Assignment of dower*—Dower in the land should be assigned to the wife, with reference to its value and condition at the time of the sale of her husband's title. Therefore, the enhancement in value of a part of it assigned to the purchaser by improvements placed upon it by him will not be considered in making the assignment. Supposing that the whole tract was of uniform value on the day of its sale for the husband's debt, the widow will be allowed one-third in quantity.

R. A. Burnett for appellant.

Fenton Sims for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Pryor.

The Commonwealth of Kentucky obtained a judgment against I. F. Gentry for several thousand dollars, as the surety of one Major, who was sheriff of Trigg county, on his bond for the collection of revenue.

An ordinary execution issued on the judgment and was levied on the land of Gentry, then in his possession and to which he had title, and sold to satisfy the judgment, and the vendees of the present appellant, being the purchasers, obtained a sheriff's deed and entered upon the land.

Gentry died and his widow, the present appellee, brought this action, asserting her right to dower. It seems to us there is no defense in the way of recovery.

The potential right of dower was not involved in this litigation on the bond of the sheriff, and the appellee had no interest in the land liable for taxes or any such interest as she could be divested of except in the manner pointed out by the statute.

It is alleged that the husband had in some way compromised with the purchaser and obtained for the wife the sum of $100 as the value of her potential right. This is unsupported by the testimony, as there is nothing showing that the wife ever received any consideration for her dower, or that she ever induced the appellant or his vendor to pay over to the husband any money or property on the promise to relinquish her dower or in consideration therefor.

It is also contended that the mode of assigning the dower is erroneous, and that the appellant is given too much land. The testimony shows that the land was worth $1,500 when this deed was made to the sheriff, and this would give to the widow one-third of the number of acres in the tract, if it was all of equal value.

The commissioner is directed to give to the appellant the improve-

Digitized by Google

ments, and the effect of the judgment is to allow the widow one-third of the land, looking to its value and condition when the husband sold it or was deprived of his title. We see no reason for disturbing the judgment.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

HULS, &c. V. BLACK.

(*Filed March* 22, 1893.)

Representations by a vendor of a town lot as to improvements to be made by others in the future are but expressions of opinion, and the fact that the expected improvements are not made will not entitle the purchaser to relief upon the ground of fraud.

J. Smith Hays for appellants.

James D. Black for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Presiding Judge Yost.

Answering the petition in this action brought by the appellee to recover judgment on two notes given in consideration of the purchase price of a town lot in Barbourville, Ky., the appellant pleaded in bar of the recovery sought that he was induced to sign the notes by the false and fraudulent representations of the appellee, his vendor, touching the future prospects of the town, all of which he relied upon as and believed to be true.

He alleged that the appellee represented to him that the Barbourville Land and Improvement Company had bought of himself and others all their lands near to and adjoining Black's addition to the town, in which the lot purchased was situated, had paid others large sums of money and had and must pay to him for his lands so purchased by it $100,000; that the capital stock of this corporation was $2,000,000, which he further represented would be immediately spent in improving the lands by laying it out into squares, lots and streets, and building thereon hotels, race courses, fair grounds, and giving reservations to mill and electric light plants, factories and machine shops; that booms would be by this company put in the river and a belt railroad run around the town; that oil wells would be opened and operated and other industries engaged in by this and other corporations. He then alleged that this corporation was then insolvent and known to be so by the appellee, and that none of the improvements which he represented to the appellant were about to be begun had ever in fact been made, by reason of which his lot was practically worthless to him.

Digitized by Google

The court sustained a demurrer to this answer and the appellant refusing to plead further judgment was rendered against him on the notes, and he has prosecuted this appeal therefrom.

The answer did not set up a good defense to the appellee's cause of action, and the court properly sustained the demurrer thereto.

Counsel cite and rely upon the law as laid down by this court in Tanner v. Clark, 13 KY. LAW REP., 922, but there is a broad and marked distinction in the two cases. There the plaintiffs and others combined and bought unimproved lands, and with the fraudulent design of inducing others to purchase from them actually begun the building of railroads, laying out and curbing of streets, laid the foundation of a large hotel and did many other things to induce a belief by the public that a large and prosperous city must soon be built, when in fact they intended to carry none of these improvements to a completion, but intended thereafter and actually did abandon the whole enterprise so soon as they succeeded in realizing a large profit on their investment by selling "corner lots" to a confiding and credulous public, anxious as always to get in "on the ground floor" of a boom. The purchaser then, relying on the improvements which he could see *were going on*, bought his lot.

In that case it was agreed that a representation to constitute fraud must relate to an existing fact and could not be predicated on a representation as to the future.

This court, however, held that a representation of an *existing* and material fact or the *affirmation* of a matter in the future *as a fact* (*and not a mere opinion, statement of intention or promise to do some act in the future*) might, and in that case did, constitute fraud.

In this case the vendor had done nothing in the past and made no promise as to what he would do in the future. There is no charge of any combination between him and the corporation, or that the latter had begun any of the improvements mentioned. Nor is it even alleged that the corporation did not then in good faith intend to carry out the designs which the vendor "represented" that it had in view.

There was nothing that the vendee could see had been done upon which he could rely as an earnest of the intentions of the company. All depended upon a representation what it would do in the future. In fact every representation made was the mere opinion of the vendor as to acts all to be done in the future, and thus this case falls within the exception to the rule as given in the Tanner case.

Mark that it is everywhere alleged that the vendor represented that the corporation would do certain things. This at best was but his own impression or opinion as to what it would do. Opinions are formed on speculative matter, often spring from the imagination and in all cases are but inferences or deductions which fall short of certain knowledge. Hence a mere representation of opinion, though erroneous, is not fraud against which the law will *relieve*. *Such conjectural* and exaggerated statements what will be done in the future are too indefinite to place reliance upon and such to put the person to whom they are made upon inquiry. They are only expressions of opinion, essentially of an uncertain nature and depend upon estimates conjectured at best.

They are in fact but *gratis dicta*, and the vendee who relies upon them does so at his peril, and must abide the results and bear the fruit of his imprudence and gullibility.

The judgment is affirmed.

Digitized by Google

THE HOME CONSTRUCTION CO. V. CHURCH.

(*Filed April* 5, 1893.)

1. *Evidence as to value of stock killed by railroad train—Proof of actual sales*—The market value of a thing at a given time and place may be proved by evidence of actual sales then and there of property of the same quality; and even proof of a single sale would be admissible in the absence of better evidence.

In this action against a railroad company to recover damages for the killing of a mare by one of its trains it was competent for defendant to show the sum for which plaintiff had "within the past month" sold "stock similar to the mare of as good strain of blood."

2. *Same—Hypothetical questions* may be put to a witness, and his opinion asked, based upon one or another hypothesis, but in this case it was not proper to allow a witness to state what the mare was worth "if all plaintiff said about her was true," the plaintiff having testified that she was worth $3,000, and that he would not have taken $5,000 for her.

3. *Undertaking by grantor of right of way to fence land—Duty of company as to stock on track*—Where one who conveys to a railroad company the right of way over his land undertakes by a clause in the deed that he and those to whom he may convey his lands will build and maintain such fencing "as may be necessary for the protection of the adjoining lands and of the railway company from accident and damage from stock running upon said lands," the employes of the railroad company in charge of trains are thereby relieved from the duty of keeping a lookout for straying cattle while passing through the land over which the right of way was granted, although the grantor may since the contract have conveyed the land to another.

As the plaintiff in this case is the grantee of one who had made such a contract with the defendant, it was error to instruct the jury that if they believed that by reason of plaintiff's failure to provide a sufficient fence the mare escaped from his land and went upon the company's roadbed and was then killed, the company was not liable unless they further believed that after its servants saw "or could by the exercise of ordinary diligence have seen" the mare, they could without endangering the safety of the train have avoided the accident. The only duty the company owed under the contract was to avoid injuring the mare after she was discovered to be in a position of danger.

John W. Rodman and John B. Lindsey for appellant.

James A. Scott for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Presiding Judge Yost.

On the trial of this action, brought against the appellant to recover $3,000 damages for the alleged negligent killing of a mare by one of its trains of cars, several errors prejudicial to its rights occured which call for a reversal of the judgment.

The appellee, Church, owner of the mare and plaintiff below, testified, touching her value, that she was a brood mare, fifteen and one-half hands high, three years old, by Onward out of Bonita, worth $3,000, and that he would not have taken $5,000 for her. On cross examination he said that he fixed her value "*by the value of other stock* and her individuality." He was then asked "if he did not have Onward stock similar to the mare of as good strain of blood" sold in the market at the Lexington stock sales "within the past month," and, if so, for what sum they were sold. The court refused to permit the witness to answer this question, although it

Digitized by Google

was avowed that he would say that he did; that they brought from $350 to $450; and further that at these sales such stock generally brought a much higher price than they would ordinarily sell for. This question was clearly competent. The market value at a given time and place may be proved by evidence of actual sales then and there of property of the same quality, and even proof of a single sale would be admissible in the absence of better evidence.

Council for the appellee asked the witness, Bowen, by whom he wished to prove the mare's value, "if all that Mr. Church stated was true," what he thought the mare was worth; and he answered, $3,000. The witness, Holten, was asked "if what Mr. Church had said about the mare was true, was the mare worth $3,000." And he answered yes. All of this testimony was admitted over the objections of the appellant, and was incompetent. Hypothetical questions may be put to a witness, and his opinion asked, based upon one or another hypothesis; but here the given hypothesis, "if all Church said about the mare was true," was too broad and far reaching. He had said that he would not take for her $5,000. If this was true it would inevitably bias the opinion of the witness as to her value. He again said that she was worth $3,000, and if this was true there was nothing left for the witness to say then than that if it is true that she is worth $3,000, she is worth $3,000. It was a question necessary answered in its putting.

The mare was killed on a tract of land owned and occupied by Church, which he had bought from Macklin, who owned it when the road was constructed. In her deed conveying the right of way to the company was inserted the following clause: "And the said grantor obligates herself that she and those to whom she may convey said adjacent lands will build and maintain such fencing along the lines of said tract as may be necessary for the protection of the adjoining lands and of the railway company from accident and damage from stock running upon her said lands, and said railway company will erect necessary cowgaps."

In this State the killing or damaging of any stock by the cars of a railroad company is *prima facie* evidence of negligence.

The question in this case is, can a railroad company by entering into such a contract as this exempt itself from liability for negligence, in whole or in part, in the face of the statute above referred to?

Upon this question the court instructed the jury thus: If they believed from the evidence that by reason of Church's failure to provide a sufficient fence the mare escaped from his land and went upon the company's roadbed, and was there killed, the company was not liable, unless they further believed that after its servants saw *or cauld, by the exercise of ordinary diligence, have seen her*, they, without endangering the safety of the train, could have avoided the accident, in which case the law was for the plaintiff, and so they should find.

This instruction, in so far as it required the company's servants to keep a lookout for stock while passing through the land, ignored the contract entirely, gave the law to the jury just as it would have been if it had never been made, and was in that erroneous, if the agreement had any force or affected in any way the rights of the parties.

At the time of the killing of the mare there was no law in this State requiring railroads to fence in their right of way except in the same manner as other land owners are required by law to do so, and

Digitized by Google

in the absence of such a statute no duty rests upon them to fence their tracks.

Wood, in the 3d volume of his work on Railway Law, page 1560, says that even in States with statutory enactments requiring railroad companies to fence they may exonerate themselves from liability by showing that the land owner agreed to maintain the fence himself. If this be true, there is certainly no good reason why such a contract should not be binding and enforceable in a State where the company is under no greater duty to fence its tracks than is the owner of the land through which its road passes.

Lawson, on Rights, Remedies and Practice, section 1407, says that where, by contract with the railroad, the fence is to be erected by the plaintiff, and he fails in his performance of it, he can not recover for an injury to his stock resulting from a defect consequent upon such failure, as he is guilty of contributory negligence.

In Thompson on Negligence, volume 1, pages 524 to 528, it is said that while a company can not perform its statutory duty (where such a statute exists) by merely contracting with another person to erect the fence, if the performance itself is insufficient; still if such a contract is made with the plaintiff, and he fails in his performance of it, he can not recover, of course, for an injury to his stock resulting from the defect.

Shearman and Redfield, in their work on Negligence, sections 418 and 419, say that in States where the owners of cattle are not bound to keep them in, and railroad companies are not bound to keep them out, cattle straying upon an unfenced railroad are not trespassers, and the company is bound to keep a vigilant watch for them. But, say the writers further, "a railroad company may protect itself against such liabilities by procuring a contract from adjoining owners for the maintenance by the latter of the necessary fences, which will be a good defense to any claims of the parties so contracting, their grantees and tenants."

Such seems to be the rule by the settled weight of authorities.

In this State employes of a railway company must keep a lookout for stock; and if, by inattention or negligence, they fail to discover them by the proper use of the means at their hands, the company is liable. We are, however, of the opinion that such a contract as this relieves the employes of the company in charge of its trains from the duty of keeping a lookout for straying cattle while passing through the lands of the party, his grantee or tenant, with whom it was made; and thus the only duty the company owes to his cattle found straying upon its track within such inclosure is to use all proper means to avoid injuring them after they are discovered to be in a position of danger.

The instruction, in so far as it required any greater duty than this of the appellant's employes, was erroneous.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

German Insurance Co. of Freeport v. Clark, &c.

Filed February 22, 1893. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *A contract of insurance may be reformed* so as to express the true intent of the parties, and after reformation enforced.

In this case application was made for fire insurance for certain persons "and" the heirs of another person. By mistake of the draftsman the word "and" was omitted in issuing the policy. *Held*—That the heirs referred to were entitled to have the policy reformed and then enforced.

2. *The transfer of the policy* by some of the beneficiaries with the consent of the company did not divest the other beneficiaries of their interest in the insurance.

3. *Parties to action—Limitation*—As the action was instituted by the real parties in interest within the time required by the policy, their failure within that time to make certain persons parties, who were at most only necessary as nominal parties, did not deprive them of the right to maintain the action.

D. S. Clay and E. E. Settle for appellant; Lindsay & Botts for appellees.

Fireman's Fund Ins. Co. v. Caye, &c.

Filed February 22, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *Fire insurance—Provision for arbitration*—Where a policy of fire insurance provides that in case differences shall arise concerning the amount of any loss by fire, after proof thereof has been received by the company, the matter shall, at the written request of either party, be submitted to arbitration, and that no suit shall be brought on the policy until after an award shall have been obtained fixing the amount of such claim in the manner provided, no suit will lie on the policy if such written request has been made by the insurer and refused by the insured. But where the policy provides that the loss shall be payable within a certain time after the proofs of loss are received, the request for arbitration must be made within that time, and not only within that time, but early enough to permit arbitration to be had before the expiration of the time.

2. *Same—Authority of attorney*—Under such a policy a request for arbitration made by the insurer to an attorney who had been employed by the insured merely for the purpose of preparing proofs of loss, and whose employment was at an end, was not sufficient, and even if it had been made to the insured himself was not in time as it was not made until fifty-nine days after proofs of loss were furnished, the policy providing that the loss should be payable sixty days after proofs of loss were received.

Gibson, Marshall & Lochre for appellant; Rogers & Duncan for appellees.

Preston, &c. v. Grimes, ex'or.

Filed February 22, 1893. Appeal from Lee Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Revivor*—The personal representative of a dead plaintiff may have the action revived in his name by filing amended petition praying for revivor, and having summons thereon served on the defendants. The provision of the statute authorizing the revivor of actions by amended pleading is not confined in its application to a revivor by a plaintiff against the representatives of a defendant who has died.

Digitized by Google

2. *An heir is responsible for the debts of his ancestor* to the extent of the estate received by him. But in order to hold the heir responsible for liabilities created by the personal representative, such facts must be shown as would make it unconscionable for the heir to retain the estate without recompensing the creditor.

3. *The heir can not be made liable for debts of the ancestor* or for liabilities created by the personal representative in the absence of an allegation that he has received estate from the ancestor. Proof without allegation will not avail.

4. *Executors and trustees—Termination of powers*—Where executors have duties to perform as trustees under the will, which are independent of their duties as executors, their powers as trustees are not ended by their settlement and release as executors.

5. *Agents—Compensation*—Where an agent, in dealing with the property intrusted to his care, places his interest and that of his principal in antagonism, he can not demand compensation for his services.

An agent intrusted with the control of lands belonging to heirs living in remote parts of the State cut and removed timber from the land without authority from his principals. In this action to recover compensation for his services he fixes the value of the timber thus taken and charges himself with it. *Held*—That he is not entitled to compensation beyond what he has received, as it should never lie in the power of an agent to appropriate the principal's property to his own use and fix the price he is to pay for it, or render it necessary for the principal to engage in litigation to ascertain its value.

R. A. Thornton for appellants; John W. Rodman for appellee.

Forbes, &c. v. Kentucky Mutual Security Fund Co.

Filed February 22, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Motion for new trial—Time for making*—In this ordinary action, in which the law and facts were submitted to the court without the intervention of a jury, as the motion for new trial was not made within three days after the court filed its conclusions of law and fact, it came too late. The fact that counsel for appellant had no notice of the filing of the conclusions and were misled by the fact that they were filed on a day of the week other than that on which, under the rules of the court, judgments and opinions are handed down, does not excuse the delay.

2. *Failure to except to conclusions of law*—Even if the motion for a new trial had been made in time the court, in the absence of any exception to the conclusions of law, could not consider anything except the sufficiency of the pleadings to support the judgment. An exception to the judgment is not sufficient.

Helm & Bruce for appellants; M. Munday for appellee.

Rogers, ex'r, v. Reid.

Filed March 1, 1893. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Brent, affirming.

1. *Trusts—Limitation*—Express trusts are created by the direct, intentional, declaratory acts of the party, and as to such trusts the statutes of limitations do not apply.

2. *Same*—Whenever a trustee or other person in a fiduciary capacity, acting apparently within the scope of his powers, purchases property with trust funds and takes title thereto in his own name without any declaration of trust, a trust arises in favor of the beneficiary which belongs to that class of trusts known as constructive trusts, and as to such trusts limitation applies.

Digitized by Google

3. *Same—Purchase with notice of trust*—Wherever property which is already impressed with a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then such heir, devisee or other voluntary transferre or purchaser with notice becomes himself a constructive trustee for the original beneficiary.

An agent for the collection of a debt took in his own name a deed to land from the debtor to secure the debt. He afterward sold the land and took the purchase money notes payable to himself. He brought suit upon the notes in his own name, but died before a recovery was had. His executor compromised the suit and paid the amount received to the widow with the consent of the other devisees. *Held*—That the agent was a constructive trustee for his principal as to the land he received as security for the debt, and also as to the proceeds of the land, and his widow held the money received by her impressed with the same trust, and as she received it in 1872 and suit was not brought by the beneficiary to recover it until 1885 the suit is barred by limitation, more than five years having elapsed since the cause of action accrued.

W. A. Sudduth and Tyler & Apperson for appellant; H. L. Stone and R. Reid Rogers for appellee.

Daviess Gravel Road Co. v. Commonwealth.

Filed March 1, 1893. Appeal from Daveiss Circuit Court. Opinion of the court by Judge Brent, reversing.

Indictment—Description of offense—Where there is no generally known name for a statutory offense an indictment under the statute in designating the offense should give a brief general description in the language of the statute.

An indictment against a gravel road company, charging it with the offense of "failing to keep road in repair and demanding and receiving toll while out of repair," is not a good indictment under section 7 of chapter 110, General Statutes, which provides for the punishment of a turnpike, gravel or plank road company "if the road becomes unfit for public travel and so remains four days."

Sweeney, Ellis & Sweeney and Hill & Hill for appellant; W. J. Hendrick for appellee.

Long v. Duncan.

Filed March 1, 1893. Appeal from Graves Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *To annul a contract on the ground of fraudulent representations* those representations must be material and have induced the contract to be made. It is not enough that they have indirectly contributed to the transaction or supplied a motive to the party to enter into it.

2. *Fraudulent representations as to value of goods sold*—If no concealment is practiced by the seller in order to deceive, a buyer can not allege fraud where he inspects what he purchases, and the defect is apparent, or where the thing purchased was open to his inspection so that by the exercise of ordinary diligence and prudence he could have ascertained the defect. But whenever the seller is guilty of willful misrepresentations as to material facts and thereby induces a party to purchase on terms that would otherwise have been withheld, equity will give the buyer relief.

The defendant, a merchant, representing that his stock of merchandise had twelve days before the time at which the representation was made invoiced, cost and carriage, $1,325, sold to plaintiff, who bought upon the faith of that representation an interest in the goods and business for one-

Digitized by Google

half the sum represented as the amount of the invoice. As a matter of fact, the invoice had amounted to only $782, and defendant had raised the figures to $1,325. In this action by plaintiff to have cancelled his note executed for the unpaid part of the purchase price, *Held*—That he is entitled to the relief sought. Defendant went far beyond a mere expression of opinion as to the value of the goods.

Webb & Robertson for appellant; Smith & Robbins for appellee.

L. & N. R. R. Co. v. City of Louisville.

Filed March 1, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour.

Taxation of railroads by cities—Discrimination as to discount—As railroad property should be and is assessed for city purposes upon a different basis and in a manner different from that in which other property is assessed, and the mode of collecting the taxes is different, the provision of the charter of the city of Louisville offering a discount to taxpayers who promptly pay the taxes assessed against them does not embrace railroad companies, but in fact seems to exclude them; and the exclusion works no wrong, as the difference in the time in which the taxes become due or are required to be paid is a sufficient compensation for the loss of the discount.

Helm & Bruce for appellant; Laf Joseph for appellee.

Freeman's adm'r v. Deer Bros.

Filed March 1, 1893. Appeal from Marshall Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Testimony as to transaction with decedent—Entries in account book*—In this action by an administrator upon a note executed to his intestate in which the defendant pleaded payment in lumber, entries made by defendant in a book in the usual course of business and such as the business required to be made, were competent evidence for him, and he had the right to testify that they were correct, but it was not proper for him to testify that he furnished the decedent with lumber, he not being a competent witness to testify orally before the jury as to the transactions between himself and decedent.

2. *Payment—Variance*—The defendant having pleaded payment in lumber "between the first of October, 1889, and the first of March, 1890," it was not competent for him to prove that he also furnished lumber in July and August, 1889.

3. *Introduction of testimony*—After the defendant had introduced his evidence in chief and the plaintiff had concluded his testimony it was not proper to allow the defendant to introduce other evidence in chief, no reason being shown why it could not have been introduced at the proper time.

Reed & Oliver for appellant.

City of Louisville v. Johnson, &c.

Filed March 1, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, reversing.

1. *Suit for taxes—Limitation*—A tax is a "liability created by statute" within the meaning of section 2, article 3, chapter 71, General Statutes, which provides that "an action upon a liability created by statute, when no other time is fixed by the statute creating the liability, shall be commenced within five years next after the cause of action accrued."

2. *Same*—Under the act of May, 1884, amending the tax laws of the city of Louisville, which should be treated as an amendment to the city charter, the right of the city to sue for taxes does not accrue until the 1st day of May of the second year after the assessment, and limitation does not begin to run until then. Prior to that time the city can only distrain goods and chattels or garnish rents. The provision of the act that all uncollected taxes re-

Digitized by Google

maining in the hands of the receiver on the 1st of May next after the assessment, together with interest from that date, "shall be deemed a debt to said city arising as by contract, and may be enforced as such by all remedies given for the recovery of debts in any court of competent jurisdiction," was intended to fix the time at which the taxes shall, if unpaid, begin to bear interest, and not to fix the time when steps can be taken to coerce their collection by legal process, as other sections prescribe specifically the different remedies for coercing the collection of taxes and the time in which they shall be begun.

3. *Implied repeal of statute*—As the act of May, 1884, purports to be a complete law in reference to the levy, assessment and collection of taxes, it operates as a repeal of a provision in the charter authorizing the city to sue at any time.

4. *Tax bills prima facie evidence*—To make tax bills issued before the passage of the law of May, 1884, *prima facie* evidence, the city should show that they were authenticated under the ordinances of the general council.

5. *Sham pleading*—It is proper to strike from an answer as mere sham pleading denials of facts which the court judicially knows to be true.

Laf Joseph for appellant; Lane & Burnett for appellees.

Avery & Sons v. Meek.

Filed March 1, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, reversing.

1. *Master and servant—Defective machinery—Instructions to jury*—In an action by the servant against the master to recover damages for personal injuries alleged to have been caused by the negligence of defendant in furnishing defective machinery for plaintiff's use it was error to give an instruction authorizing the jury to find for plaintiff on account of the defective condition of the machinery without requiring them to find that the injury was caused by the defect.

2. *Contributory negligence*—It was error to require the jury to believe, in order to find for defendant on the ground of plaintiff's contributory negligence, that the injury was "caused" by plaintiff's negligence, as this required them to believe that it was caused wholly by plaintiff's negligence. Although the consequence of contributory negligence on plaintiff's part was declared in other instructions, this did not cure the error.

3. *The holding of the jury for further consideration of the case* after they have announced that they can not agree is so peculiarly discretionary with the trial judge that some flagrant abuse of discretion must appear before this court will undertake to control him in that respect.

Dodd & Dodd for appellant; O'Neal, Phelps & Pryor and Samuel B. Kirby for appellee.

Louisville & Nashville Railroad Co. v. Smith.

Filed March 1, 1893. Appeal from Oldham Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Carriers—Notice of claim for injury to stock*—A provision in a contract with a railroad company for the shipment of live stock by which the shipper agrees as a condition precedent to his right to recover any damages for loss or injury to the stock that he will give to the carrier's agent at the place of destination notice of his claim therefor, before the animals are removed or mixed with other animals, applies only to a claim for damages on account of physical injury done to the stock in transit, and has no application to a claim for damages on account of delay in the transportation of the stock.

2. *Same—Delay in transportation*—Several car loads of lambs which were delivered by plaintiff to defendant, railroad company, for shipment started on their journey in the afternoon, and should have reached their destination

Digitized by Google

before 6 o'clock next morning, but did not arrive until from 6 to 16 hours after that time. *Held*—That the testimony showing these facts made out a *prima facie* case of negligence, and it devolved upon defendant to explain the delay.

3. *Same—Measure of Damages*—The court properly told the jury that if they believed that defendant negligently failed to deliver the lambs within a reasonable time after it received them, by reason of which they were injured or rendered less valuable, they should find for plaintiff the damages sustained, the criterion being the difference between the market value of the lambs, if they had been delivered in a reasonable time, and their market value when they were really delivered.

D. H. French for appellant; Morris & Ladd for appellee.

CINCINNATI, &c., R. R. CO. v. GREEN, &c.

Filed March 1, 1893. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Carriers—Injury to live stock in transit—Negligence*—In this action against a railroad company to recover damages for injury to live stock in transit under a contract with defendant for the shipment of the stock from Lexington, Ky., to Atlanta, Ga., plaintiffs alleged that they shipped the stock from Mt. Sterling to Lexington in a car belonging to another road, which was wholly unfit to make the trip from the latter place to Atlanta, which car defendant hauled into its yard at Lexington, instructing plaintiffs how to unload their stock therefrom and load it into a car prepared by defendant for the purpose, but that defendant's servants negligently refused to put the car in such position that the stock could be transferred, and that they were thereby compelled to let the stock remain in the unsafe car, by reason of which the injuries were sustained. Defendant alleged that a suitable car was placed in proper position for the transfer of the stock, and that plaintiffs failed to transfer it, it being their duty under the contract to load and unload the stock. *Held*—That it was error to instruct the jury that if defendant negligently failed to place the car in such position that the stock could be unloaded therefrom "they should find for plaintiff in a sum not exceeding $700," that being the amount claimed. This instruction authorized a recovery without regard to whether the injury to the stock was caused by defendant's negligence, and also without regard to the damages really sustained.

2. *Same—Instructions to jury*—The court erred in refusing to instruct the jury that if they believed defendant placed the car in which the stock was delivered to it in such position that the stock could be conveniently unloaded from said car, and that the plaintiffs then failed to unload said stock from said car, they should find for defendant

C. B. Simrall and R. A. Thornton for appellant; Beauchamp & Allen for appellees.

PETTY & BRO. v. MERRITT.

Filed March 1, 1893. Appeal from Washington Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Separation of conclusions of law and fact—When, in an ordinary action, the law and facts are submitted to the court without the intervention of a jury, and the court fails to state in writing the conclusions of fact found separately from the conclusions of law, the only question for consideration upon an appeal from the judgment is as to the sufficiency of the pleadings.

W. C. McChord for appellants; Clements & Lewis for appellee.

LOUISVILLE & NASHVILLE RAILROAD CO. v. THOMPSON.

Filed March 8, 1893. Appeal from Hopkins Circuit Court. Opinion of the court by Judge Brent, reversing.

Digitized by Google

Railroads—Duty to trespassers—A railroad company owes to persons walking on its track at a point where its right to the use of the track is exclusive of the public no duty except to guard against injury to them after it is made aware of their peril, its servants in charge of its trains not being bound to anticipate their presence on the track. And the fact that a person walking on the track at such a place is suddenly overcome by sickness and thus rendered helpless does not impose upon the company any greater degree of care than it owes to persons in full vigor of mind and body.

Gordon & Gordon for appellant.

MEYER, &c. v. ZELL.

Filed March 8, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Brent, reversing.

Assessments for street improvements—Where an alley lies wholly within one of the quarters of a square in the city of Louisville only property within that quarter of the square can be assessed to pay for the cost of its improvement.

H. M. Lane for appellants; Bright & Brandeis for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. MAY 15, 1893. No. 22

KENTUCKY COURT OF APPEALS.

CITY OF COVINGTON v. MCDONALD, &c.

(*Filed Feb.* 2, 1893.)

Dedication of street—Evidence—In this action in which a city is claiming that a certain strip of ground was by implication, as shown by various conveyances of the property, dedicated to public use as a street, the evidence shows that all the conveyances of the property have *included* the strip in dispute as a part of the land conveyed, and that the center of a certain street extended has been referred to in the deeds merely as a landmark and not to evidence a dedication. Much of the strip is in no condition for use as a street, and one-half of it could not be now so used, therefore, neither a dedication nor an acceptance of the strip as a street can fairly be inferred from the evidence.

W. P. Byrne for appellant.

Collins & Fenley for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

The act of appellee, McDonald, complained of in this action by appellant, the city of Covington, is the inclosure as part of his premises the southern half of what is claimed to be Sixteenth street, between Madison and Washington streets; and the question involved is whether the parcel so inclosed is part of a public street.

It appears that in a division of lands of Richard Southgate, made many years ago, a block now lying within the corporate limits of Covington was allotted to Richard H. Southgate, and that in 1860 that block was divided between his two sons, Richard H. Southgate and C. F. Southgate, lot No. 1 falling to the latter, who, in ——, conveyed it to Clements, under whom McDonald holds by lease for a term of years that was executed in 1887.

Digitized by Google

There is no evidence of an express dedication of the land in dispute for a public street having ever been made; and such dedication, if established at all, must be by implication from the language of deeds by which the title has been successively passed.

On the map of the lands of Richard Southgate, as divided, a dotted line was made along the center of what is called Sixteenth street, between Madison and Washington, though it was not designated by name as a street. On the contrary a note was written on the map to the effect that the survey and calculations were made from the center of streets, supposing that if ever laid out in lots the streets would be extended.

In the report of commissioners who made the division between Richard H. Southgate, jr., and C. F. Southgate, in 1860, lot No. 1 of block 12, allotted to C. F., is described as beginning at the junction of the center of Sixteenth and Madison streets; thence with center of Madison street southward 225 feet to lot No. 2; thence extending in parallel lines westward 269 feet to a fifty-foot street.

About the same description of lot No. 1 was given in the deed of partition between Richard H. and C. F. Southgate, and the subsequent deed of the latter to Clements. But the strip of land in dispute is included in all the plats and deeds, and title thereto conveyed to the respective vendees without any condition or reservation. So that the most that can be implied from the language of the deeds is that Sixteenth street was recognized as an existing landmark. It does not, however, follow that part between Madison and Washington, as now claimed by appellant, was so recognized, but rather that part east of Madison, which is now a public street.

Up to the time lot No. 1 was leased to and taken possession of by McDonald it was a common uninclosed, and though Sixteenth street east of Madison may have been used as a public thoroughfare, it had not been so used west of Madison, nor except the north half is it even now fit for use.

It has been held by this court that where a sale of lots takes place according to maps showing squares, lots and streets laid out, and such lots are conveyed by deeds describing them as binding on or by designated streets, a dedication may be implied for benefit of purchasers of adjacent lots, whose rights thus become involved whether the municipality has formally accepted the dedication or not. (Roman v. Town of Portland, 8 B. M., 237; Wickliffe v. City of Lexington, 11 B. M., 155.)

But lot No. 1 was not so described in any of the deeds by which title to it was passed; nor are the rights of purchasers from a common vendor at all involved in this case. On the contrary lot No. 1 is so described as to include a part of Sixteenth street extended, and in virtue of the deeds title to the parcel in dispute has been conveyed to the purchaser, Clements, as had been done to his vendor; and, in such case, it must appear there was a dedication by the original or some intermediate proprietor of the land claimed as a street, and that it was accepted by the municipality, otherwise a subsequent purchaser can not be divested of the title or possession. All that can be reasonably inferred from the various deeds and maps is that an extension of Sixteenth street might sometime in future be made when the owner could, at his election, dedicate his land for the purpose or demand compensation.

But the evidence in this case shows that at the date of the original division of Richard Southgate's lands, as well as when the partition was made between Richard H. and C. F. Southgate, the land described as lot No. 1 was not needed for a public street, and would

Digitized by Google

probably not, if dedicated, have been accepted and appropriated for that purpose by the city of Covington; for, though now claiming the parcel in dispute as part of Sixteenth street, it has not been improved by the municipality.

It seems to us very clear there never has been any dedication by Clements or any of his vendors of the land claimed by appellant, and the lower court, therefore, properly instructed the jury to find for defendant.

Judgment affirmed.

BRANDTS' EX'OR V. DONNELLY.

(*Filed Feb.* 25, 1893.)

Liability of indemnitor of the surety of a personal representative—The surety of a personal representative can not recover of one who has executed an indemnifying bond pursuant to chapter 104, General Statutes, his attorneys' fees for prosecuting an appeal to the Court of Appeals from a judgment in favor of the distributees of the estate against him for a failure of the personal representative to account for the estate received by him, when the indemnitor neither requested nor in any manner induced the taking of the appeal; nor can he recover from such indemnitor the cost of printing the brief of his attorney on the appeal.

But the indemnitor is liable for all court costs, including the costs on the appeal and for the 10 per cent. damages awarded on the affirmance of the judgment by the appellate court.

Cleary & Hamilton for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hazelrigg.

Section 1 of chapter 104 of the General Statutes provides that if a surety on the bond of a personal representative wishes to be relieved from future liability, and to obtain indemnity for such as may have been incurred, or either, he may by notice require the principal obligor to appear before the court in which the original bond was given, and if a new bond (see section 6, same chapter) is given, it shall operate as a discharge of the surety from all liability for the acts of the principal thereafter done; and if the object be so specified the bond shall contain a stipulation or covenant to indemnify the surety against any loss, cost or damage legally incurred by reason of said suretyship.

In the Kenton County Court, on the 27th of June, 1879, E. H. Brandts, the intestate of the appellant, executed bond as surety of one L. J. Blakely, administrator of John Pepper, deceased, covenanting, in the usual form, that Blakely should well and truly administer the goods, etc., of Pepper, and further covenanting to indemnify Charles Donnelly, now the appellee, and who was the former surety of said Blakely, as administrator of said Pepper, against any loss, cost or damages legally incurred by reason of his suretyship.

It appears that prior to the execution of this bond there had come to the hands of Blakely of the estate of Peffer some $4,000, to provide against the possible payment of which by himself, Donnelly

Digitized by Google

had taken the proper steps to obtain the indemnifying bond of Brandts, of June, 1879, as provided for under the sections of the statute, *supra*.

Thereafter, in March, 1881, William Pepper, sole distributee of John Pepper, instituted his action against Brandts and against Donnelly, on their respective bonds, to recover the amount alleged to be in Blakely's hands, or wasted by him, coming to said distributee. Pending the action various payments were made on the demand—possibly by Brandts, who, however, died in 1885, and the action was thereupon discontinued as to him.

In September, 1888, Pepper recovered judgment against Donnelly, who then appealed to this court, when, in March, 1891, the judgment was affirmed. The amount of it, including the debt, interest and costs, up to July 21, 1891, was $3,010.30. To recover which, and also the sum of $230.45 paid his attorneys in his defense of said suit, and also $20, the cost of printing a brief in the Court of Appeals, the appellee brought this action against the executor of Brandts. His petition sets out in detail the foregoing facts. The appellant, as such executor, filed his answer in some seven paragraphs, to each of which a general demurrer was sustained. He tendered an amended answer which was rejected, and declining to plead further judgment was rendered against him *de bonis testatoris*, and from this he appeals.

By his first paragraph he denies that Donnelly caused a written notice to be served on Blakely to appear and execute the bond of June, 1879, and his counsel insist that thereby the county court of Kenton, by reason of its being a court of limited jurisdiction, could not accept the bond voluntarily executed by Brandts. He denies that Blakely and Brandts executed and acknowledged such bond "*pursuant to such notice*," or that such bond was "*duly*" accepted, etc.

In another paragraph he alleges that the bond in question was signed in the clerk's office and not in the courthouse, and that the *judge* made no order allowing said bond to be executed.

The statute of limitation is also pleaded in another paragraph, although Donnelly's damnification had occurred only a few months before the institution of the action. The annihilation of the trust is set up, based on the alleged final distribution of the assets in the executor's hands.

That these averments are wholly insufficient to support a defense is manifest, and without burdening the record with detail it is sufficient to say that nowhere in the answer or amended answer is there to be found a statement of fact sufficient to constitute or support a defense, unless in the fifth paragraph of the original answer as amended.

There the defendant denies that the plaintiff is entitled to be reimbursed for the expenditures in the way of interest, costs, lawyers' fees or any other expenses paid or incurred since the judgment in the Pepper case, of September 21, 1888, and he alleges that embraced in the sum sued for are the sums of $230.45 for attorneys' fees, $20 for printing brief, $229.90 for 10 per cent. damages on supersedeas, $120 for officers' fees and costs, all incurred after the judgment of September, 1888, and incurred by reason of the alleged unnecessary appeal of said Donnelly.

These denials and statements, we think, are sufficient to raise the legal question as to whether these extraordinary costs can be recovered of the indemnitor on the bond of June, 1879.

It seems certain enough that the legal or court costs, including the damages on affirmance of the judgment in the Appellate Court, are embraced expressly in the language of the bond. These costs and

Digitized by Google

damages are the precise liabilities, against paying which the indemnitee provided by obtaining this bond.

This cost and expense the appellant could have stopped at any time by paying the debt his intestate had bound himself to pay, or even by notifying the appellee not to prosecute the appeal unless at his own expense. The general rule seems to be that in cases of this kind all such cost may be recovered where nothing appears to indicate bad faith in making the defense, and in this way incurring cost.

But the general rule seems otherwise when it comes to extraordinary costs, such as attorneys' fees, etc.; and certainly in the absence of a showing that these fees were incurred for the benefit or attempted benefit of Brandts' estate, or at the instance of his executor, the appellant should not be held bound for them. The appellee could have stopped, and that too with the consciousness of having done all he could to prevent recovery, upon the rendition of the judgment in September, 1888. The action had been instituted in March, 1881, and more than seven years had elapsed before this judgment was obtained.

The appeal may have been taken solely or mainly to benefit Donnelly. It may have been done without any reasonable or probable expectation of success, and may not have been on the merits of the case, but with the knowledge that its prosecution could not in any wise result beneficially to the estate of Brandts.

Therefore, solely for the reason that it allows these two items of $230.45 and $20, the judgment of the lower court is reversed, with directions to enter judgment in accordance with this opinion.

In such cases it would seem that unless the indemnitor encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to his advantage, such extraordinary costs are not chargeable to him.

BROWN, &C. V. VANCLEAVE, &C.

(*Filed March* 9, 1893—*Not to be reported.*)

1. *The chancellor has the power to order a restitution by a purchaser of stock* sold under a judgment rendered the chancellor which, on appeal, is decided to be void.

2. *Void judgment—Appeals*—A party may waive objection to the hearing of an appeal from a void judgement, before a motion made in the trial court to set it aside, by failing to move to dismiss the appeal.

The judgment ordering the sale of the stock involved was void and not voidable merely, although an appeal therefrom was heard and disposed of by this court before a motion made in the trial court to set it aside, no objection to the hearing of the appeal on that account having been made by the appellee.

B. F. Buckner and R. W. Woolley for appellants.

C. B. Seymour and O'Neal, Jackson, Phelps & Pryor for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

It seems to us there can be no trouble in determining the power of the chancellor in a case like this, and no reason exists for denying

Digitized by Google

the relief asked. The matter in controversy between the parties had been fully litigated and a final judgment rendered.

The question involved was as to the liability of the appellant, Brown, on a note of $4,000, and to secure that liability the stock of Brown in a certain corporation had been attached in the hands of Ourbacker to pay the debt.

The court on final hearing adjudged that Brown was liable to the extent of $510, and adjudged that the stock would be sold unless Brown, the appellant, paid the money in ten days. The money was paid and the judgment satisfied.

After this was done Vancleave, the plaintiff, filed what he calls an amended petition, setting up the fact that the stock had been pledged in the hands of Ourbacker to secure the whole note. It was not a supplemental petition based upon the alleged discovery of facts entitling the party to a new trial, but an amended petition offered and permitted to be filed after final judgment over the objections of the defendant.

On this amended petition a judgment was rendered and the stock sold and purchased at a nominal sum by the plaintiff, Vancleave, and by him assigned to his coappellee, Smyser. The confirmation of the sale was objected to, and on the appeal to this court with Vancleave and Smyser, both appellees, it was held the entire proceeding was a nullity and the case remanded. On the return of the case, Smyser having obtained a transfer of the stock, the appellant, Brown, moved for restitution and that the assignment of the stock to Smyser be erased, it having been made by the court's commissioner.

The court refused to order restitution upon the ground that the judgment was erroneous and not void and the title passed to the purchaser. The facts alleged in the petition were not only litigated but the order confirming the sale on the ground that the entire matter had been disposed of by a final judgment, and that the judgment was void admits of but little doubt, and so this court held on the original appeal; and such proceedings should be held void, for the reason, if no other, that parties litigant could never be able to get out of court. There would be no end to litigation.

It is argued, however, that the judgment on the amendment was not void, for, if so, this court had no jurisdiction of the appeal until a motion was made to set aside the judgment below.

We see no reason why this objection may not be waived by failing to take advantage of it in this court by motion to dismiss. This court certainly had jurisdiction of the appeal and the questions involved in it, and if not a final order when the parties appear and make no objection, the judgment of this court is as binding as if there was a final judgment. Proceeding then on the theory that the judgment was void, it is again argued that the chancellor had no power over it, because he must be then regarded as acting in his individual and not his official capacity. With proper respect for learned counsel we think it unnecessary to respond to the suggestion.

The power to restore this property rightly belonged to the chancellor, and if he had no jurisdiction to order it sold he had the jurisdiction to have it brought back into court and to place the parties in the same position they were before the void judgment was rendered.

The judgment is reversed and remanded, with directions to order a return of the stock and a cancellation of the assignment, and for proceedings consistent with this opinion.

Digitized by Google

BRADBURY V. WALTON, &C.

(*Filed March* 11, 1893.)

1. *Closing of lateral highways within one mile of a turnpike—Constitutional law*—The act forbidding the opening of lateral roads within one mile of a turnpike, and requiring such lateral roads to be closed (article 13, chapter 110, General Statutes) is constitutional.

2. *Same—Res adjudicata—Damages*—Where one of several landowners, through whose lands a lateral road within one mile of a turnpike runs, closes such road by placing obstructions thereon on his own land, in pursuance of an order of the county court directing that such lateral road be closed, he is not liable in damages for so closing the road to another person whose land lies on such road, and who resisted in the county court the order directing it to be closed.

So long as the order of the county court, directing the lateral road to be closed, remains unreversed, it is binding on the public and all parties to the proceedings in which it was rendered, and one of the parties thereto can not maintain a suit against another of such parties for closing such highway, nor will he be heard to claim that the statute on which the county court bases the order is unconstitutional, he having taken no appeal therefrom.

Edward W. Hines, Cochran & Son and T. C. Campbell for appellant.

E. L. Worthington and Garrett S. Wall for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

The contention by the appellant in this case is that the statute authorizing the county court to close lateral roads or what is known as ordinary highways when running within a certain distance of a turnpike road (one mile) is unconstitutional. It appears from the petition filed, in which it is alleged that the closing of a lateral road by the defendant was an interferance with the right of the appellant to pass from one part of his land to another, that the road had been ordered closed by the county court of Mason in a proceeding under chapter 110 of the General Statutes to which the appellant was a party, and that he appeared in that court and resisted the motion.

It seems to us that proceeding must bar the recovery of the appellant in this case. The appellee closed the highway on his own land, and by virtue of the judgment of the county court, and until that order is reversed, it is binding on both the public and the appellant. It is argued, however, that the act is unconstitutional, and if so the judgment of the county court is a mere nullity; and if this view of the question was even conceded, with the broad and almost unlimited power of county courts over the highways of the State within their jurisdiction, it must be held that a proceeding to close, alter or discontinue a public road with the party complaining a party to that proceeding, and a judgment entered, such a judgment must be deemed conclusive so long as it remains in force.

The appellee closed the road on his own land, and, therefore, no trespass was committed by an entry on appellant's land, and unless the latter had some right of property in this easement, not only on his own land but on the land of the appellee, no action can be maintained by reason of the wrong complained of. The public highways of the State known as county roads are opened and maintained for

Digitized by Google

the public and not for mere individual use; and whenever it may be deemed proper to close, alter or discontinue a county road the power is given to the county court to make such changes as may be conducive to the public welfare, and the right to close a highway that affects the travel on a turnpike is expressly given the county court to be exercised only when the public good requires it, and of this the county court must be the exclusive judge and its action only subject to review by some higher tribunal. It was to encourage the construction of better and more permanent roads for the convenience of trade and travel and to prevent the avoidance of turnpike gates that the statute was enacted, and in such cases mere private convenience has been subordinated to the public good.

A private citizen has no right of property in a public road, although it passes over his own land, unless he owns the land itself subject to the easement.

If the owner of land abutting on a public road has a right of property in the easement it necessarily follows that no change or alteration can be made without first making compensation to the owner, as it would be a taking of private property for public use without compensation; but he has no other interest except such as is common to the entire public; and while he is the owner of the land and the road is discontinued its use then reverts to him to the extent he has title, but no further.

This court, in the case of Lexington & Ohio R. R. Co. v. Applegate, 8 Dana, 209, recognizes the distinction between the streets of a town or city and an ordinary public way. "An ordinary public way," says the court in that case, "may be discontinued or applied to some other public purpose than that for which it was first established without any legal liability for pecuniary compensation to the local public or to any owner of adjoining land, because neither such public nor proprietor had any right of property in the way, or any other legal interest in it than that which was common to all people."

The distinction is this: Ordinary highways, or what are termed county roads, are created by law for the public and the land or its use taken from the owner in the first place by paying him its value, or there may be sometimes such a dedication by the individual owner and an acceptance by the county court as will create this easement without compensation.

The streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot owner, the grantor or the party making the dedication saying to the owners of lots, this right of ingress and egress you shall have; but not so with an ordinary public road. The State creates the easement for the entire public; its use is that of the public, one citizen having as much right to this use as the other; and when its abandonment or nonuser is deemed necessary for the public good the county court may discontinue it altogether, and in that tribunal the question must be made.

In the case of the Campbell Turnpike Co. v. Dye, &c., 18 B. M., 761, the construction of this same statute was the matter in controversy. The statute reads: "No lateral road shall be opened to and from the same places now connected by any turnpike or plank road, or which may hereafter be so connected, as to run within one mile of such road; and any such lateral road now in use, or which may hereafter be in use, shall, by order of the county court, be shut up and closed. But such lateral roads shall not be precluded from so running as near as a mile for the distance of one mile from any town or city."

Digitized by Google

The court, in alluding to the argument made by counsel as to the individual injury that must result to the owner of the abutting land, expressed the opinion that no such questions could be raised on the hearing in the county court, the statute being imperative as to discontinuing the road; all the county court could do was to obey the statute. It is true the constitutional question was not raised in that case, but the inconveniences resulting to the land owners were greater in that case than in this, and such as to suggest to court and counsel the importance of a careful consideration of the question; and besides this court has, since the case referred to, passed upon the rights of the land owner in this class of cases more than once in MS. opinions; and while no constitutional question was made, we are satisfied the statute would have been held valid in those cases as it must be in this.

Judgment sustaining the demurrer to the petition is affirmed.

REYNOLDS v. WHITE, &C.

(*Filed March* 11, 1893.)

Mortgage—Adverse possession—The owner of an undivided half interest in a tract of land in 1852 mortgaged it to his cotenants. He was never able to pay the mortgage debt. Shortly after 1852 the mortgagees entered upon the tract, exercised acts of ownership and claimed the whole of it until their deaths. The mortgagor lived near the land and without protest permitted the heirs of the mortgagees to have the whole of the land divided among themselves in 1875, and thereafter to claim, possess and sell different parts of it. In this action, *Held*—That possession and claim of ownership by the mortgagees and their heirs is sufficient evidence that the mortgagor had parted with his title to the land and their title to the entire tract can not now be questioned.

John L. Scott, A. W. Baker and J. M. Sebastian for appellant.

Jno. W. & H. G. Rodman, B. P. White and J. C. White for appellees.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

In 1834 a patent for 600 acres of land was issued to Alexander White and Messenger Lewis, and in 1835 the latter sold and conveyed his undivided half thereof to C., J. & D. White, three brothers and copartners.

In 1852 Alexander White, being indebted to them a large sum of money, mortgaged all his landed estate, including his undivided half of said 600 acres, to C., J. & D. White, retaining, however, possession of his home place.

In 1875 C., J. & D. White, all being dead, the heirs at law of D. White instituted an action against the heirs and devisees of C. White and J. White for a partition of all the lands owned by the firm of three brothers.

In the list of lands alleged to belong to C., J. & D. White, and subject to partition between their respective heirs and devisees, was the tract of 600 acres patented to Alexander White and Messenger Lewis; and it was stated in the petition that Alexander White had conveyed

Digitized by Google

his undivided half of that tract to C., J. & D. White before they died, but that the deed had been lost. However, by the judgment rendered in that action the tract of 600 acres was in fact partitioned, and 100 acres of it, besides other tracts, was allotted by the commissioners appointed by court to the heirs and devisees of J. or James White, and a deed made to them therefor in 1881.

In 1883 H. L. White, executor of the will of James White, and empowered thereby to do so, sold and conveyed to appellant Reynolds all the land that had in the action mentioned been allotted to the heirs and devisees of J. or James White, including the parcel of 100 acres that had been taken off the tract of 600 acres, and for description and identification of the land so sold and conveyed to Reynolds reference was made to deed of the commissioners to James White's heirs and devisees.

The land in controversy in this action is a parcel of thirty-six acres inside the boundary of the original 600 acre tract, and also within boundary of the 100 acres taken therefrom and allotted to said heirs and devisees; and the cause of this action, which was at first placed on the ordinary docket, is alleged trespass by the defendants, B. P. White and J. C. White, in cutting and carrying timber away from the thirty-six acres.

It is proper here to state that neither of the defendants claim the land as heirs at law of any one of the three brothers, C., J. & D. White, though defendant, B. P. White, is the husband of one of the heirs and was a party to the action instituted in 1875 for division of the lands.

In their answer they state that prior to his death, though subsequent to the death of the other two members of the firm of C., J. & D. White, D. or Dougherty White caused executions to issue on judgment or judgments in favor of the firm against Alexander White, and to be levied on various tracts of land owned by him; that after the executions were levied he, Dougherty White, made an agreement with one L. A. Byran by which the latter, upon bidding and paying $400 for certain parcels of the land, one of which was the thirty-six acres in controversy, was to have made to him by D. White, the surviving member of the firm of C., J. & D. White, a complete title to the land thus bid for and purchased by him; and thus claiming the parcel of thirty-six acres, L. A. Byran, they allege in the answer, in 1889 conveyed it to defendants, B. P. and J. C. White.

But there is not filed in this record nor accounted for a copy of either the judgment or execution against Alexander White, nor the original or copy of either a deed to L. A. Byran or the one from him to the defendants. In fact it is not shown, nor attempted to be shown by any but oral testimony, that is both incompetent and vague, that there ever was such judgment, execution or sale, and L. A. Byran stands without a vestige of paper title to the thirty-six acres. Nor does claim of title by possession avail him, for no survey was made, even if he had paper title by which to show the parcel of thirty-six acres is included in the boundary of land sold by the sheriff, if he in fact ever made any such sale.

On the other hand the plaintiff traces his title to an undivided half of the parcel of thirty-six acres by regular and connected chains to the Commonwealth, and possession and claim of absolute title to the whole from 1883, when the executor of J. White sold and conveyed to him.

It is, however, alleged and attempted to be shown that in 1889, about the time they state L. A. Byron sold and conveyed to defend-

Digitized by Google

ants, the plaintiff disclaimed ownership of the parcel of thirty-six acres, and that the defendants were thereby misled and induced to purchase.

But we think that allegation is not sustained by the proof. For, according to the statements of witnesses, L. A. Byran sold and conveyed to defendants, in 1889, several tracts of land, including the parcel of thirty-six acres, but refused to warrant the title to that parcel, thus showing the parties to that deed knew of the title and claim of the plaintiff Reynolds.

The parcel of thirty-six acres seems to be on opposite side of a dividing ridge from the residue of the tract of 100 acres, and Reynolds admits he did not, in 1889, certainly know whether it was included in the deed made to him in 1883, but insisted upon claiming all within his boundary.

The testimony and report of the surveyor in this case place it beyond doubt that the parcel of thirty-six acres is inside the boundary of the 600 acres, and was allotted to the heirs of James White, whose executor conveyed to Reynolds. Indeed it is impliedly admitted by the defendants that the parcel of thirty-six acres was conveyed by commissioners to James White's heirs, for they allege in their answer a mistake was made by the commissioners in running the lines so as to include it, and ask the deed be reformed, which of course can not now be done.

This action having been transferred to equity upon motion of defendants, it certainly was competent for the chancellor, and we believe his duty, to have adjudged the plaintiff, Reynolds, entitled to at least one-half the land in dispute, and, consequently, to one-half value of the timber cut and carried away by defendants.

The real and only question in this case is whether the plaintiff is owner of all the land in dispute. He is if Alexander White was divested of title to his original undivided half of the 600 acre tract at the time the division took place in 1881.

There is no evidence the mortgage executed by Alexander White, in 1852, was ever enforced, nor does it appear he ever paid any part of the mortgage debt. On the contrary the evidence in this case satisfactorily shows he never was able to do so. There is evidence tending to show that C., J. & D. White took possession of the 600 acres not long after the mortgage of 1852, and had claimed and exercised acts of ownership over it till they died; and notwithstanding Alexander White was living in the immediate neighborhood of the 600 acre tract in 1881, he permitted the heirs at law of C., J. & D. White, the mortgagees, without objection or protest, to obtain judgment for division and allotment of the 600 acre tract among themselves, and thereafter to possess, claim and sell the different parts of it.

It seems to us that after the lapse of twenty-nine years from the date of the mortgage, in 1852, to the division among the heirs at law of C., J. & D. White, in 1881, without setting up any claim himself, or objecting to the claim, possession and acts of absolute ownership by C., J. & D. White while they lived, and of their heirs at law afterwards, which finally culminated in a division and allotment of it; that Alexander White must be presumed to have parted with his title, especially when it is satisfactorily shown he was fully aware of the condition of affairs, and yet during that long period never asserted or exercised any acts of ownership of the land, or claimed to have paid any part of the mortgaged debt.

If then the heirs at law of C., J. & D. White had, when the division took place in 1887, acquired title to the entire tract of 600 acres,

Digitized by Google

and whether paper or possessory it was transmitted as to 100 acres thereof, including the thirty-six acres in dispute, unimpaired to the plaintiff, Reynolds; and that they had so acquired it in virtue of twenty-nine years of continued and undisputed possession and claim of ownership we think the evidence conclusively shows. For there is no other way to account for the conduct of the mortgagees and creditors in failing to enforce their lien and to such collections of the mortgage debt, and of the conduct of the mortgagor and debtor in acquiescing in their possession and claim of the land for twenty-nine years, without any assertion of title or claim to the land, or any pretense he had paid or even attempted to pay any part of the debt.

Wherefore, the judgment is reversed and cause remanded for judgment in favor of plaintiff for the land and inquiry as to damages he is entitled to by reason of the trespass complained of.

RUNNER V. YOUNG.

(*Filed March* 16, 1893—*Not to be reported.*)

Vendor and vendee—A vendee in possession with no one asserting any conflicting or other claim to the land can not refuse to pay the purchase price on the ground that his vendor had no title when it appears that the vendor had been in actual adverse, undisturbed possession for thirty years.

P. F. Edwards for appellant..

Edward W. Hines and Charles Drake for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee sold and conveyed by deed the land in controversy to the appellant and put him in the possession of the same. To the action to enforce the last payment ($100) on the land the appellant made defense that the appellee had no title, etc. A trial of the question resulted in a judgment sustaining the appellee's perfect right to convey the land. That is the question brought here for review.

The evidence authorized the judgment of the chancellor. It is in evidence that said tract of land, at the time it was sold to the appellant, had been in the actual adverse possession of the old man, Jim Glass, and those claiming under him and from whom the appellant claims, for about thirty years. Indeed there is no contradiction upon that subject.

Also there is no evidence that any one, during all that time, ever claimed an adverse right to the land sold the appellant, nor is it shown that there is any one to claim such right. Also the evidence is clear to the effect that the appellant was well acquainted with the survey of land that he purchased before he accepted a bond for title and deed, and expressed himself satisfied and was put into possession of the survey that he purchased and now has that possession, and no one has proposed to interfere with that right or possession; and after about thirty years of undisturbed right and possession we think that the court did right in concluding that time had barred such right.

The judgment is affirmed.

Digitized by Google

WALKER, &C. V. YOWELL'S ADM'R, &C.

(*Filed March* 22, 1893.)

The court of the county in which the personal representative qualified has jurisdiction of an action by him and the heirs of the decedent for the sale of land and distribution among those entitled, although the land lies in another county.

Nelms & Bickers for appellants.

Phil. B. Thompson, sr., for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Chief Justice Bennett.

This action was brought by the administrator and heirs of Emily J. Yowell in the Anderson Circuit Court for a sale of a tract of land lying in Mercer county, Ky., belonging to said Emily, and for a division of the proceeds, etc.

Section 66, Civil Code, reads: "An action for the distribution of the estate of a deceased pertson, or for its partition among his heirs, or for the sale for the payment of his debts of property descended from or devised by him, must be brought in the county in which his personal representative was qualified."

The question is, does the Anderson or Mercer Circuit Court have jurisdiction to order the sale? Upon that subject it seems to us that if tbe action involves a settlement of the estate and the payment of debts or distribution, or partition among the heirs, the action in such case should be brought in the county where the deceased perso n's representative qualified, for the reason that in all such actions t he payment of debts is involved, and the administrator has the right to be heard as to them in the county in which he qualified.

The judgment sustaining the demurrer to the petition is reversed, and the case is remanded, with directions to proceed according to this opinion.

MILLER, &C. V. NELSON, &C.

(*Filed March* 28, 1893—*Not to be reported.*)

Injunction—Evidence—A two-story building was erected jointly by the trustees of a common school and by a certain church—the lower story to be used for school purposes and the upper story by the church for religious purposes In this action by the school trustees to enjoin the church from conducting religious services while the school is in session it is held that the evidence wholly fails to show any contract or agreement by the church not to assemble and use the the upper story for devotional exercise while the school is in session, and the evidence does not tend to show that the school was disturbed by such meeting of the church.

W. R. Beckhart for appellants.

Reiley & Reiley and Hill for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Bennett.

Digitized by Google

The appellants, as trustees of school district No. 15, of Campbell county, by this action sought to enjoin the appellees as trustees of the M. E. Church, South, from holding religious services in the room immediately over the schoolroom of the appellants during the time that the school was in session.

The facts are that appellants and appellees erected a two-story building jointly, the lower story to be used for school purposes and the upper story to be used as a Methodist Church. The appellants contend that it was agreed by the appellees that no religious services were to be held in said church during school hours, and as the appellees held religious services therein during the sessions of school they violated said agreement. The appellees deny that such was the agreement. A writing, purporting to be the agreement between the appellants and appellees, is on file and which is proven to be the agreement in reference to said building for school and church purposes, but said writing contains no such agreement as that contended for by the appellants.

They say the agreement was verbal, and they offer evidence that the agreement was actually made. But the appellees rebut that evidence with evidence just as positive that there was no such agreement, and as the court seems to have decided in accordance and with the latter evidence, we must let the judgment stand as to that matter. But it is contended by the appellants that as the property was owned jointly by the appellants and appellees, but to be used separately and for different purposes, neither could use his part so as to destroy the other's use of his part, or to unnecessarily discommode him in his reasonable use of it.

It is entirely useless to discuss the legal aspect of this question for the reason that the evidence does not tend to show that the appellant's school was disturbed or discommonded by the preaching in the church room above.

The judgment is affirmed.

DAVIDSON V. RITCHIE, &C.

(*Filed March* 2, 1893—*Not to be reported.*)

Action to quiet title—Evidence—In an action to quiet title by a plaintiff claiming under a patent for 1,500 acres senior in date to the 700-acre patent under which defendant, who has been in possession of a part of his survey since 1873, claiming to its exterior boundary, claims, and the plaintiff has enclosed only a small part of his survey, the burden is on the plaintiff to show that the whole or a part of the land in dispute is within his 1,500-acre patent; and since at the time of submission the evidence in the record did not show whether it was within or without such boundary, and since this could not be done definitely without an actual survey, the judgment for the plaintiff was erroneous. On a return of the case the trial court should order a survey of the land and hear such further evidence as to location as the parties may offer.

W. J. Hendrick and R. Reid Rogers for appellant.

Jno. L. Scott for appellees.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Lewis.

Digitized by Google

In 1847 a patent for 1,500 acres of land, and in 1849 two others, each for 400 acres, were issued to Esau Hammons. In 1847, though subsequent to date of the first named, a patent for 700 acres was issued to John Walker.

Appellees brought this action, claiming title through Hammons and also possession for a long time of a tract of 500 acres described in their petition, to which, they state, appellant is without right setting up claim. The relief prayed for is that the title of plaintiffs be quieted and defendant compelled to relinquish his claim to the land.

The judgment appealed from was that plaintiff, John Ritchie, is the owner of the land in controversy and for quieting his title.

The plaintiffs allege a purchase of the land in 1863 from one Combs, who executed a title bond and continuous possession and claim to the extent of the boundary from that date. Whether the deed read in evidence is sufficient to connect them by paper title with Hammons, the patentee, we need not inquire, because their possession would equally avail them if the title of the defendant, who claims under Walker, be not superior. He alleges and shows purchase in 1873 and continuous possession and claim to the extent of the Walker patent boundary; and also read in evidence deeds connecting him by paper title with the patentee. It is true counsel argues the deeds are vague and uncertain as to description of the land, but they refer to and comprehend the land owned by John Walker, and can be, therefore, easily and with reasonable certainty identified by reference to the patent.

It does not appear that plaintiffs had more than a very small part of the land inclosed. Therefore, their possession could not be regarded as extending, even constructively, beyond the boundary of the 1,500-acre patent, if the Walker patent for 700 acres intervened.

It is evident and admitted by defendant that to the extent the land in controversy is actually covered by the 1,500-acre patent he has no title. But no survey according to either patent was ordered by the court during pendency of the action; and there is not enough in the record without such survey to enable us to determine how much of the land in dispute is within that patent boundary, if there is any of it.

The judgment of the lower court was, therefore, in our opinion, premature and erroneous. For it certainly was incumbent on plaintiffs to show the essential fact the land in controversy, or at least part of it, was within the patent under which he claims, otherwise even his possessory claim would not avail against possession and claim by defendant under the Walker patent. But here again, as evidence of the impossibility of doing exact justice in this case without a survey and fixing of the two patent boundaries, counsel contends the Walker patent does not touch the land in dispute, though the defendant alleges and attempts to show it does cover a part if not all of it.

The judgment is, therefore, reversed and cause remanded for an order of survey and such further proof as either party may offer showing the boundary of the patents and location with reference thereto of the land in controversy.

RITCHIE V. C., N. O. & T. P. RY. CO.

(*Filed March* 11, 1893.—*Not to be reported.*)

Substitution of parties plaintiff after submission of case—The purchaser of a railroad, which had been in the hands of a receiver, for more than one year

Digitized by Google

after his purchase suffered a suit brought by the receiver for the benefit of the railroad to be prosecuted in the receiver's name as plaintiff. He assisted the receiver to prepare the case and to take depositions and permitted an order of submission to be entered. Nearly a year after the order of submission, and when a judgment for defendant was about to be rendered, the purchaser filed a petition to be made a party plaintiff, in which he presented new issues that would have necessitated the setting aside of the submission. *Held*—That the court properly refused to file the intervening petition or to set aside the submission, the purchaser having delayed too long before presenting his petition.

W. O. Bradley for appellant.

C. B. Simrall and J. W. Alcorn for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

H. K. Burras filed his petition in equity in the Casey Circuit Court in July, 1888, against the Cincinnati & Green River Railway Company seeking a judgment against it and asking that the road be placed in the hands of a receiver and that all the rights, franchises and interest of said road be sold to satisfy the judgment. After this the road was placed in the hands of Harper, as receiver, with directions that he should operate it, and with power given him to sue, etc.

In December, 1888, a judgment was rendered directing the road, together with all the fixtures and appurtenances thereto belonging, to be sold, the receiver to remain in possession until the purchaser gave bond, etc. The commissioner sold the road in pursuance to the judgment, and the appellant, Ritchie, purchased it for $21,000. The commissioner reported that he sold the engines and the rolling stock, engine house, depot, all the fixtures, cement, supplies, *contracts*, etc., and had turned the property over to him.

On the 13th of June, 1889, the report of sale was confirmed and the commissioner ordered to make a deed to the purchaser for the property *named* in the report. The deed was approved and admitted to record.

In the month of July of the year 1885 the Cincinnati & Green River Railway Company entered into a contract with the appellee, the C., N. O. & T. P. Ry. Co., regulating the manner of transporting freight between them, by which the former company was to have a certain per cent. of the charges for transportation on the road of the latter of the freight furnished by the Green River Railway Co. This contract was to continue during the period of seven years.

Harper, as receiver, under the order of the court, on the 13th of March, 1889, filed his petition in the Lincoln Circuit Court against the C., N. O. & T. P. Ry. Co., alleging that he was entitled to recover of the latter company the sum of $10,000, the part of the earnings that the Green River Railway Co. was entitled to under the contract; that these earnings included the freight receipts from November, 1886, down to and including January, 1889.

The C., N. O. & T. P. Ry. Co. resisted the claim and alleged that the contract was obtained by the fraudulent representations of the company and was void and without consideration. The issues were made up in October, 1889, and depositions taken, and in the month of March, 1890, the cause was submitted to the court for judgment. The case was under submission until April, 1891, when a judgment was rendered, the court finding for the defendant.

Digitized by Google

A few days before this judgment was rendered Ritchie, who had purchased the road, asked to be substituted as plaintiff in lieu of Harper, as he was the owner by purchase of the road. This was after the case had been submitted for one year, and more than one year after the appellant had become the purchaser. The filing of the petition by Ritchie to be made the plaintiff was refused, and that is the question on the present appeal. The case of Harper, receiver, v. C., N. O. & T. P. Ry. is not before us, except so much as applies to the appeal of Ritchie, which is alone considered.

The court, we think, acted properly in refusing the filing of the petition, as it set up causes of defense that would necessitate setting aside the order of submission. It is alleged that the receiver could have made a better defense to the charge of fraud made by the C., N. O. & T. P. Ry. Co., when it appears that during the litigation in October, 1889, after the appellant had purchased, he was in New York assisting the receiver to take depositions. He does not show that he produced any witnesses to the receiver or informed him of the names of those by whom any fact could be established bearing on the question of fraud, or that any effort was made by him to prepare the case that was declined by the receiver or the court, but stands by and sees the case submitted, in March, 1890, with the papers under submission until April 8, 1891, and about the time the judgment is about to be rendered makes an application presenting new issues, or such as would necessitate a reopening of the case.

The cause submitted was an action instituted at the instance or by the direction of the court. The receiver was under the court's control, and if there had been a failure to properly protect the rights of the insolvent corporation or its creditors the court would have known it from the preparation made by his receiver, and it would be trifling with the discretion of the chancellor to say that he was compelled on such statements as were made by the appellant to reopen the case.

If the intervening petition of the Alabama Great Southern Railroad seeking to recover $3,000 of the insolvent corporation is a lien on the road the purchase money in the hands of the appellant will amply protect him, for if a lien the court will apply it in that way.

We have not discussed the question as to whether the appellant was entitled to the proceeds of this contract up to the date for which the claim was asserted by the receiver. There is nothing whatever in the judgment authorizing a sale of this contract or its proceeds, and how a confirmation of the report selling that not authorized to be sold by the judgment passes the title is difficult to perceive. That question, however, will be left open, as without passing upon it there is enough in this case showing that there was no abuse of discretion by the chancellor in refusing the filing of the petition of the appellant or his amended petition.

Judgment affirmed.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY V. SCHICK.

(*Filed March* 18, 1893.)

1. *Willful neglect—Evidence*—The evidence authorized the finding of the jury that the husband of appellee was killed by the willful neglect of the appellant.

Digitized by Google

2. *The court may permit the jury to view the premises* where the accident, resulting in death, occurred, even after they have retired to consider of their verdict when they return into court and request the permission of the court to so view the premises.

3. *Crossing of street by railroad—Neglect*—The failure of the railroad to erect a gate where its road crossed a street of the city of Louisville, or to have a watchman there to warn the public of the approach of trains, was of itself negligence when it appears that, by reason of a cut and the location of fences, the view of those approaching the crossing was obstructed.

4. *The index of the record in this case* does not comply with the law concerning such records, it being found in about the middle of the record and being incomplete.

Thomas W. Bullitt and James Quarles for appellant.

O'Neal, Phelps & Pryor for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Bennett.

Wm. Schick, husband of the appellee, resided in Jefferson county a short distance from the city of Louisville. On the 29th of July, 1883, he visited Louisville in a Jersey wagon, and after finishing the business that took him to the city he started home in said wagon, taking Mrs. Becker, wife of his neighbor, and Mr. Thester, another neighbor, in the wagon to ride home with him. As they approached the place where the appellant's trains cross Eighteenth street in the city limits they received warning, by the customary signals, of the approach of a train of cars. They stopped and awaited the passage of said train, and immediately after the said train had passed Wm. Schick attempted to cross the track with the Jersey wagon and party in it; but before he could cross the track another locomotive, which was following close upon the first train and running backward at a rapid rate, struck the wagon and knocked it from thirty-five to fifty yards, killing Schick and Mrs. Becker, and injuring Thester.

The appellee, widow of Wm. Schick, brings this suit for damages, and the trial resulted in a verdict and judgment for $12,000 in her favor. The evidence before the jury authorized them to believe that said locomotive did not give any notice that it was approaching the crossing by blowing its whistle or by ringing its bell, or otherwise, until it was almost on the Jersey wagon, and it was then too late for Schick and party to escape being struck. The evidence also authorized the jury to believe that owing to some obstructions, as a cut, high fence, etc., Schick and party could not see the approach of the locomotive. It also appears that no gate or watchman was kept at the crossing.

From the facts and circumstances in evidence the jury had a right to believe that the deceased came to his death by the willful neglect of the appellant.

It appears that after the case had been given to the jury and they had gone to their room to consider their verdict they returned into the courtroom and asked permission to visit the place of the accident, in order to view the place for themselves. The request was granted, and they were conducted to the place and did take a view of it. There is no objection made to the manner in which this was done, nor is there any complaint as to the misconduct of the jury. The only objection urged here is that the court, after the jury had gone to their room to consult of their verdict, had no right to grant the request.

Digitized by Google

Section 318 of the Civil Code provides: "Whenever, in the opinion of the court, it is proper for the jury to have a view of real estate which is the subject of litigation, or the place in which any material fact occurred, it may order the jury to be conducted in a body, under charge of an officer, to the place, which shall be shown them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial." The 119th section of said Code relates to the disposition to be made of the jury after the case has been finally submitted to them. Section 321 provides: "After the jury have retired for deliberation, if there be disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of the parties, or after notice to the parties or their counsel."

Counsel contend that the two latter sections control section 318 so as to limit the right of the court to order a view not later than the conclusion of the evidence and argument; but when the jury have taken the case to their room to consider of their verdict they have no right to receive any further evidence, unless when they disagree as to some part of the evidence that has been submitted to them; then they may be conducted into court and, in the hearing of the parties or their counsel, or after an opportunity has been given them to hear, be informed by the court or by the witnesses themselves as to the point of disagreement; and, as the view of the place is evidence not introduced before the jury, they can not be allowed, after they have retired to their room to consider of their verdict, to make the view, because they would be receiving evidence not theretofore before them.

We agree with counsel that the place appearing on the view is evidence intended to explain, modify, corroborate or contradict the recollection of witnesses as to it. And we think that under section 318 the court is unlimited as to the time of allowing the view, for as that section contains no limitation as to time the court has the right to order the view at any time during the investigation of the case by the jury. (Thompson on Trials, section 908.)

We also think the other sections *supra* do not limit section 318. But if they do we think that section 321 expressly authorizes the course pursued by the court, for said section provides that if the jury disagree as to the evidence they may be taken into the courtroom and be satisfied as to it.

Now, the witnesses had testified about the place, its location and condition, which was an important fact to be ascertained in order to determine the question of negligence and its degree. The place and its condition were thus before the jury all the time in the nature of evidence upon the subject of the appellant's negligence. The jury, it seems, could not take an intelligent view of this place from the evidence of the witnesses concerning it, and disagreeing as to said evidence they asked the court to let them view the place itself as an object lesson, correcting, explaining or contradicting the verbal testimony in that regard. We think that the sections *supra* do not limit section 318; but if we are mistaken in this we think the action of the court is in harmony with section 321.

Counsel for the appellant also object to instruction number five, relating to willful negligence. That instruction is more favorable to the appellant than the law justifies. The appellant had no gate erected at said crossing nor any watchman there to warn persons that they

Digitized by Google

might be in danger of being hurt by an approaching train. The view, by reason of the cut, fences, etc., was obstructed, it seems to us; therefore, especially in view of the fact of no gate and no watchman at the crossing in a city like Louisville, and on the street described, an instruction saying that such failure was negligence would have been proper.

We see no injury to the rights of the appellant in the refusal of the court to stop counsel for the appellee in the course of the argument indulged in by him.

There is no full index to the record of this case; there is no index to the evidence, nor to the instructions, and what index there is is to be found in about the middle of the record. There is no compliance with the law in regard to indexing. The record is properly indexed and must be and is construed.

The judgment is affirmed.

COMMONWEALTH V. COV. & CIN. BRIDGE CO.

SAME V. COV. & CIN. ELEVATED RY. AND B. AND T. CO.

COV. & CIN. BRIDGE CO. V. COMMONWEALTH.

(*Filed March* 25, 1893.)

1. *Constitutional law—Contracts—Regulation of tolls*—A charter granted in 1846, authorizing the construction of a bridge between Cincinnati and Covington, which provides that the bridge company (by its officers) "shall have the right to fix the rate of toll" thereon, provided that the company shall from time to time reduce such rates so that the net profits shall not exceed 15 per cent. per annum, does not constitute or evidence a contract, whereby the State binds itself not to reduce the rate of tolls so long as the net profits do not exceed 15 per cent. The charter does not constitute any contract concerning the fixing of the rate of toll, therefore, an act of the Legislature of 1890, reducing the rate of toll below that fixed by the bridge company, does not impair the obligation of any contract. (Overruling Hamilton v. Keith, 5 Bush, 548).

The regulation of the rates of toll on a bridge used by the public is a governmental power belonging to the Legislature, which will not be considered as surrendered by the Legislature, by contract or otherwise, in the absence of a positive and clear expression of such intent by the Legislature.

2. *Same—Bridges—Interstate commerce*—Although the bridge spans the Ohio river, and is an avenue over which commerce passes between Ohio and Kentucky, the bridge company can not be considered as in itself a carrier of interstate commerce, since it merely permits others to transport articles of commerce over its bridge for a fixed rate of toll. Therefore, in the absence of any act of Congress fixing or regulating the rates of toll on such bridge, the State is authorized to regulate such rates, and an act reducing the rates of tolls is in no sense an interference with or obstruction of interstate commerce.

3. *Same—Taking of private property for public use without compensation*—An act of the Legislature for the purpose of regulating the rates of toll of a certain ferry, which reduces the rates so much that the costs of operating the ferry is more than its income, is virtually a destruction of the franchise and a taking of private property for public use without just compensation, and is unconstitutional and void.

4. *Same*—The fixing of the rates of toll for the foot and wagonways of a bridge at such a rate that the income derived from the foot and wagonways

Digitized by Google

is not sufficient to improve and keep them in repair, does not necessarily amount to a confiscation of the property, since the rates fixed for main ways of the bridge may be such as to yield a reasonable net profit from the whole structure; and in the absence of evidence showing the profit from the whole structure, the rates fixed for the foot and wagonways will not be held to be void.

Wm. Goebel, W. J. Hendrick and R. Reid Rogers for Commonwealth.

Wadsworth & Son, W. H. Jackson, O'Hara & Bryan, W. M. Ramsey and J. F. & C. H. Fisk for the Bridge Company.

Appeal from Kenton Criminal Court.

Opinion of the court by Judge Pryor.

These three cases will be considered together, as similar questions are involved on each appeal.

The bridge company, the appellant in the one case and the appellee in the other, was indicted for its refusal to comply with the provisions of an act of the Legislature, passed March 31, 1890, regulating the tolls to be charged for those passing over its bridge on foot, in vehicles or otherwise, and also for refusing to comply with the provisions of the same act that also regulated the charges on its ferry that it had purchased under legislative authority, and was operating it in transporting freight and passengers across the Ohio river between the cities of Covington and Cincinnati, etc.

The Covington & Cincinnati Elevated Railroad and Transfer and Bridge Co. was indicted for violating the same statute and in like manner.

It is contended, and was so adjudged by the court below, that the legislation of March, 1890, reducing the toll on both bridges, was in violation of section 10, article 1 of the Constitution of the United States, prohibiting the passing of laws impairing the obligation of contracts, and also of section 20 of article 3 of the Constitution of this State, containing a like provision.

In regard to the ferry it is also maintained that the reduction of tolls by the act of 1890 has so lessened its resources as to place the receipts below the expenses, and that its effect is to destroy the franchise, and is equivalent to the taking of private property for public use without compensation, or the appropriation of private property for the use of the public without due process of law.

On the 17th of February, in the year 1846, the charter of the appellee was passed, with its capital stock fixed at $300,000, and the provision in relation to the rates of toll to be charged for the transportation of freight, live stock, passengers, etc., over its bridge, between the cities of Covington and Cincinnati, is found in section 8 of the act of incorporation that reads as follows: "That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carriages or animals of every description or kind: *Provided, however*, that the said company shall lay before the Legislature of this State a correct statement of the cost of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping said bridge in repair, and of the other necessary expenses of the company; and the said president and directors shall from time to time reduce the rates of toll so that the net profits of said bridge shall not exceed 15 per cent. per annum after the proper deductions are made for repairs and

Digitized by Google

charges of other description. Toll gates shall be kept and tolls received at each end of the bridge, and the rates of toll shall be posted up in some conspicuous place where toll is demanded."

On the 5th of February, 1861, the capital stock was increased to $1,000,000, and the company also authorized to issue one-half of the amount in preferred stock, provided "*that it shall be lawful to prefer such stock to the extent of 15 per cent. per annum and no more.*"

By an act approved the 21st of January, 1865, the capital stock was increased to $1,250,000, the additional $250,000 to be held as preferred stock.

The bridge was opened for travel in the year 1867, after a struggle for near twenty years to raise money in order to secure its completion. The record shows that this bridge cost (its construction) $1,785,000, and the receipts from the bridge since its construction show a payment to the preferred stockholders on an average of 7.8 per cent. per annum, and the net earnings during that period would have paid on the original cost 4.82 per cent. per annum.

In a controversy between the nonpreferred and the preferred stockholders coming to this court by an appeal (10 Bush, 69), it was held that the action of the board in issuing preferred stock was legal, and the entire earnings have been applied after paying expenses to those who hold the preferred stock, and they are realizing a handsome dividend on the investment, and will receive as much as 6 per cent. on the reduction of the tolls as made by the act of 1890.

Such is the history of this great enterprise from the grant of its charter, in the year 1846 up to the passage of the act of 1890, by which the power to fix the tolls was taken from the grantee and assumed by the grantors, for the reason as the State maintains that no contract ever existed between the State and the bridge company by which legislative control in the regulation of tolls was surrendered.

We understand the rule to be well settled by numerous decisions of the Supreme Court that the regulation of tolls or other charges made by a corporation or an individual for the use of his or its property by the public is a governmental power, and when such a power is contracted away by the sovereign, it must be done by positive grant, or the use of such language in the charter or grant as carries with it necessarily an abandonment of legislative control.

The question, therefore, arising in this case is: Did the Legislature, by section 8 of appellee's charter, surrender its power to regulate the toll on appellee's bridge so long as the company realized not exceeding 15 per cent. on the investment.

It is true, as maintained by the State, that no repeal has been made of the right of the appellee to make 15 per cent. of annual net profit, but when the tolls are reduced at least 25 per cent. less than the rates fixed by the corporation, it must be assumed that no such income can be realized as 15 per cent. per annum, and if a contract exists it must be regarded as impaired by the legislation of 1890, as under that act the annual net profit will be greatly reduced.

The case of Hamilton v. Keith, 5 Bush, 458, comes nearer sustaining the views of counsel for the appellee and the judgment below than any case to which our attention has been called.

The charter of the Covington & Lexington R. R. Co. was amended on the 5th of February, 1854, as follows: "The rates of freight to be charged by said company shall be fixed by the directory, and may be by the ton, hundred, car or specific article, provided when the charge shall be by the ton or barrel the through rate shall not exceed three and one-half mills per mile per 100 pounds, nor one cent per mile per barrel, and other through rates in proportion."

Digitized by Google

By another amendment, of March, 1865, the company was authorized to increase their legal rates 25 per cent. on freight and passengers from Covington to Lexington, and *vice versa*.

By an act passed in the year 1869 the sixth section of the amended charter of 1854 was repealed and a tariff of way freights established, not to exceed, for fifty miles or over, 25 per cent. per mile over the rates of through freights. Hamilton tendered a lot of freight and demanded that it be carried at the rates established by the act of 1869, and the company refusing an action was instituted against the company, and this court held that the sixth section of the amended act of 1854, providing that "the company might charge such rates of freight as shall be fixed by the directors," was a contract, and for the reason that it become a part of the charter that was as inviolable as any other privilege conferred and, therefore, in violation of both the Federal and State Constitutions.

The opinion in that case was a clear misconception of the doctrine of the Dartmouth College case, and was delivered before any adjudication of the Supreme Court in regard to the governmental powers of State Legislatures, in reference to grants made private corporations, where private property was clothed with a public use, and for that use the public required to pay certain rates or charges to the corporation.

Mr. Justice Cooley, in treating of that clause of the Federal Constitution forbidding the States to pass laws impairing the obligation of contracts, says: "And it has been held without dissent that this clause does not remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important;" and in reference to charters of private corporations, he says: "Although these charters are to be regarded as contracts, and the rights assumed by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of State regulation, and that the charter implies an undertaking on the part of the State that in the same way in which their exercise is permissible at first and under the regulations then existing, and those only may the corporations continue to exercise their rights while the artificial existence continues;" and in Dartmouth College v. Woodward, 4 Wharton, 518, it is said: "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed."

It is not pretended that the charter of the appellee, the Cincinnati & Covington Bridge Co., can be repealed because there was no such power reserved in the grant, and the general law now found upon the statute book of the State, where this power is expressly reserved, was not enacted until after the grant was made, nevertheless this power to regulate tolls over public ways, and in this class of cases, being the exercise of a governmental power, as must be conceded, its exercise may be resumed at any moment unless by contract the State has surrendered it.

We have found no decision of the Supreme Court, since this question as to the right of a State to surrender these governmental powers has been mooted, where private property has been devoted to public use under legislative grants in which that court has construed the grant as containing stipulations precluding the State from exercising any control over the rates or charges the citizen is required to

Digitized by Google

pay for its use. There are many changes in the condition of the country, as well as its people, during a period of forty years.

What may have been a reasonable rate of toll or income upon such investments forty years ago would now be deemed exorbitant, and before this court should hold that the corporation had the right to a net income of 15 per cent. per annum to be paid by the public so long as the structure exists, or that this power of government had been delegated to those whose interests were adverse to the public, it should entertain no doubt of the purpose of the Legislature to surrender by the words of the grant all future legislative control over the subject-matter.

The capital stock of this corporation at the time its charter was obtained, and the right to charge these tolls given, was only $300,000, and has been increased from time to time to $1,785,000, upon which sum the right to an income of 15 per cent. per annum is claimed, although the amendments by which this increase of stock was made were enacted, as well as other amendments, since the passage of the general law reserving to the State the power to alter or repeal corporate grants.

In determining this question we feel constrained to follow the decisions of the Supreme Court, because the clause of the Federal Constitution prohibiting the States from enacting laws impairing the obligations of contracts is directly involved, and there should be no reluctance in State courts, even if different views were entertained in following the decisions of the highest judicial tribunal of the country that must ultimately determine all such questions. It is necessary, therefore, to refer to some of the leading cases in which the power of State Legislatures to regulate charges and tolls over property devoted to public use has been passed on.

In the case of Stone v. Farmers Loan & Trust Co., 116 U. S., 636, the twelfth section of the charter of the Mobile & Ohio Railroad Co. was involved. It provided "that it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of persons or property on their railroad or way hereby authorized to be constructed, erected, built or used, or any part thereof." And in Stone v. Illinois Central Railroad Company, decided at the same time, the charter provision was "that the president and directors be, and they are hereby, authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter or change at pleasure."

Chief Justice Waite, in delivering the opinions in the cases cited, after holding that such provisions in a charter did not create contracts between the corporations and the State, refers to a number of cases in support of the conclusions the court had reached, and we shall only refer to one of those cases as showing that no contract existed, when, perhaps, by implication it might be assumed that it was the purpose of the State to surrender its taxing power, except to the extent taxation had been imposed by the charter.

In the Delaware railroad tax cases, 18 Wallace, 206, where the charter of a railroad provided that "it should pay annually into the treasury of the State a tax of one-fourth per cent. on its capital of $400,000," it was held not to be a contract, as there were no words indicating that no other or further tax should be levied. Many other cases are referred to in that opinion to the same effect, and in the same case, in reviewing the cases in which it has been held that a State Legislature could not interfere with the grant, reference was made to the case of Gordon v. Appeal Tax Court, 3 Howard, 133

Digitized by Google

The statute read, "That upon any of the banks of this State complying with the conditions of this act the faith of the State is hereby pledged not to impose any future tax or bonus on said banks during the continuance of their charters under this act." In the case of the Home of the Friendless v. Barnie, 8 Wallace, 430, it was provided "that all the property of the corporation should be exempt from taxation, and that the general law reserving to the Legislature the power to amend or repeal all charters shall not apply to this corporation."

In each of those cases no doubt could well arise as to the intent of the Legislature, and, as said by the Chief Justice in the case of Stone v. The Farmers Loan & Trust Company, "the power of regulation is a power of government, and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power. The rule is elementary and the cases in which it has been considered and applied are numerous."

The case of the Georgia Banking Co. v. Smith, 128 U. S., 174, the opinion written by Mr. Justice Field, it seems to us, is conclusive of this case as to the power of the Legislature to regulate the tolls on the bridge of the appellee. In that case the Georgia Railroad Company was given "the exclusive right of transporting and conveying persons, merchandise and produce over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right: *Provided*, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles and ten cents per cubic foot on articles of measurement for every one hundred miles, and five cents per mile for every passenger," with another proviso that the company might rent or pass all or any part of the exclusive right to transport, etc., to others, etc. This privilege was given by the Georgia Legislature in the year 1835, and the company leased its rights and privileges to one William Wadley in the year 1881.

On the 14th of October, 1879, the Georgia Legislature passed an act to provide for the regulation of railroad freight and passenger tariffs in that State and to prohibit the charging of other than just and reasonable rates, and for the violation of which certain penalties were imposed by the commissioners, who were designated as the railroad commission. The Georgia Banking Company filed a bill for the purpose of enjoining the commission from prescribing rates of fare and freight over its road or its branches. It was contended by the corporation that its charter, granted in the year 1835, was a contract between it and the State, and invested it with the right to charge the rates fixed by the charter, and this right could not be impaired by any legislation. Mr. Justice Field, speaking for the court, held that so long as the property and employment was affected with a public use, so long as the use continued, the power of regulation remained with the Legislature, and that the difference of opinion entertained in reference to such questions was not as to the power of the State over the subject, but whether that power had not, by some provision of the charter or other legislation amounting to a contract, been surrendered to the company.

There was a proviso in that case as in this. An exclusive privilege was given to transport persons and merchandise, provided that the charge of transportation shall not exceed fifty cents per hundred pounds for heavy freight and five cents per mile for every passenger; and yet the court held there was no contract, saying, "It would require much clearer language than this to justify us in holding that,

Digitized by Google

notwithstanding any altered conditions of the country in the future, the Legislature had, in 1833, contracted that the company might for all time charge rates for transportation of persons and property over its line up to the limit designated."

The grant to the bridge company is, "that the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carriages or animals of every description or kind." These are the words of the grant, and similar in almost every respect to the grant in the case of Stone v. Illinois Central Railroad Company, already referred to, and held by the Supreme Court not to constitute a contract; but it is insisted that the proviso constitutes the contract, and this reads: *Provided*, That the company shall perform certain duties, namely, inform the Legislature of the amount of tolls received and the expenses of the company in keeping the structure in repair, "*and the said directors shall from time to time reduce the rates of toll so that the net profits shall not exceed* 15 *per cent. per annum after the proper reductions are made for repairs and changes.*" It is difficult to find any language in this proviso stronger than in the grant, or such as would deprive the Legislature of all power to regulate these tolls. The State does not bind itself by saying in express terms or by bare implication that no reduction of tolls shall be made to lessen this rate of interest or the net profits on the investment. There is no contract or agreement in this charter by which the State has agreed that this company shall forever impose such a burden on travel as it sees proper as will yield 15 per cent. on the investment. The proviso is only a limitation on the rights and privileges previously granted; and to say that because a limit is designated it creates a contract is not sustained by reason or authority.

It is argued that in the case of the Banking Co. v. Smith the period for which the charter was to run had expired, and the court was discussing the power of the Legislature to enact a law regulating the tolls after the expiration of the grant. Such could not have been the question involved, for if the grant had expired no doubt could arise as to the power of the Legislature over the question. It was a decision upon the one question, and that was, did the terms of the grant to the Georgia Banking Company create a contract?

It is also contended by the appellee that the classification of and rates for travel and transportation of freight over the bridge of the appellee is a legislative regulation of commerce among the States and not a charge for the use merely of the structure.

While the regulation of commerce between the States is subject to the control of Congress, for with that body the paramount authority resides, we are unable to perceive how the use of this bridge, in aid of commerce and upon which tolls are charged, is an interference with Federal power. There has been no legislation by Congress adverse to this right of the State, and the lessening of tolls, it seems to us, would aid commerce, instead of obstructing it in any way. This bridge is not a carrier of commerce, but others who transport commerce are permitted to use it as a means of facilitating trade and travel between the States, upon the payment of a reasonable toll authorized to be exacted by the State.

The bridge spans the Ohio river between the large cities of Covington and Cincinnati; it is a Kentucky corporation and no burden is imposed upon the carrier of commerce passing over it other than a reasonable charge for its use; and in the absence of any legislation by Congress fixing the tolls the power of the State to authorize, by

Digitized by Google

legislation, the company to make a reasonable charge for its use is unquestioned and fully sustained by the decisions of the Supreme Court on the subject. (Perachita Packet Co. v. Aiken, 119 U. S., 543; Packet Co. v. Keokuk, 95 U. S., 80; Mobile County v. Kimball, 102 U. S., 691.)

It, therefore, follows that the act of March, 1890, regulating these tolls is valid and should be enforced, and the case of Hamilton v. Heith, 5 Bush, 548, to the extent it conflicts with this opinion, is overruled.

As to the rates of charges fixed by the act of 1890 for transporting freight and passengers over the ferry now owned by the bridge company it appears, from the agreed facts that were read subject to exceptions for competency, that the rates are so low as not to produce an income sufficient to pay the ordinary expenses in keeping the ferry in repair, and when looking to the necessary expenses incurred for years prior to the passage of the act of 1890 it is apparent the company would necessarily expend, in complying with the provisions of that act in operating this ferry, a sum exceeding the gross income, and, if so, the act amounts to spoliation, and requires the bridge company to submit to the use of its property by the public without compensation. It is a destruction of the right to operate this ferry, and in plain violation of both the Federal and State Constitutions. Under the statute of this State ferries are established and regulated by the county courts. This ferry had been operated under the authority of the county court or by special enactment for a great many years, when, on the 23d of February, 1869, power was conferred by an act of the Legislature on the bridge company to purchase, hold and operate ferries, conditioned *that the rates of ferries shall be subject to the control of the courts* as in the case of ferries owned by individuals. The bridge company purchased the ferry under the legislation of February 23, 1869, and in 1890, by subsequent legislation, the bridge company, by reason of the reduction of tolls, is made to operate its ferry without compensation.

We can well see, conceding the power to regulate the charges on the ferry, it might become necessary to fix a reasonable toll looking to the public interest, although it might not yield a net income on the original investment; but when the law-making power undertakes to so regulate tolls as to require the operation of a franchise at less than the actual operating expenses, it is virtually a taking of private property for public use without compensation, as the agreed facts not only show that the tolls are unreasonable but destructive of the right itself, and when such facts appear the court should interfere; nor do we understand that this view is in conflict with the case of Budd v. People of New York, 146 U. S., ——; nor would the doctrine be different if the ferry was a chartered corporation, created since the act of 1856, reserving the right to amend, etc., and while under such a reservation of power the grant itself may be repealed, it can not be so amended as to leave it in force with such a reduced rate of toll that its income will not pay the expenses of operating it, and yet the corporation required to discharge the duties imposed on it by its charter.

As to the indictment against the Covington & Cincinnati Elevated Railroad Bridge and Transfer Co., it follows, from what has been adjudged in reference to the Covington & Cincinnati Bridge Co., that the provisions of its charter in regard to tolls is not a contract between it and the State, and the Legislature, therefore, had the right to regulate the tolls to be charged for the use of footways and wagonways, both being a part of the main structure; nor is the legislation in con-

Digitized by Google

flict with the commerce clause of the Federal Constitution, for the reason already given. Its charter in relation to tolls provides only "that the rate of toll shall at no time exceed the rate charged by the Covington & Cincinnati Suspension Bridge Company upon January 1, 1886."

When this grant was made there was (and is now) a statute, general in its character, applicable to all corporations, which is as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It is well settled that a company taking a franchise under such a general law agrees to abide by its provisions; in other words, it becomes a part of its charter, unless there is some provision in the grant in the nature of a contract or agreement that divests the state of its power. (Greenwood v. Union Freight Co., 105 U. S., 13; Atlantic & Gulf Railroad Co. v. Georgia, 98 U. S., 359; Cumberland & Ohio Railroad Co. v. Barren County Court, 10 Bush, 604.)

It is further argued that the reduction of tolls on the foot and wagonways over appellee's bridge amounts to a confiscation of the property, and, as in the ferry case, the tolls as reduced by the act of March, 1890, will not pay the expenses of keeping up the two ways. By the charter the appellee was required to make these ways a part of the main structure, and while the income from the foot and wagonways may not, when applied to improving them alone or keeping them in repair, be sufficient for that purpose, yet the entire structure may be yielding a handsome income. It is unlike the ferry purchased by the appellee, the Cincinnati & Covington Bridge Company, under the authority of the Legislature. The ferry is distinct from the bridge, although the bridge company owns it, while the foot and wagonways are a part of the transfer company's bridge, and the profits on the entire structure must be considered. What those profits are does not appear, and we must assume, in the absence of testimony to the contrary, that the receipts from the structure are in excess of the expenditures, and before this court can undertake to say that the appellee has been deprived of compensation for the use of its property we must be informed as to the revenue received from the entire structure, and in the absence of such a showing will not say that the Legislature, in regulating these tolls, has violated both the Federal and State Constitutions, and more particularly when it has been authoritively settled, in the case of Budd v. The People of New York, that what are and what are not reasonable charges, etc., is a legislative and not a judicial question.

The judgments below against the State and in favor of each bridge company are reversed and remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

On the appeal of the Cincinnati & Covington Bridge Co. v. Commonwealth, known as the ferry case, the judgment is reversed, with directions to dismiss the indictment.

Digitized by Google

CITY OF NEWPORT, &C. V. NEWPORT LIGHT CO.

(*Filed March* 4, 1893—*Not to be reported.*)

1. *Construction of contract between city and gas company*—The contract made in 1880 between the city of Newport and the Newport Light Company, whereby the gas company was given the exclusive privilege of furnishing gas to the city until 1904, relates to the lighting of the public places of the city by gas only, and does not preclude the city from contracting with other companies to furnish electric lights to the city, nor authorize the city to demand of the gas company any light other than gas.

A former judgment of the chancellor enjoining the city, at a time it was contracting for gas from another company, from entering into a contract with any company other than appellee for the lighting of the city, etc., *with gas or otherwise* during the continuance of the contract of 1880 was not intended to give the appellee the exclusive right to furnish all manner of lights to the city; it related to gas alone, and the city is not guilty of a violation of the injunction by subsequently contracting with another company for electric lights.

C. J. Helm, Hallam & Myers, Jno. P. Newman and T. P. Carrothers for appellants.

Nelson & Desha and John G. Carlisle for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

In the year 1885 a contract was entered into between the city of Newport and the Deuber Light Company by which the latter was to furnish gas for lighting the city, etc., for a fixed period. The city, in the month of June of the year 1880 had made a contract with the Newport Light Company to furnish the same light to the city; and at the time of the execution of the contract between the city and the Deuber Light Company the Newport Light Company was in the actual performance of its contract. The latter obtained an injunction preventing the Deuber Light Company and the city from disturbing the exercise of its franchise under the contract of June, 1880, and the chancellor below rendered a judgment, the substance of which was: Enjoining the city from making a contract with any person for lighting the streets, alleys, public buildings, etc., of the city with gas *or otherwise during the continuance of the contract with the Newport Light Company.*

The contract with the Newport Light Company continues until the year 1904. The case was brought to this court and the judgment affirmed. (84 Ky., 166.)

In July, 1891, the city of Newport entered into a contract with a company called the Suburban Electric Company by which that company undertook to furnish electric lights for the streets, etc., of the city, and the Newport Light Company conceiving that the judgment of the chancellor in the equity action against the city and affirmed by this court was being disregarded obtained a rule against the mayor, the councilmen and others to show cause why they should not be punished for contempt for violating or refusing to obey the mandate of the chancellor. The motion on the rule was tried in the Louisville Law and Equity Court and the parties adjudged to be in contempt and ordered to jail on their refusal to annul the contract between the city and the electric light company; and the question, therefore, arises, can the city make any contract for

Digitized by Google

lighting its streets and public places with electricity as long as the contract for furnishing it with gas remains in force. It was held in the case brought to this court that the chancellor had the right to protect the Newport Light Company in the exercise of its franchise, and, having expended large sums of money, with its pipes and posts laid down and erected, the city was properly enjoined from permitting the Dueber Light Company and the city from executing a like contract—that a contract with a corporation when the right to contract existed was as inviolable as a contract made with natural persons.

We think the case presented now is different in many aspects from the original case between the Dueber Light Company and the city on the one side and Newport Light Company on the other.

By an act appproved April 17, 1890, the board of councilmen was authorized to contract for lighting the city of Newport and its inhabitants in any mode now known or which may hereafter be discovered, etc.; and while no legislative enactment can authorize the violation of a contract, nor does this enactment propose to do so, as it provides that existing contracts shall not be interfered with; still the growth of the city and its increase of population since the contract of June, 1880, demands that its people and the public places shall have the benefit of the improvements made in lighting large cities; and under such a state of facts the chancellor would hesitate in inflicting the punishment for contempt, or even in granting an injunction, where the circumstances connected with the subject matter of the contract has been changed, and the city, by reason of its rapid growth and the necessities of the public, requires that the more recent improvements in lighting the public places should be adopted for the comfort and welfare of its people, otherwise the city would be compelled to use gas and no other light until the appellee's contract expires, which is in the year 1904.

The city, under the contract with the Newport Light Company, could not compel that company to furnish any other light than gas; and this court, in construing that contract in the case of the City of Newport v. The Newport Light Company, 89 Ky., —, held that the Newport Light Company could not enter on the streets of Newport and subject them to a new use so as to furnish electric lights without the consent of the city, indicating clearly that as to improved lights the city had to be consulted before the Newport Light Company could use the streets for the purpose of furnishing it; and, therefore, the chancellor will not say that because of the original contract made in June, 1880, the city is to be deprived of electric lights, unless the appellee sees proper to furnish them. Did that contract by its terms give to the Newport Light Company the unlimited power over its streets for the purpose of lighting them for the period of twenty-five years from June, 1880? We think not. The original action in this court, under which the injunction was made perpetual, was in reference to the supply of gas alone and only considered in that light, and the word *otherwise* used in the restraining order by the judgment below can not be construed as giving to the Newport Light Company the absolute right to furnish gas and any other light during the existence of the contract. The contract may authorize the company to furnish gas or any other light as good; still it may decline to furnish other lights or the city to receive them, as it is apparent the contract had reference to gas only, and could have been considered in no other way by either the court below or this court. The contention was as to which of the two companies should furnish gas, the Dueber Light Company or

Digitized by Google

the appellee; and upon that issue the opinion of this court was rendered as found reported in 84 Ky., 166. Now a court of equity is asked to adjudge that no other light shall be used than gas, or, if so, that the Newport Light Company shall furnish it.

The chancellor in restraining the city from making a contract with the Dueber Light Company went as far in protecting the rights of the appellee as was justified by the facts, but to go further and adjudge that no other company shall furnish light of a different character, when, in the judgment of the council, the public interests requires it, would be to give the exclusive privilege to the appellee to furnish all lights necessary for the twenty-five years. The company has its legal remedy, and must resort to that remedy if it has sustained damages by reason of the refusal by the city to have its streets and public places lighted by gas. It is a right for the violation of which there is a remedy, but not to be enforced by the chancellor to the detriment of the public interests.

We are not to be understood as holding that the appellee can not retain its pipes in the streets with a view of furnishing gas to the inhabitants, but what we do hold is that a court of equity will not interfere to prevent the city from lighting the streets and public places with electric lights; and, therefore, the rule against the appellants should be discharged.

There is a litigation pending in the court below by which the appellee is insisting that the city consented, under the terms of the original contract, that the appellee might place electric lights on the streets, etc. This opinion is not to affect the pending litigation, as the questions involved in that case are not before us.

Reversed and remanded with directions to discharge the rule.

MARTIN V. RICHARDSON.

(*Filed March* 18, 1893.)

1. *Appeals—In the absence of the evidence* from the record only the sufficiency of the pleadings to support the verdict can be considered, and in support of the verdict every presumption must be indulged that the pleadings will authorize.

2. *Contract concerning lotteries—Pleadings*—Plaintiff averred that he bought a certain lottery ticket from the defendant, who, after the day of the "drawing," fraudulently secured possession of the ticket, which had drawn a prize, and collected the money thereon. In this action to recover of defendant the amount so collected, *Held*—That plaintiff's cause of action does not rest on a contract of purchase of a lottery ticket, but upon an obligation implied by law to refund money obtained by falsehood and fraud. The demurrer to the petition was properly overruled.

3. *Same*—On an appeal by the defendant from a judgment for the amount of money so obtained by him in which he filed a record containing no part of the evidence, it will be presumed in support of the verdict that the evidence showed that plaintiff purchased the ticket of the defendant in a State where such purchase was permitted by law and that the lottery company was authorized by law to carry on its business.

4. *Same*—Defendant can not plead by way of defense that the purchase of the lottery ticket by plaintiff was unlawful, because the value of the ticket at the time defendant fraudulently obtained it was already fixed and did not depend upon any lot or chance, the drawing already having taken place, and plaintiff's cause of action grows out of an obligation of the defendant implied by law to refund money so obtained by fraud.

Digitized by Google

Adair & Morton for appellant.

Edward W. Hines, Wm. Lindsay and Allen & Hughes for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Hazelrigg.

Richardson, the appelle, was the owner and holder, by purchase from Martin, the appellant, of four tickets in the Little Louisiana Lottery concern; among them was ticket No. 93,262. The drawing was fixed for January 14, 1890, and on the 15th or 16th of that month Martin informed Richardson that it had been postponed. He then induced him to surrender his four tickets and accept one in the Big Louisiana Lottery, saying that he had let him have these four tickets by mistake; that they belonged to another person, who was demanding them.

As a matter of fact the drawing had not been postponed, and the ticket, numbered as above stated, had drawn a prize of $3,750. These facts were known to the appellant and not to the appellee.

Thereafter the appellant presented the ticket to the lottery concern and received the prize.

Refusing to account to the appellee for it he was sued, and in the lower court, after the verdict of a jury, judgment for the sum of $3,750 was rendered against him and from which he appeals.

He does not bring up the evidence, and hence the only question is as to the sufficiency of the pleadings to support the verdict and judgment.

The action was simply one for money had and received. The defendant collected that which belonged to the plaintiff, and the law implied a contract to pay it over to him.

The contract which the law raised between them was not founded on the purchase or sale of a lottery ticket, but on the obligation to refund the money which had been procured and received by falsehood and fraud. It is true the plaintiff alleges that he bought the ticket from the defendant, and that it was one in the Little Louisiana Lottery; but he does not state where he bought it, and there is nothing in the petition to show that the lottery was unauthorized by law to transact such business. Hence the demurrer was properly overruled.

The answer denied that the plaintiff had ever owned or held the ticket numbered 93,262, or that the defendant ever delivered said ticket to the plaintiff, or that such ticket was obtained by defendant from the plaintiff in any way, or that he made the representations complained of.

Then follows a statement in the answer of how the plaintiff and defendant had exchanged a dollar ticket in the Big Louisiana Lottery for four twenty-five-cent tickets in the Little Louisiana Lottery, and he disclaims any knowledge at the time of the tickets having drawn prizes.

He avers that the Little Louisiana Lottery is located and operated in California, and is not licensed or authorized by the laws of California or other State to carry on that business, nor is either of said concerns authorized or licensed to carry on such business, or sell or dispose of tickets or prizes by any law or statute of this State; that both plaintiff and defendant resided in this State at the time of the purchase by the plaintiff of the tickets and at the time of their procurement and exchange *as aforesaid*, and all *said* acts and transactions were had and done in Union county, Ky.

Digitized by Google

It will be observed that it is nowhere alleged that plaintiff bought ticket No. 93,262 in Kentucky, or that he exchanged that particular ticket with the defendant in Kentucky.

The transactions set up by the defendant in his answer, as having occurred in Union county, Ky., necessarily excluded those with reference to this particular ticket, because the defendant expressly and unreservedly denied that plaintiff ever held this ticket or that he ever obtained it from him in any way.

Moreover, the plaintiff by reply denied that the Little Louisiana Lottery was not licensed or authorized by law to carry on such business, and, therefore, as every presumption must be indulged in necessary to support the judgment, we must assume, in the absence of anything to the contrary, that this purchase or exchange of ticket No. 93,262 occurred in some place where it was legal and lawful to purchase it or exchange it, and that the Little Louisiana Lottery was an institution legally licensed to carry on its business.

If the evidence were before us a different state of case might be shown, but the verdict was for the plaintiff, and presumably sustained by the proof, and moreover, as announced in all such cases, every presumption is in favor of the legality of the transaction. (Bibb, &c., v. Miller, &c., 11 Bush, 306.)

Here, then, we have a case where a party holds a ticket, the value of which does not depend on any chance, or its payment on the voluntary action of the company, and the legal obtention, title and ownership of which is not called in question or tainted with any sort of illegality. It is fraudulently obtained from the possession of its rightful owner, and we can see no reason why recovery may not be had.

Such, indeed, would seem to be the case if the purchase or exchange were shown to have occurred in Kentucky.

This is not an action on a contract of sale or purchase of a lottery ticket.

The transaction out of which the suit springs, and which forms its sole basis, is subsequent to any alleged illegal act, and wholly disconnected with it.

In Armstrong v. Toler, 11 Wheat, 258, Chief Justice Marshall approved the opinion of the lower court, which was to the effect "that a new contract founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful;" and Toler was allowed to recover of Armstrong money which he had paid for Armstrong on account of goods known by both parties to have been imported contrary to law.

In Catts v. Phalen, &c., 2 Howard, 376, Catts was employed to draw out the tickets. He had a confederate to buy a certain ticket, and before inserting his hand in the lottery wheel he concealed in the cuff of his coat certain false and fraudulent tickets which he managed to slip between his fingers, and then, drawing out his hand, produced the false ticket. When sued for the money received on the tickets so purchased, he relied on the admitted illegality of the lottery drawing. The Supreme Court said: "Phalen & Morris had in their possession $12,500, either in their own right or as trustees for others interested in the lottery; no matter which, the legal right to the sum was in them; the defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery or perjury, and the only question before us is whether he can retain it by any principle or rule of law."

"To state," says the court, "is to decide such a case."

Digitized by Google

"The principle of illegal contracts is" (Story on Conflict of Laws, sections 248, 249) "after the illegal act is done, if the new contract is wholly unconnected with the illegal act and is founded on a new consideration, and is not a part of the original scheme, although it may be known to the party with whom the contract is made, it will make no difference that such new and independent contracts are made with the person who is the contractor or conductor of the original illegal act, if it is wholly disconnected therefrom."

So in Story on Contracts, section 760, it is said: "If an act in violation of either statute or common law be already committed, and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such an agreement is valid."

Instead of an "agreement" between the parties founded upon alleged illegal acts, we have in this case an implied obligation raised by law to refund means fraudulently received and withheld. For other authorities to the same effect see Tanner v. Russell, 1 B. & P., 295; Willson v. Owens, 30 Mich., 474; Rothrock v. Perkinson, 61 Md., 39.

The Little Louisiana Lottery concern was, under the pleading in this case, an institution operated under lawful authority, and the defendant, in presenting the ticket in question and collecting plaintiff's money, may be regarded as acting as his agent and as collecting for his use. The law implies an obligation to refund the money, which is subsequent to and disconnected with the alleged illegal acts of buying, selling or exchanging the tickets.

Judgment affirmed.

L. & N. R. R. Co. v. Law.

(*Filed March* 7, 1893—*Not to be reported.*)

1. *Excessive verdict*—A verdict assessing $2,000 damages for an injury to the end of appellee's thumb, which rendered the amputation of the thumb at the first joint necessary, is so excessive as to evidence passion or prejudice on the part of the jury, and must on that account be set aside.

2. *Railroads—Punitive damages—Instructions*—Where the evidence does not tend to show that the railroad company was guilty of any willful neglect, it is erroneous to instruct the jury that they may give punitive damages if they believe a case of gross neglect had been made out.

3. *Same—Neglect*—Where all the appliances of a car were in good condition when it was started on the journey, and it was discovered that a drawhead of the car was injured when within ten miles of its destination, it was not negligence in any degree to carry the car on to its destination without uncoupling it from the train, it appearing that there was no car shop at which it could have been repaired before the destination was reached.

When the conductor knew of the defective condition of the drawhead it was his duty to inform the brakeman of it before ordering him to uncouple the car from the train; but if the brakeman was so informed, or if he knew, or, by the use of ordinary caution and diligence, could have known of the defect and have avoided the injury suffered, then the railroad is not liable to him in damages.

Dulayney & Mitchell for appellant.

Edward W. Hines, Thomas H. Hines and B. F. Proctor for appellee.

Digitized by Google

Appeal from Warren Circuit Court.

Opinion of the court by Judge Lewis.

Appellee brought this action to recover damages for an injury to his left thumb, which was caught between the head of a coupling pin and end of a car while he was, as brakeman, in employ of appellant, under orders of the conductor of a train, uncoupling cars.

It appears that on the day appellee was hurt an accommodation freight train left Bowling Green for Louisville, appellee being the middle brakeman. Forming parts of the train were three flat cars loaded with ties and to be left at Upton Station, the front one being attached to the engine. But upon arrival at Bonnieville, a station about ten miles from Upton, a box car destined for Louisville was put next to the engine, thereby requiring the flat car uncoupled, which was done by the front brakeman, who then discovered the drawhead of that flat car was defective, and notified the conductor of the fact.

Upon arrival of the train at Upton it became necessary to throw open the switch track in order to put the flat cars thereon, which the front brakeman did, while appellee was directed to do the necessary uncoupling, and while so engaged his thumb was so injured as necessitated amputation at the first joint from the end. And for that injury the jury returned a vervict of $2,000 in damages. One of the grounds prescribed by section 340, Civil Code, for vacating the verdict of a jury and granting a new trial is excessive damages appearing to have been given under the influence of passion or prejudice.

It being province of the jury to assess damages as well as try the facts, this court is not authorized nor even inclined to disturb a verdict merely because damages may be so assessed for a greater amount than we think is entirely reasonable and just; but as the statute has made it the duty of the court to do so, whenever the condition provided for in section 340 exists, we have no right to hesitate. In this case the amount of damages assessed is so utterly unreasonable and unjust, being at least four times more than it ought to have been, that the verdict clearly appears to us to have been given under the influence of passion or prejudice, and, therefore, can not stand.

The instructions given in this case are nineteen in number, seven for plaintiff, twelve for defendant, and some of them so long and complicated as to confuse an ordinary jury.

Amongst others was one informing the jury they might give punitive damages if they believed a case of gross negligence was made out. Though the question of gross negligence should be submitted to the jury, when there is evidence tending to show the defendant was guilty of it, and as a consequence to allow the jury, in their discretion, to find punitive damages, yet an instruction upon that hypothesis should never be given, where, as in this case, there is no evidence whatever to justify the inquiry or to support such finding.

It appears from uncontradicted testimony of servants of the defendant and specialists employed for that purpose that before the train left Bowling Green it was inspected and all the machinery found to be in proper condition; so that the drawhead attached to the particular flat car appellee uncoupled at Upton Station must have been injured in some way after the train was under way. And as there was no work shop between Bowling Green and Louisville there was no reason or necessity for detaching that car before it reached Upton

Digitized by Google

Station, its destination. And, therefore, not only was it improper for the court to instruct the jury upon the assumption of gross negligence, but it was error to hypothecate negligence of any degree at all upon the fact of the drawhead being defective. But it is argued that the defendant is chargeable with negligence by reason of failure of the conductor, who was told at Bonnieville by the front brakeman of the defective condition of the drawhead, to inform appellee of the fact before ordering him to uncouple the car at Upton. The defect consisted in loss of some of the bolts attached to the drawhead, whereby the car would, when jamed or pushed, strike against the opposite car. But the front brakeman uncoupled that same car at Bonnieville without injury to himself, and, moreover, he and the testimony shows that after discovering the defect he informed the conductor of the fact in hearing of appellee, though the latter states he was ignorant on the subject when attempting to uncouple the car at Upton, and the jury seems to have believed him.

As it was not the result of any appreciable negligence on part of appellant or its servants that the drawhead was defective in the particular mentioned, the case is narrowed down to the simple inquiry whether appellee was informed by the conductor or his fellow brakeman at Bonnieville, or at any time before he was hurt, of the condition of the drawhead; for, as danger of uncoupling the car was increased by that defect, it was the duty of the conductor, if he had discovered or known it, to imform appellee of the fact, and his failure to do so was negligence. Nevertheless appellee was not entitled to recover if he knew, or by exercise of ordinary diligence might have found out, as did the front brakeman at Bonnieville, the defect and avoided the injury, for it was his peculiar business and not the special duty of the conductor tolook to the condition of the coupling apparatus while the train was in motion.

Appellee, in undertaking his dangerous business, assumed all ordinary risks incident thereto, and if his injury resulted from his failure to use ordinary caution and diligence in uncoupling the car, and but for such want of caution and diligence on his part the injury would not have occurred, he was, in law, guilty of such contributory negligence as deprives him of the right to recover in this action.

The instructions, so far as they conflict with these views, are erroneous and must have prejudiced the rights of appellant.

The judgment is reversed and cause remanded for a new trial consistent with this opinion.

WARE, &C. V. BRYANT, SR.'S, ADM'R, &C.

(*Filed March* 28, 1893—*Not to be reported.*)

1. *Adverse possession—Evidence*—The evidence conduced to show that the defendants and their ancestor had been in the actual adverse possession of the land in controversy for more than fifteen years before the institution of this action to recover it, and hence the judgment for them was proper.

2. *Interference between patentees—Constructive possession*—When a junior patentee enters upon and takes actual possession of a part of an interference between his and a senior patent claiming to a well-defined boundary, and so holds and claims for fifteen years, and the senior patentee subsequently enters upon a part of his patent outside of the interference, the junior patentee's possession must be regarded constructively as embracing the entire interference and the senior patentee acquires no right thereto by his entry.

Digitized by Google

W. O. Bradley, J. T. May and W. A. Morrow for appellants.

O. H. Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Bennett.

Wm. Bryant is dead, and this action is against his heirs and administrator to recover about thirteen acres of land. It seems that in 1865 the chancery court sold the land of Edward Land and Wm. Bryant purchased it. The sale was confirmed and a deed was made to him. This deed, by inserting one call which it seems had theretofore been left out of the conveyances, made twelve or thirteen acres more land than there would be with the call left out. The appellants' ancestor, conceiving the idea that this strip of land was vacant land, obtained a patent for it, but it does not appear that the appellants or those under whom they claim, ever held the actual possession of it.

From the evidence the court was authorized to believe that Wm. Bryant, in 1867, took the actual adverse possession of this land, so held it as a part of his home place until his death, and then his heirs continued to hold it in the same way, making nearly thirty years in all.

It also appears that a part of said land was, in 1870 or 1871, cleared by Wm. Bryant and has been cultivated by him and those claiming under him ever since. We think that the court, according to the evidence, was authorized to believe that Bryant and those claiming under him, were in such actual adverse possession of the land for more than fifteen years as would take the appellants' right to it, if any they had. If we treat the appellees as holding said land by a former right, the statute will, nevertheless, run in their favor, because it is well settled in this State that if there is an interference between a junior and senior patentee, and the junior patentee gets the actual possession of a part of the interference and claims the whole by lines, etc., for as many as fifteen years, the senior patentee not being in the possession of any part of the older survey but thereafter enters upon said survey but not upon any part of the interference, the junior patentee's adverse possession will extend to the whole interference.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

N. N. & M. V. Co. v. Holmes & Co.

(*Filed April* 12, 1893.)

1. *Common carriers—Special contract—Burden of proof*—Where a contract by a common carrier for the shipment of goods stipulates that the carrier shall not be liable for the loss of the goods from certain designated causes, in an action against the carrier to recover for the loss of the goods the burden is upon him to show not only that the loss arose from a cause excepted in the contract, but also that his negligence did not contribute to the loss.

Digitized by Google

In this action against a railroad company to recover the value of lumber destroyed by fire while in transit over defendant's road, under a contract by which defendant stipulated that it should not be liable for loss or damage by fire, the burden was on defendant to show that the fire was not caused by its negligence.

2. *Burden of proof—Concluding argument to jury*—As defendant controverted the allegations of the petition as to the value of the lumber, this placed the burden in the case on the plaintiffs, and the court did not err in giving them the concluding argument to the jury.

3. *As the plaintiffs assumed the burden of proof*, and did not introduce a scintilla of evidence even tending to show that the fire was caused by the negligence of defendant, the judgment for plaintiff must be reversed.

Bullitt & Shield and P. H. Darby for appellant.

Jas. E. Gaither for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Presiding Judge Yost.

Holmes & Co. delivered to the appellant two car loads of lumber at Obion, Tenn., for carriage over its road to Louisville, Ky. In the contract of shipment the carrier's common law liability as insurer was limited and restricted in this, that it was therein stipulated that the company should not be responsible for loss or damage by fire to the freight while in transit. While the cars in which the lumber was stored were passing over the trestle at Garrison creek they caught fire and with their contents were consumed. Holmes & Co. then brought this suit to recover the value of the property so lost. In its answer the company, after describing the manner of the loss of the freight and its consequent inability to deliver it, pleaded the restrictive clause in the contract in bar of the recovery sought.

Replying, the plaintiffs alleged that the fire was caused by the company's negligence, and this was put in issue by the rejoinder filed.

The case went to trial, and the court held, the defendant objecting and excepting, that the burden of proof was on the plaintiffs, required them to introduce their testimony first and gave to their attorney the conclusion of the argument to the jury. A verdict for the amount sued for was returned, and this appeal is prosecuted by the defendant from the judgment rendered thereon.

Upon whom was the burden of proof? The rule in Kentucky is that carriers may limit their common law liability by a special contract made without duress or fraud, but they can not restrict it so as to excuse themselves from loss or damage resulting from the negligence of their servants or agents. The burden is, of course, upon the carrier, not only to show that a limited contract has been made, but further, that the loss arose from a cause excepted therein. The question then comes, after the carrier has brought the case within the exception and proved that it proceeded from the cause mentioned, shall he then be called on to show that he was guilty of no negligence contributing to the loss? Upon this question the decisions of the courts are in conflict, some holding that the burden is upon the carrier, not only to show that the goods perished or were damaged by the cause excepted, but that he was free from any negligence contributing to it; others that when he has shown that the loss was occasioned by a cause against liability for the consequence of which he was protected by his contract, the presumption is that he has done his duty and the burden of proving negligence devolves

Digitized by Google

upon the shipper. A careful review of many of these reported decisions exhibits a great degree of confusion of thougnt in the adjudication of this class of cases, and while we are free to confess that the latter view is supported by a decided preponderance of authority, we are constrained to hold that the carrier must show that he exercised ordinary skill to avoid the casualty, and could not by the use of care and diligence have prevented it; in other words, that the burden throughout is upon the carrier.

This doctrine, held by some of the elementary writers and announced by the courts of many of the States, is, in our opinion, upheld by far the better reason.

There is no sounder rule than that which devolves the burden on him who best knows what the facts are. Our statute, that the killing or damaging of stock by the cars of a railroad company shall be *prima facie* evidence of carelessness and negligence on the part of the company, is based upon this principle, and it seems to us that the only safe and just rule in cases like this is that the carrier should be required, when in its power, to introduce as witnesses those employes who would know whether there had been any negligence on the part of the company.

Greenleaf on Evidence, volume 2, section 219, says that if the acceptance of the goods was special the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care.

The reason for all this is that when goods are delivered to a carrier they are usually no longer under the eye of the owner, who, unless he goes or sends some one to protect his interests, is compelled to rely solely upon the carrier. If his property be lost or injured by the negligence, no matter how gross, of the carrier's servants or agents, the owner would be unable to prove his cause of loss by any one except these same servants or agents who, knowing that they could not be contradicted, must, by the very nature of the case, feel inclined, if not impelled, to excuse their masters and themselves. It will be readily seen that in this case his ability to sustain his action would be necessarily at all times uncertain and often impossible.

It follows from this view of the law that the court erred in placing the burden as to the company's negligence on the plaintiffs, and must necessarily result in a reversal of the judgment, except for the fact that the defendant in its answer controverted the allegations of the petition as to the value of the lumber, and this placed the burden in the case on the plaintiffs.

The judgment must still be reversed, however, as the plaintiffs, assuming as they did the burden, did not introduce a scintilla of evidence even tending to show that the fire was caused by the negligence of the company.

The judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

L. & N. R. R. Co. v. Schweitzer's adm'r.

(*Filed April* 19, 1893.)

Failure to reply to plea of contributory negligence—Judgment notwithstanding verdict—In this action to recover damages for personal injuries alleged to have been caused by defendant's negligence, in which there was a verdict

Digitized by Google

for plaintiff, the plaintiff having failed to reply to a plea of contributory negligence by defendant, the court should have sustained a motion by defendant for judgment, notwithstanding the verdict. As the defendant introduced no testimony and offered no instructions, it can not be claimed that it waived its right to judgment on the pleading.

James C. Wright, Wm. Lindsay and Ed. W. Hines for appellant.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Brent.

This suit was brought to recover damages for a wagon and team belonging to Adam Schweitzer. Adam died pending the action and it proceeds in the name of his administrator. It has been tried twice. The first time there was a verdict in plaintiff's favor, which, on appeal to this court, was reversed for errors in nowise affecting any of the questions now presented. The pleadings have all the time remained as they were made up for the first trial. The action was based on the alleged carelessness of the defendant, the L. & N. R. R. Co.

The injury occurred on Saratoga street, in Newport. The allegations as to defendant's negligence are: That "while plaintiff was in the lawful use of said street and engaged in moving furniture with his horses and wagon, as hereinafter described, the defendant, the L. & N. R. R. Co., by its agents, servants and employes, carelessly, negligently and wrongfully, with its locomotives, engine and cars being at said time operated by it on said Saratoga street, ran against plaintiff's said wagon and upon, against and over his said horses, by reason whereof" they were damaged, as particularly set out. The defendant answered, specifically denying the negligence charged, and affirming "that plaintiff, by his own carelessness, contributed to and caused said accident and injury to his said wagon and horses." To his answer there was no reply, and with the pleadings in this condition the parties went to trial the second time. The verdict was again for the plaintiff, and from the judgment on that verdict the railroad company appeals the second time. On this second trial, after the plaintiff closed his testimony, the defendant moved for a peremptory instruction, which motion being overruled, it declined to introduce any testimony whatever, neither did it ask for any instructions, and the case was submitted upon the pleadings, the evidence introduced by the plaintiff and the instructions given at his instance.

The jury found for plaintiff, and defendant at once moved for a judgment, notwithstanding the verdict. This motion was overruled and a judgment entered. Upon this appeal from that judgment the refusal of the court to enter a judgment for defendant on the pleadings, notwithstanding the verdict, is the first ground relied on for reversal. In the beginning of this opinion we set out the essential parts of the petition and answer relating to the plaintiff's cause of action. It appears that the defendant not only denied the charge of negligence, but also alleged that the plaintiff was guilty of contributory negligence. Here was set out in affirmative allegations a complete defense. No reply was filed at any time in the case. There can be no question but that when the parties went to trial, and even after the verdict had been rendered (see Civil Code section 386), the defendant was entitled to judgment upon the face of the pleadings. Has it in any way waived or lost that right? In the case of the L. &

Digitized by Google

N. R. R. Co. v. Copas, February, 1893, in which, as here, there was a failure to reply to a plea of contributory negligence, this court held that no judgment in plaintiff's favor could stand unless the defendant had in some way waived his right to insist upon a judgment for the party whom the pleadings entitled thereto. In that case it appeared that the defendant entirely failed to move for a judgment on the pleadings, either before or after the verdict; that it cross-examined the witnesses for plaintiff for the purpose of showing contributory negligence, and for the same purpose introduced the rules of the company; that after its motion for a peremptory instruction had been overruled it introduced its own evidence, and, upon a submission of the case to the jury, had the court instruct it as to the law of contributory negligence when the verdict was rendered instead of moving for a judgment notwithstanding, it moved for a new trial on the ground that the court had erred in overruling its motion for a peremptory instruction and in giving and refusing instructions. The defendant having thus conducted his case just as he would have done had there been a traversing reply, we held he had waived his right to require one, and could not complain that it was not filed. Moreover, as the verdict is the foundation of a judgment in such actions, the defendant had no right to complain to us of a judgment entered in accordance, unless he had moved the court below to enter one conformed to the pleadings. For those reasons we dicided in that case the defendant could not here insist upon his right to a judgment upon the face of the pleadings. The differences between that case and this are palpable. Here the defendant in no way relied on evidence to establish its defense, introduced none to sustain it, asked no instructions based upon it, but, guiding itself in the conduct of the case by its evident right, did nothing inconsistent with its claim to rely upon the plaintiff's conclusively-admitted contributory negligence as its sole and sufficient defense. It asserts this not only by refusing to take any steps inconsistent with it but by promptly moving the court below for the order to which it was entitled immediately upon the rendition of the verdict. This motion should have been sustained.

Judgment reversed and case remanded, with directions to set aside the judgment for plaintiff and enter a judgment for defendant.

SUPERIOR COURT ABSTRACTS.

Bain v. Sawyers.

Filed March 8, 1893. Appeal from Knox Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Limitation—New promise*—An acknowledgment of a debt to take it out of the statute of limitations must be made not to a mere stranger, but to the creditor or some one acting for him, and upon which the creditor is to act and confide.

2. *Same*—While a promise to pay a debt before it is barred does not absorb the subsisting cause of action, but merely prolongs the statutory lim-

Digitized by Google

itation by cutting off the antecedent time, such a promise made after that time constitutes a new cause of action, and suit must be brought upon the promise and not the original debt.

A. K. Cook and W. H. Holt for appellant; J. B. Black and H. C. Faulkner for appellee.

Dehoney v. Kimball.

Filed March 8, 1893. Appeal from Washington Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Bailees of live stock—Negligence—Bailees of live stock for hire are not insurers of the safety of the stock, but they are liable if they fail to use such care as men of ordinary prudence use in the performance of the same duty toward their own property.

Defendant being in possession of a young stallion belonging to plaintiff under a contract to board and train him at a certain price per month, their servant in entering the stall of the stallion to cleanse it left open the lower door of the stall, which was five feet high, and the stallion, being unhaltered, escaped from the stall, and while pursued by the hostler jumped upon a picket fence and received injuries resulting in his death. In this action to recover damages for the loss the testimony for plaintiff showed these facts, and witnesses experienced in handling stallions testified that no man of ordinary prudence would attempt to clean and bed the stall of a young stallion with a door five feet high open behind him unless the horse was haltered or in some way securely confined. *Held*—That there was sufficient evidence of defendant's negligence to require the submission of the case to the jury.

J. W. S. Clements for appellant; John W. Lewis for appellee.

Crozier's ass'ee v. Cromie.

Filed March 8, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *If a vendee obtains property from the vendor by means of fraudulent misrepresentations* the vendor may, when he discovers the fraud, elect to rescind the sale, and, following the property, recover it from the possession of the vendee.

The purchaser of a lot of mules obtained possession of the mules by delivering to the vendor his note for the agreed price, to which a name signed as surety was forged by him. *Held*—That the vendor, upon discovery of the fraud, had the right to treat the sale as a nullity and sue to recover the specific property.

2. *An assignee for the benefit of creditors generally is not a purchaser for value*—He stands in the position of his assignor, and can assert no equity that could not have been asserted by the assignor if no assignment had been made.

3. *Verification of pleading*—As this is an action by the vendor against the vendee to recover possession of the property sold, upon the ground of the vendee's fraud in giving a forged note for the purchase price, it is not an action in contract, but an action in tort, and the provision of the statute that the execution of a writing on which a suit or defense is founded shall only be denied by answer or other pleading verified by oath has no application, and, therefore, does not require that the petition should be verified.

4. *Same—Objection waived*—It is too late to object in this court for the first time that a pleading was not verified.

C. T. Atkinson and G. S. Fulton for appellant; John S. Kelley for appellee.

Crozer's ass'ee v. Johnson.

Filed March 8, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Digitized by Google

Sales of personal property—Fraud of vendee—A vendor of personal property, who had the right to treat the contract as a nullity because of the vendee's fraud, having obtained peaceable possession of the property from one to whom the vendee had made an assignment for the benefit of creditors, has the right to hold the property as against either the vendee or his assignee.

C. T. Atkinson and G. S. Fulton for appellant; John A. Fulton for appellee.

CONNER v. CRUZAN.

Filed March 8, 1893. Appeal from Harrison Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. *Limitation—New promise—Pleading*—Where a reply to an answer pleading the statute of limitations relies upon a new promise made after the bar was complete it is bad in that it sets up a new cause of action, as the action in such a case should be upon the new promise and not upon the original promise. But as the defendant in this case traversed the allegations of the reply setting up the new promise, and without objection went to trial as if the issues were properly made, the court will treat the objection as waived.

2. *Parol evidence to explain note—Advancements*—In this action by a father upon a note executed to him by his son-in-law parol evidence was competent to show that the note was given simply as evidence of the amount advanced by the plaintiff to defendant's wife.

Ward & Kimbrough for appellant; Ward & Dixon and T. T. Forman for appellee.

MORRIS, &c. v. GERMAN-AMERICAN INSURANCE CO.

Filed March 8, 1893. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Fire insurance—Award not binding on mortgagee*—Where a policy of fire insurance taken out by the owner of the insured property provided that the loss, if any, should be paid to one who held a mortgage on the property, "as her interest may appear," the mortgagee was the real party in interest, and the company and the owner, after the loss of the property by fire, could not by an agreement to which the mortgagee was not a party bind her to abide by an arbitration as to the amount of the loss, although the policy provided that upon the written request of "either party" the loss should be thus determined.

2. *Refusal to unite in action—Estoppel—Ratification of award*—The original refusal of the mortgagee to unite in this action by the owner on the policy did not estop her from subsequently coming in and asserting her claim, and in the absence of evidence that she ever ratified the award of the arbitrators as to the amount of the loss any evidence as to the arbitration was incompetent. The fact that her debt was amply secured without the insurance was altogether immaterial, that circumstance alone not being sufficient to establish a ratification.

3. *Evidence—Admissions of attorney*—The testimony of a witness as to conversations with the attorney for the mortgagee was not competent, as it is clear that the attorney was not acting for his client in these interviews.

4. *Proofs of loss—Premature action*—The owner of the property was the proper person to make proofs of loss, and the proofs made by him inured to the benefit of the mortgagee. And although this action was brought, contrary to a provision of the policy, within sixty days after such proofs were furnished, it was not premature, as the company had refused to pay any part of the loss except upon the basis fixed in the award, upon which refusal the cause of action at once accrued.

5. *Waiver of defect in award*—Although it was a part of the agreement of arbitration that the two arbitrators selected by the parties were to select a third person to sit with them, yet as the owner of the property, with knowledge of the fact that they had not done so, forwarded his proofs of loss

Digitized by Google

based on the award, and as it was also accepted by the company it would have been binding on the owner if the mortgagee had persisted in her refusal to become an actor in this litigation.

6. *Order offering to confess judgment—Contradiction of records of court*—An order having been entered at a former term reciting that defendant had offered to confess judgment for a certain sum, it was error after the jury had returned a verdict in favor of plaintiff for a smaller sum to hear proof as to whether there had been an offer to confess judgment for the sum recited in the former order, and upon such proof to base a judgment in favor of plaintiffs for their costs. Unless there is some fraud or mistake alleged and clearly shown the court should never undertake to set aside such orders.

Galloway & Gaines for appellants; Dulaney & Mitchell for appellee.

Cook v. Newton.

Filed March 8, 1893. Appeal from Taylor Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Sale of liquor to inebriate—Habitual drunkard*—Under the statute which provides that any licensed vendee of liquors who knowingly sells such liquors to an inebriate or person in the habit of becoming drunk, after written notice from the wife of such person forbidding the sale, shall be liable to an action for damages by the wife, to constitute one an habitual drunkard it is sufficient that he has a fixed habit of frequently getting drunk, though not oftener drunk than sober, and though sober for weeks at a time.

In this action under the statute testimony tending to show that plaintiff's husband has for several years past been in the habit of getting drunk frequently, sometimes coming home drunk three or four nights in a week, and that for the past few months he has been drunk as much as he has been sober, was sufficient to authorize the submission to the jury of the question as to whether he was "an inebriate or in the habit of becoming intoxicated or drunk."

2. *Same—Evidence*—It was competent for plaintiff, as bearing upon the question of defendant's knowledge of her husband's habits, to prove the extent of sales made to her husband prior to the sales complained of in the petition. And also competent for the same purpose for plaintiff to testify that before she gave defendant the notice she frequently searched for her husband at night and found him in defendant's saloon drunk, and that she requested him not to sell her husband any more liquor.

3. *Same*—The plaintiff having testified, her husband was not a competent witness.

4. *Same*—As defendant's barkeeper testified that in August, 1891, he sold to plaintiff's husband, in defendant's presence, at different times on the same day, three drinks and two half-pints of spirituous liquors, and another witness testified that he saw plaintiff's husband drink a glass of brandy in defendant's saloon in November, 1891, and pay defendant for it, this testimony was sufficient to authorize the submission to the jury of the question as to whether defendant did sell or permit to be sold in his saloon spirituous, vinous or malt liquors to plaintiff's husband between the 4th of May and the 22d of December, 1891.

Montague & Collins and Garnett & Wolford for appellant; C. Patteson and Wright, Towels & Russell for appellee.

Eagle Distilling Co. v. McFarland.

Filed March 22, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Right of agent to commission on sales*—An employer has no right to reject a sale made by his agent upon his own terms for cash in order to defeat the claim of the agent for commissions. The principal's right to reject sales

Digitized by Google

made by his agent is not arbitrary, but must be reasonable and only exercised for good cause.

In this action by an agent against his principal, a distilling company, to recover commissions on sales of whisky made for the principal, the court properly refused to permit the defendant to introduce testimony tending to show that it was its custom and usage to approve or reject at will all sales made by its agents.

2. *To make proof of a custom admissable* for the purpose of affecting a contract the custom must be of such age, such uniformity of observance, such certainty and fixedness of character and of such notoriety that a jury would feel clear in saying that it was known to the party sought to be affected by it, and that he contracted in reference thereto.

In this case the court properly refused to permit the defendant to prove that it was its custom not to allow its traveling salesmen selling whisky on commission to sell in the town where its distillery was situated, and that the plaintiff knew this at the time he made the contract, this not being sufficient to show that the parties contracted with reference to the custom.

3. *Same*—Such a custom not being pleaded by defendant in bar of plaintiff's recovery, it was proper for that reason also not to allow defendant to prove it.

4. *Question for jury*—The court properly submitted to the jury the question as to whether it was plaintiff's duty, as secretary of defendant company, or by reason of his confidential relations with the company, to communicate to it all offers made to him for the purchase of its whiskies.

5. *Contract--Understanding of parties as to its terms*—The court properly refused to instruct the jury that, if plaintiff believed the contract was unrestricted in its terms, yet if the defendant "might" have believed and had the right to believe that it was restricted as alleged, the law was for the defendant. The question was not what the one party or the other might have believed, but what was meant and understood by the "mutually meeting minds of both."

Knott & Edelen, R. W. Slack and W. N. & J. J. Sweeney for appellant; W. T. Ellis for appellee.

Paducah Land, Coal & Iron Co. v. Mulholland.

Filed March 22, 1893. Appeal from McCracken Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Corporations—Fraud of original incorporators—Purchaser with notice—Parties from the time they begin to form an association stand in a confidential relation, not only to each other, but to all who may subsequently become members thereof; and none of them can purchase property for the company and sell to it at an advance without disclosing the fact.

The original incorporators of a corporation purchased land for the company for $55,000, but in order to make for themselves a profit out of the other stockholders they had the deed to the company recite that the consideration for the land was $100,000, paid by the delivery to the grantors of 10,000 shares of its capital stock, whereas only 5,500 shares of stock were issued to the grantors, the other 4,500 shares being divided among the incorporators. In this action by the corporation to recover the value of one hundred shares of this stock from one to whom the incorporators transferred it in payment for services, *Held*—That the evidence is sufficient to charge defendant with notice of the fraud by which the stock was obtained, and, therefore, the plaintiff is entitled to recover.

W. D. Greer and J. W. Bloomfield for appellant.

Mitchell v. Stephens.

Filed March 22, 1893. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Digitized by Google

1. *Supersedeas bond—Signing by attorney in fact*—Where the name of a surety to a supersedeas bond was signed by a Deputy Clerk of the Court of Appeals under a power of attorney authorizing the clerk "or any of his deputies" to sign the name, there was a valid execution of the bond, although it does not appear on the face of the bond that the person by whom it was signed as "attorney in fact" was a deputy. That fact may be shown by evidence *aliunde*.

2. *Same—Pleading*—Although it does not clearly appear from the petition in this action upon a supersedeas bond, taken by the Clerk of the Court of Appeals, that the appeal was granted by the clerk of that court, the allegations being vague and uncertain, yet as that is the fair presumption from the allegations made, and the defect seems to have been overlooked in the lower court, it will be treated as waived, the record in which the bond was executed, which is in evidence, showing conclusively that the appeal was granted by the Clerk of the Court of Appeals, and, therefore, that he had authority to take the bond.

3. *Homestead—Set-off*—As plaintiff was kept out of the possession of his homestead for two years by the superseding of the judgment setting aside the sale by which he had been deprived of the possession, he is entitled to recover the rental value of the property for that time; and defendant, the surety in the bond, can not plead as a set-off the judgment against plaintiff assigned to him by the principal, as to allow that would be in effect to take the rents of the homestead to pay a debt which it has been adjudged the homestead is not liable for.

Cornelison & McKee and R. A. Mitchell for appellant; Wood & Day for appellee.

Payne v. Sebree.

Filed March 22, 1893. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

An alleged mistake in a deed must be established by clear and satisfactory evidence; it can not be inferred from the mere weight of evidence.

The evidence in this case is not sufficient to show a mistake in a deed as to the number of acres conveyed.

Rhey Boyd for appellant.

E. T., V. & G. R. R. Co. v. Adams.

Filed March 22, 1893. Appeal from Woodford Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *Jury may fix value of service without proof*—In an action of *assumpsit* for work and labor the jury have a right to fix the value of the work done in the absence of proof of its value.

2. *Waiver of jury—Powers of court*—The submission of an ordinary action to the court for trial clothes him with all the functions of a jury in determining the facts and rendering a judgment based thereon.

In this action against a railroad company to recover the value of plaintiff's services as a conductor of a train, the law and fact being submitted to the court, the court had the right to fix the value of plaintiff's services and render judgment therefor, although there was no proof of value, the nature of the services and the time plaintiff was employed being shown.

Ed. M. Wallace for appellant; Field McLeod for appellee.

Commonwealth v. Hart.

Filed March 22, 1893. Appeal from Bath Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

A razor is a deadly weapon within the meaning of the statute against carrying concealed deadly weapons upon the person.

W. J. Hendrick for appellant; C. W. Goodpaster for appellee.

Digitized by Google

L. & N. R. R. Co. v. Trustees School District.

Filed March 22, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Yost, affirming on original and cross appeal.

1. *In levying a tax to repair or refurnish a school-house*, no assessment other than that made by the assessor of the county for the current year is necessary.

2. *Acts of officer de facto*—When the trustees of a school district delivered to the deputy sheriff a list of the taxable property in the district and ordered him to collect the tax they in effect appointed him as their collector of taxes; and his failure to give bond constitutes no defense to a suit for taxes, as the official acts of an officer *de facto* can not be inquired into collaterally.

W. H. Marriott for appellant; Hobson & O'Meara for appellees.

Wood v. O'Nan.

Filed March 22, 1893. Appeal from Franklin Court of Common Pleas. Opinion of the court by Judge Brent, reversing.

1. *Breach of warranty—Novation*—The purchaser of a jack offered to return him to the vendor, demanding a rescission of the contract upon the ground that the jack was not a foal getter as he was warranted to be. The vendor would not take him back, but agreed to buy him back, returning one of two notes executed by the purchaser for the purchase price, the purchaser promising to pay the other note. In this action upon the note retained by the vendor, *Held*—That it was error to allow the defendant to recover by way of counterclaim for breach of the warranty, the original transaction having been settled when the jack was returned. The jury should have been instructed to find for plaintiff the amount of his note with interest.

2. *The sureties in the note were discharged* by the novation.

Wm. Cromwell for appellant; J. Andrew Scott for appellee.

Gardner, &c. v. Richardson.

Filed March 22, 1893. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, granting rehearing and reversing.

Practice—Agreement as to record on another appeal—Upon this appeal from a judgment discharging an attachment and dismissing so much of plaintiff's petition as sought to set aside a deed of assignment, it was agreed by the parties that the record upon a former appeal by another creditor from a similar judgment against the same debtor should be considered as a part of the record in this case, and that the pleadings and the evidence in that case and those in this case are, as to the grounds of attachment and the attack upon the deed of assignment, the same. *Held*—That as the judgment upon that appeal was reversed, the judgment appealed from here must also be reversed, and cause remanded for same proceedings as were directed in that case.

James Montgomery for appellants; J. C. Poston and J. P. Hobson for appellee.

Brook v. Yadon, &c.

Filed March 22, 1893. Appeal from Laurel Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. *Division in church—Title to church property*—In all churches of the United Baptists the form of government is purely congregational, each church being sovereign and independent. The powers of the association are simply advisory, and it has no power to determine the property rights of the respective parties in case of a division in a congregation.

2. *Same*—There is no rule either of ecclesiastical or civil law which will permit the minority of a church to be deprived of its right of property by the mere will of the majority. On the contrary the title to the church

Digitized by Google

property of a divided congregation is in that part, though a minority, which adheres to the ecclesiastical principles and usages of the denomination under which the church was constituted, and while the courts will not attempt to pass upon the truth or falsity of any religious belief or practice, they will, where the right to property is involved, institute an inquiry as to which of the parties is the adherent of the principles upon which the church was organized.

3. *Same*—Where, as in this case, there is not upon the part of either party of a divided congregation a substantial departure from the principles of union adopted by the church upon its organization, the case is one of a "schism" or "division" in the meaning of subsection 4 of section 3 of chapter 18 of the General Statutes, which provides that "in case a schism or division shall take place in a society the trustees shall permit each party to use the church and appurtenances for divine worship a part of the time, proportioned to the numbers of each party."

4. *Same*—Conceding that the church book, which is the subject of this litigation, is appurtenant to the church, yet as the book itself can not well be divided between the two factions so as to be beneficial to either, and the belief and practice of the party in possession of the book accords more nearly with the belief and practice of the church from its organization to the time the dissension began than do those of the other party, it will be allowed to retain possession of the book, but required to furnish a copy to the other party in a reasonable time, the cost of the copy to be divided between the two parties.

W. H. Holt and W. R. Ramsey for appellant; Alcorn & Craft for appellees.

L. & N. R. R. Co. v. Howard.

Filed March 22, 1893. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Purchase of property of one corporation by another—Liability of stockholder*—Two corporations can not be consolidated, or one purchase the property and franchises of the other, without the unanimous consent of the shareholders, even though the Legislature should authorize the consolidation or purchase to be made. Nor can a corporation become a stockholder in another corporation for the purpose of controlling the business or affecting the management of the latter unless such power is conferred by statute.

2. *Same*—A stockholder can not ordinarily be sued for the liabilities of the corporation. Therefore, when stock is killed on the track of a railroad company the fact that another company owns the controlling stock of the company to which the road belongs, and in whose name it is operated, and has elected the directors and managers of that corporation, does not render it liable for the damages sustained, as the party injured must look to the corporation and not the stockholder. And in this case testimony tending to show that the defendant railroad company paid the employes on the road upon which plaintiff's horse was killed, and that engines and cars with defendant's name on them were run over the road, and that bills for goods shipped over the road were made out in defendant's name, did not contradict defendant's written evidence showing that it merely owned the controlling stock in the corporation and elected the officers and managers of the road.

J. I. Blanton for appellant; Swinford & Evans for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:
W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. JUNE 1, 1893. No. 23

KENTUCKY COURT OF APPEALS.

FIELDS, &c. v. FIELDS, &c.

(*Filed Jan.* 10, 1893.)

Construction of will—Distribution per stirpes and per capita—The testator in one item of his will directed his executor to pay a certain fund "equally to the children (that are living at the time of distribution) of my brother W., * and the living children of my brother." One brother had two and the other six children, and in determining whether the devisees take *per stirpes* or *per capita* it is held that the whole will construed together indicates an intention on the testator's part that they should take *per stirpes*.

Robt. Harding for appellants.

R. T. Jacobs for appellees.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hazelrigg.

The construction of the following clause of the will of Jeremiah Fields is the only question involved on this appeal, namely: Item 5th. * * * "I hereby direct my executor to sell my undivided interest in said two tracts of land, * * * and pay the proceeds of such sale equally to the children (that are alive at the time of distribution) of my brother, William Fields, of Missouri, and the living children of my brother, James Fields. In the event of the death of any of the parties to this bequest, then their portion is to go to any issue they may have left; and if none is left, then their portion is to be given to the heir or heirs indicated above."

William and James were dead when the will was made, the former leaving six and the latter two children. The question is, do the

Digitized by Google

children take *per stirpes* or *per capita?* And shall the $10,000 in the executor's hands be divided into two or eight parts?

The presence of some suggestive clause or expressions in other portions of the will, indicatory of the testator's intent to the contrary, must be found before we should disturb the equal distribution of the estate *per capita* among these children, as is apparently provided for by a literal construction of the language used.

And we observe, first, that the 6th clause appears to furnish us some slight clew to the testator's meaning. He directs his executor to collect all money owing to him by note or otherwise, to sell his bank stock, pay the few debts he owed, and "distribute the residue as follows, to-wit: One-fourth of the amount he, my executor, will pay to my sister, Jemima Fields; one-fourth to my brother, Frederick R. Fields (provided he is living at the time of distribution; if not his share is to be equally paid to the other three *branches* of my kindred named in this item, 6th); one fourth is to be paid to the children of my brother, William Fields, deceased, and the remaining fourth to be paid to the children of my brother, James Fields, deceased."

Thus the testator gives his estate to his sister Jemima as "*one branch of his kindred;*" to his brother Frederick, if living, and if dead, then "equally" to the other three *branches;* to the "children of his brother, William Fields, deceased," whom he designates in this 6th clause as one of the *branches of his kindred*, and to the "children of his brother, James Fields, deceased," whom he also designates as one of said *branches*. He refers to "the children of his brother William" collectively only and as a *branch* or as a class, and he does this in apparently studied or express terms; and having so unequivocally used these phrases as representing *branches of his kindred*, and having disposed of a large portion of his estate to these children as branches in the 6th clause of his will, no good reason can be assigned for giving a different meaning to the same phraseology when used in the 5th clause.

Moreover, the 5th clause is itself not wholly without a suggestion indicative of this intention.

The testator knew that his brother James had two children only, and, therefore, he provides that in the event of the death of any of the parties to the bequest, their portion was to go to their issue, and if none, then to the *heir* or *heirs* as above indicated.

When we regard the distribution as being made to the two branches or classes, we can see why the testator used the word "heir" in providing that the surviving brother or sister of the children of James Field should take the property and be properly designated as an heir;" and then, too, under a distribution *per capita*, upon a child dying without issue, its property would go, not to its brother or sister wholly, as members of the same class or branch, but the distribution is made equally among the remaining brothers and sisters and the cousins of the decedent. If one of James Fields' children died the remaining one would take one-seventh of the property and the cousins take six-sevenths, a distribution certainly not contemplated by the testator.

On the whole case we are of opinion that the testator meant that the children of his brothers should take in the 5th, as they took in the 6th clause of his will, by classes or branches, or *per stirpes* and not *per capita*, as was held in the lower court.

Many authorities are cited by counsel on both sides, but, after all, the construction of the will in dispute depends on no other rule or principle than the ascertainment of the testator's meaning as gathered from his own language.

Digitized by Google

The judgment of the lower court is reversed, with directions to distribute the estate in accordance with the requirements of this opinion.

LEVIS & BROXHOLM V. ZINN, &C.

(*Filed Jan.* 19, 1893.)

Assignment by operation of law—Intent to prefer—A conveyance or mortgage of property will not operate as an assignment of the grantor's estate for the benefit of his creditors under the statute unless he was then actually insolvent, and made the assignment with a knowledge of that fact and with a design to prefer, or contemplated becoming insolvent and made the transfer with a design to prefer.

A knowledge of his insolvency, or a design on his part to prefer, can not be presumed from the circumstance alone that it subsequently appears that at the moment of the transfer his debts exceeded his assets.

In this case a merchant agreed with one to whom he owed $2,000 that if the creditor would assume the payment of $3,100, due to another, he would execute to the creditor a mortgage on real estate for $5,100. The agreement was executed and shortly afterwards the debtor made an assignment for his creditors, one of whom attacks the mortgage above mentioned as an unlawful preference. *Held*—That although the debtor owed about $16,000 at the time the mortgage was executed, and his estate realized only $12,000 at a forced sale, the evidence does not show nor does the presumption arise that at that date he knew he was insolvent or executed the mortgage with a design to prefer.

H. Clay White for appellants.

W. W. Dickerson for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Lewis.

P. T. Zinn being indebted to W. G. Cram the sum of $2,000, then past due, an agreement was made between them and carried out February 2, 1891, for the latter to assume payment of $3,100 due by the former to one Sexton, and for Zinn to simultaneously execute to Cram a mortgage on two adjacent parcels of land, one of three and the other of fourteen and one-half acres, then occupied by him and his family as a homestead, to secure payment of $5,100, aggregate amount of the two debts.

February 21, 1891, Zinn made to J. T. Scott a deed, conveying all his property, not exempt from coercive sale, in trust for payment of his debts generally; and April 27, 1891, Levis & Broxholm, to whom Zinn was indebted about $250, brought this action for the purpose of having the mortgage mentioned adjudged to operate as an assignment and transfer of all his property and effects, and to inure to the benefit of his creditors generally, as is provided in article 2, chapter 44, General Statutes, may be done where the condition prescribed in section 1 of that article exists.

To authorize the judgment prayed for the court should be satisfied that the mortgage in question was, in the language of that section, executed by Zinn, the debtor, "in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion in whole or in part of others;" and to bring this case within operation of

Digitized by Google

the statute, as heretofore construed and applied by this court, there must appear either a concurrence of actual insolvency of Zinn, and his knowledge of the fact at date of the mortgage, or that he contemplated becoming insolvent in the future and assigned by the mortgage to give preference to the mortgagee, Cram. (Thompson v. Heffner, 11 Bush, 358; Cass v. Lewis, 3 Met., 397; Temple, Barker & Co. v. Poyntz, 3 Duv., 277.)

As said in the first cited of those cases, a too rigid construction of the statute will not only defeat its real object, but will, by tying the hands of entangled and struggling debtors, bring bankruptcy upon many who might otherwise escape; and, therefore, "if it be held that a debtor who sells or mortgages property, or assigns choses in action to his creditor in payment or as security for a debt, has violated the statute, if it shall turn out that his liabilities at the moment exceeded his assets, few commercial men would be secure either in buying or selling, or in making or receiving mortgages, or in making or receiving pledges as collateral security for existing debts."

There may be, in fact have been, before this court cases where the debtor's insolvency was so satisfactorily shown, and his means of knowing it so ample, as to admit of no other reasonable conclusion than that the sale or mortgage was made in contemplation of insolvency and with design to prefer one to other creditors. There may be also cases where, though the fact of insolvency be not established, the court would be, nevertheless, fully authorized to conclude a sale or mortgage was made by the debtor in contemplation of future insolvency and with design to prefer.

The debtor in this case was a merchant, and though it turned out his liabilities exceeded assets realized from coercive sales, he stated distinctly that he believed at the time the mortgage was executed his property exceeded in value his indebtedness, and that his sole purpose in making it was to enable him to continue his business and thereby to pay off in due time all his debts.

No other witnesses testified beside the debtor, Zinn, and creditor, Cram, both of whom were introduced by plaintiff, and it can not be fairly inferred from the statement of either, nor from any circumstances connected with the transaction, that the mortgage was executed in contemplation of insolvency, or with the knowledge of Zinn he was then insolvent, or with design to give preference in meaning of the statute.

It is true the liabilities were found upon investigation to exceed assets about the sum of $4,000; but considering the large amount of each, the former being about $16,000 and the latter about $12,000, consisting of real estate and the usual resources of a retail merchant, it does not by any means follow that Zinn knew or believed, at date of the mortgage, he was insolvent or executed it in contemplation of insolvency.

Nor is the fact he, a short time after, executed the deed of trust, sufficient to satisfy the court, in opposition to his uncontradicted testimony that the mortgage was made under circumstances, or with the design that render it invalid; for its legality and entire good faith of the parties to it can be easily reconciled with execution of deed of trust which may have been caused by subsequent investigation and causes.

In our opinion the evidence does not satisfactorily show the mortgage was made on the condition or with the design denounced by the statute, and that it would be doing positive violence to both the language and meaning to so adjudge. The conclusion of the main

Digitized by Google

question renders it immaterial whether the debt to Cram, or any part of it, can be regarded as created simultaneous with the mortgage; because the mortgage being adjudged valid, it does not make any difference under the statute whether the debts were preexisting or not.

Nor is it a subject of protracted inquiry in this case whether the court properly set apart to the debtor, Zinn, $1,000 of the proceeds of the mortgaged real property in lieu or satisfaction of his homestead interest. For only in favor of the mortgagee, Cram, and to extent necessary to secure payment of his debt, was the homestead right released or waived; and, consequently, it could not be subjected for benefit of other creditors, nor even to pay the debt of Cram, if there was enough of the mortgage property to satisfy his debt without doing so.

We think the lower court properly dismissed the action, so far as it was sought thereby to set aside or impair the natural effect of the mortgage, and the judgment is affirmed.

BARBER v. C., N. O. & T. P. RY. CO.

(Filed Feb. 4, 1893.)

1. *Railroads—Failure to give warning of approach*—The plaintiff's evidence conduced to show that a laborer of the railroad, employed at work on and near the track, was killed by reason of the failure to give the usual signal of the approach of a train, which was behind time and running very rapidly; therefore, the motion by defendant for a peremptory instruction was properly overruled.

2. *Same*—Defendant's evidence conduced to show that the laborer was working at a safe distance from the track when those on the train first saw him, but that after the train bell was rung he turned around and, perceiving the train, ran down upon a plank which had been placed across the track in the prosecution of his work, and that every effort was made to stop the train before he was killed. *Held*—That, although this evidence may contradict or explain that offered for plaintiff, it was error for the court to instruct the jury to find for the defendant.

3. *Same*—If the laborer, after learning of the train's approach, sprang upon the track for the purpose of clearing it of the plank, and thus saving lives upon the train, as it was his duty to do, and if he was killed in so doing because the signal of the train's approach was not given at the proper time, the plaintiff had a right to recovery. This was a question for the jury and not the court to determine.

Robert J. Breckinridge and Robert Harding for appellant.

C. B. Simrall, Bronough & Bronough and George R. Pryor for appellee.

Appeal from Jessamine Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellant's husband was engaged in getting out ballast for the appellee at a point on the line of its road near High Bridge, Ky. The quarry was on the west side of the track, on a hillside, and to obtain a suitable place for piling the rock he had to wheel it across the track and along by the side of it a short distance to a level point

Digitized by Google

on the east side, and for that purpose was required to place plank across the road on which to use his wheelbarrow.

While so engaged he was struck and killed by the engine of the appellee.

For damages occasioned by its alleged willful negligence the appellant, who is the widow of the deceased, sued the appellee. She introduced proof establishing the foregoing undisputed facts, and in addition proved by one or more witnesses that one of the rules and regulations promulgated by the railway company required "warning signals by the train to the laborers working on the road;" by another who was familiar with the rules she proved that "the men were required to work right up to the time of train passing, and not to lose time. It was the duty of those managing the engines of moving trains to give warning signals to the hands working on the track and along the track in time to enable them to get out of the way and clear the track for the train to pass."

She also proved that "the engineer and fireman had passed and repassed this point on the track where Barber was killed a number of times while he was at work and knew he was working there." She also introduced proof conducing to show that the only signals given on the occasion in question were the danger signals, and these only when the train was within a few feet of the deceased; that the train was behind time and was traveling at lightning speed—some forty miles an hour; that the wind was blowing in a direction unfavorable for hearing at the point where the deceased was working; that he probably could not have heard the noise of the approaching train, and that he was not up at the quarry as the train approached, but was probably engaged in actually wheeling the rock across the track or near it when struck by the passing engine. Upon this state of case the court properly overruled the motion of the appellee to instruct the jury peremptorily to find for the defendant.

The appellee then introduced proof to the effect that when the train approached the point where Barber was working, and when it had come within seventy-five or one hundred feet of him, the engineer and fireman saw him standing on the top of the bank leaning on his pick, with his back to the train, out of danger and ten or fifteen feet from the track; that the bell was then rung, when Barber turned around, facing the train, and suddenly ran down the bank to the track; that the danger signals—three in quick succession—were then given, engine reversed, air-brakes applied, track sanded and everything done to save his life, but that it was not possible to stop in time to do so.

The motion to instruct the jury as indicated above was then renewed by the appellee, and, over the objection of the appellant, was sustained.

This, we think, was error.

Certainly the plaintiff, by her testimony, had made out a state of case conducing to show negligence on appellee's part in failing to give timely warning of its train's approach, and the court below evidently so thought, as it was on this hypothesis necessarily that the premptory instruction was first overruled; and, if so, the testimony of the defendant, while it may have contradicted, did not destroy the appellant's testimony or wholly eradicate its effects.

If the deceased, from the conditions surrounding him while at work, if he was actually at work when the train approached, from unfavorable wind affecting his hearing, from the noise of his wheelbarrow on the plank when loaded with rock, a noise not wholly dissimilar from the rumbling of the train, was unable to hear the

Digitized by Google

approaching train, he might have heard the expected and discordant whistle had it been given, and for which he might have been waiting, while he continued his work in apparent safety; and if he was entitled to so wait it might have been negligence in the trainmen if such notice and warning were not given. Such seems to have been the plaintiff's theory of the killing.

But if the deceased, engaged with pick in hand, worked on in expectancy of the customary regulation whistle to warn him to clear the track of obstruction, heard the bell and signals of danger—danger to all on board from the obstructions resting on the track—sprang to prevent a wreck and save life, and the time given him in which "to clear the track," as required of him under the rules of the company, was cut short or lessened by the failure of the trainmen to blow the whistle required under the indicated regulation, then, even in this event, negligence might have been imputed to appellee by the jury. Hence, upon either theory the merely revisory power of the court should not have been interposed to control the free expression of the jury's will.

The judgment of the lower court is, therefore, reversed, that the case may proceed upon principles not inconsistent with this opinion.

WHITAKER V. CORNETT.

(*Filed March* 4, 1893—*Not to be reported.*)

1. *Purchaser at decretal sale—Execution*—The purchaser of land at a decretal sale, before he obtains a commissioner's or other deed therefor, has no legal title to the land that can be levied on or sold under an execution against him.

2. *Same—Liens*—One who claims land by virtue of a purchase at an execution sale of the interest of a purchaser at a decretal sale thereof acquires no title thereto where the purchaser at the decretal sale had not, at the time of the sale, secured any deed to the land nor paid the bonds executed therefor. Therefore, such execution purchaser had no right to enjoin the purchaser at the decretal sale, who had obtained a commissioner's deed to the land and a writ of possession therefor, from taking possession under his deed and writ, but since it appears that the execution against the decretal purchaser's interest in the land was issued to satisfy a debt, which constituted a lien upon the land, such purchaser should be required to pay said lien debt before possession is given him.

S. B. Dishman for appellant.

John L. Scott for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee brought this action to enjoin the appellant from taking possession of certain lands by virtue of a writ of possession issued in the action of Whitaker, &c. v. Ison, after the case had been stricken from the docket.

He sets up fully his claim of title in his petition and discloses that his immediate grantors, Marrs & Nuckols, had bought the lands at an execution sale, when the defendant in the execution had no legal title thereto, but was merely its purchaser at a decretal sale.

Upon the maturity of the purchase money bonds executions issued

Digitized by Google

and were returned "no property found" as to the securities. The same lands were thereupon levied on which had been sold by the commissioner, and Marrs & Nuckols, having a lien endorsed of record for attorneys' fees, costs, etc., for some $400 on the lands ordered to be sold under the judgment, bought them. After notice to the parties interested the purchasers at the execution sale, in November, 1884, obtained a writ of possession and also a sheriff's deed, and thereafter, in July, 1887, sold the lands to the appellee, Cornett, and put him in possession.

In 1889, in the case of Whitaker v. Ison, which in some way had been placed on the docket, if it had ever been off, the appellant as one of the beneficiaries in the original judgment, and who had purchased the lands at the decretal sale mentioned, obtained by an order of court a commissioner's deed for the lands and also a writ of possession, and this writ is the one under which the appellant was about to take possession when enjoined by the appellee in this action.

A demurrer to the petition was overruled, and after answer and other preparation, consisting of proof showing, however, only the facts set out in the petition, the injunction was perpetuated and the appellee's title to the lands in contest quieted. We are of opinion that the demurrer to the petition should have been sustained.

The pleading showed that Marrs & Nuckols bought nothing at the execution sale. No legal title whatever was levied on or sold, and the equity, which the purchaser obtained therein, could not be the subject of a levy and sale under an execution.

The equity of Marrs & Nuckols can be worked out in the old suit, though certainly no deed should have been made to the purchasers at the decretal sale until they had extinguished the liens of the attorneys and the officers.

Marrs & Nuckols appear to have acted in the best of faith in the attempt to collect the amounts due them, but we think their remedy was by a resale of the land under an order of court, if the bondsmen were proof against execution.

But the demurrer to the petition having been overruled, and the issues being fully made by the defendant in this action, thus bringing the whole case before the court, it is apparent that he ought not to be permitted to obtain possession of the land until he discharges the lien debts of which the appellee is virtually the owner; and if these remain unpaid and are set up by the amendment the chancellor should put the appellant on terms requiring him to pay off and discharge these lien debts before getting possession of the lands in controversy. If he does so, we perceive no reason why, as purchaser of the lands at decretal sale, he should not be adjudged entitled to the property bought by him.

The appellee has certainly not shown himself entitled to the lands or to their possession, and the judgment is, therefore, reversed and cause remanded, with directions to proceed in accordance with this opinion.

Digitized by Google

LANE, &C. V. TRADERS' DEPOSIT BANK.

(*Filed March* 7, 1893—*Not to be reported.*)

1. *A married woman does not become liable as a surety of her husband by reason of the existence* of a mortgage of her separate property to secure the husband's debt. The property is merely pledged to secure payment, and the rights of an ordinary surety are not available to the wife as a defense.

2. *The wife can not be held personally as surety in such case* in the absence of allegation or proof of facts rendering her personally liable therefor.

3. *Same—Mortgages*—Since the wife mortgaged her whole estate in the land to secure the payment of the debt, and her whole interest therein is liable therefor, she was not prejudiced by the refusal of the court to permit her to file an amended answer, alleging that she had previously intended to mortgage her land to secure a debt of her husband, but had in fact absolutely conveyed the land to the creditor for that purpose, and that the creditor, when his debt was paid, had, without her knowledge or consent, reconveyed the land jointly to her husband and herself, instead of to herself alone. But the land should be divided and the husband's interest subjected first.

Tyler & Apperson for appellants.

O'Rear & Bigstaff for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Pryor.

It is pleaded by way of defense that the appellant was only the surety of her husband, and as such was liable for this debt. Why or how she become bound as surety does not appear. She was a married woman, and there is no averment or proof establishing a state of case where she could be made personally liable for the debt. Her property was mortgaged to secure the payment of the note, and this is the only manner, in either a legal or equitable point of view, that makes her estate responsible for the debt.

The case of Hobson v. Hobson's ex'or, 8 Bush, 665, holds that a married woman does not become responsible as surety by reason of the existence of a mortgage to secure the husband's debt. It is a pledge to secure the payment only, and the rights of an ordinary surety can not be urged as a defense, such as the plea of the statute of limitation, or even indulgence given by the creditor, which is the same in effect as the failure to sue within proper time.

The land mortgaged originally belonged to the wife, and an absolute deed was made to secure this debt of the husband to one of his creditors. The debt having been paid the land was reconveyed to the husband and wife jointly. The wife (appellant) now claims that the deed should have been made to her as it was her land, and offered to amend her answer in this regard.

We can not see how the refusal to allow this amended answer filed prejudices the appellant. She had mortgaged the whole land, and if hers it was liable. This land, however, may be susceptible of division, and the part allotted the husband or his heirs should first be sold, and to this end a division should be rendered.

The judgment is reversed and remanded for the reason indicated.

Digitized by Google

VISSMAN V. BRYANT, &C.

(*Filed March* 9, 1893—*Not to be reported.*)

1. *Sale of infant's real estate—Report of guardian ad litem*—The answer of the *guardian ad litem* for the infant defendant sufficiently complies with the provisions of the Civil Code, although the statement that "after a careful examination of the case he is unable to make a defense," is not found in the body of the answer, but is set out in the jurat thereto.

2. *Same—Clerical misprision in judgment*—The fact that the draft of the judgment filed in this case, and the judgment entered in the order book, differ in that one is for $2,000 and the other for $200, does not render the judgment or order of sale void, and the purchaser of the property, under the order of sale, can not refuse to comply with the terms of sale therefor, especially when the clerical error has, on motion, been corrected.

3. *The report of sale is not required to state the sum to be raised by the sale.*

Barnett, Miller & Barnett for appellant.

Wm. Mix, Jno. C. Doolan and Simrall & Bodley for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hazelrigg.

The appellant became the purchaser of a lot of ground at a decretal sale in the Louisville Chancery Court, and refused to comply with the terms of the sale, alleging that no answer or report was filed for the infant defendants, as required by the Civil Code; that the draft of the judgment filed among the papers of the case and the one entered on the order book were materially different, the one being for $2,000 and the other for $200; that the marshal's report of sale failed to show the amount to be raised by the sale, as is required to be done under section 696 of the Civil Code; that the land was described indefinitely, and that there was a misdescription in this; that the portion sold was designated as the "eastern," whereas it was in fact the western portion.

Other suggestions are offered why he should not be required to comply with the terms of the sale and take the property, but are not referred to or insisted on in appellant's brief.

From an examination of the record we find the answers for the infants were in fact filed by their *guardians ad litem*. It is true as contended that after setting out the particular relationship of the infant or infants for whom the answer is filed in the body of the pleading, the statement or report that "after a careful examination of the case he is enabled to make a defense" is then set out and found in the jurat of the guardian, but we think this is sufficient. While not required to be sworn to, the pleading is not affected by the affidavit attached to it.

The mistake of the clerk in entering the figures at $200 instead of $2,000 was corrected on motion, and hardly affects the title of the purchaser.

The marshal's report of sale need not have contained a statement of the sum to be raised by the sale, and the land is sufficiently described in the judgment and report of sale.

It is misdescribed in that the portion sold was the western and not the eastern portion, but there was sufficient description otherwise to identify the part sold, and as Vissman, the purchaser, already owned the eastern portion he was hardly of opinion that he was again buying his own land at the sale.

Digitized by Google

Perceiving no irregularity in the proceedings affecting the title to the property bought by the appellant, and no error in the judgment requiring him to pay for it, we affirm the judgment of the lower court.

WEIR V. O. & N. R. R. CO., &C.

(*Filed March* 11, 1893—*Not to be reported.*)

1. *Damage to abutting property by filling "sag" in street*—One who obtains the permission of the municipality by valid ordinance to fill a depression in a street of a city so as to cause the whole street to be at a designated level, and who does the work properly under the supervision of the street commissioner, is not liable to an abutting lot owner for any alleged damage done his property by the making of such fill.

2. *Damage to abutting property by fill made in county road*—The county court gave a certain land owner permission to make a fill in a county road so as to make the road of a certain grade, "the fill to be so constructed as to level up the sag in said road and to leave said road in good traveling order." After the fill was almost completed another person secured an order from the county court rescinding the former order allowing the fill to be made. The party making the fill, after the order of rescission, completed it so as to make it passable for the public, and the abutting lot owner sues in this action for damages resulting to his property from the making of such fill. *Held*—That for the making of so much of the fill as was completed before the rescinding order was made by the county court, no damages can be recovered because the work was done under legal authority, and for the work done after such rescinding order nothing can be recovered because it did no damage but merely put the road in good condition.

John G. Weir and C. S. Walker for appellant.

Wilbur F. Browder for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

The Owensboro & Nashville Railroad Company purchased of J. D. Powers ten acres of land lying partly within and partly without corporate limits of the city of Owensboro, and bounded on the west by Frederick street and the Livermore road, a public highway. The object of the purchase was to construct on the land a depot and tracks, but to do so it was necessary to fill a depression of the ground up to proper grade, and also to fill a sag in the street and highway in order to make the depot accessible therefrom. And with that view Powers, who did not convey the land until October, 1891, made application to the Daviess County Court, and June 12, 1891, obtained an order permitting him to fill the Livermore road in front of his, the ten-acre lot, from the limits of Owensboro to a point named, "the fill to be so constructed as to level up the sag in said road and to leave said road in good traveling order." To the same end he, July 6, 1891, obtained an ordinance of the city council permitting him to make a fill in Frederick street from a point near James Weir's gate southward to the city limit, upon condition of the fill being made under supervision of the street commissioner, though without cost to the city, and so made as to leave the street in good traveling order.

Under authority thus granted, the Owensboro Railroad Company

Digitized by Google

commenced to fill the sag in the street and road so as to correspond with grade of the depot ground, and had done most of the work when, on application of James Weir, but without the presence of or due notice to either Powers or the company, the county court, August 11, 1891, made an order rescinding the previous one of June 12th.

August 27, 1891, James Weir brought this action against J. D. Powers, though subsequently the Owensboro & Nashville Railroad Company was made defendant, for the purpose of recovering damages for alleged injury done by filling up the sag to his parcel of land, containing six acres, and binding on the western side of the street and road.

The extreme length of the fill is 600 feet. It begins at nothing on a ridge near his gate and ends at nothing on the opposite side, the extreme depth of it, at a point 400 feet from the beginning, being, at the out edge, 24 feet 10 inches, and in the middle 5 feet. Although a judgment in pursuance of the verdict of the jury was rendered in favor of the plaintiff, he has appealed.

It is very clear that he has no cause of action against either Powers or the railroad company for any injury that may have been caused by that part of the fill within the city limits, because it was authorized by a valid ordinance and was done under supervision of the street commissioner. It seems to us also clear that no actionable injury was done to the plaintiff on account filling outside city limits prior to the action of the county in rescinding the order of June 12th. When the defendants received notice of the last order of court the work had so far progressed that the public interest, and, as it seems to us, also the interest of the plaintiff, required it to be completed instead of leaving the street and road in an unfinished and consequently unfit condition for travel.

It seems the railroad company did, notwithstanding the county court order, finish the work, whereby the road was put in good state for public use. And even if it was unlawful for the company to do so we do not see how plaintiff was thereby injured. For whatever injury the fill could do to his premises had been already done and done under lawful authority. But his right to maintain the action is not now in question, because the defendant, by failing to appeal, concedes his right to judgment for $150. And certainly the record does not show this to be a case authorizing the court to invade the province of the jury and disturb that finding and assessment. Nor do we perceive any error of law occurring at the trial prejudicial to the plaintiff; for the instructions given by the court accord with the views we have already expressed and we think embody fully and accurately the issues for the jury to try.

Judgment affirmed.

GREER V. L. & N. R. R. CO.

L. & N. R. R. CO. V. GREER.

(*Filed March* 11, 1893.)

1. *Damages—Evidence*—In action to recover for the loss of a leg alleged to have been caused by the willful neglect of a railroad company the plaintiff may show his expectancy of life by standard life tables.

2. *Railroads—Neglect—Evidence*—A brakeman, being ordered to uncouple moving cars, went between them to do so, but the coupling pin was bent so

Digitized by Google

that he was unable to uncouple them. He was walking between the cars endeavoring to uncouple them, when his foot caught in "a splinter on the guard rail of the frog of the switch," he held to the front car, was dragged some distance, finally fell between them, and in attempting to throw himself outside of the rails one leg was run over and its amputation was necessary. In this action to recover damages because of the alleged willful neglect of the railroad company in the management of the train, *Held*—That evidence concerning the defective condition of the rails and roadbed and of the coupling pin was incompetent as a basis for finding damages, although such evidence might have been competent as an incident of the accident.

3. *Same*—Plaintiff had a right to file an amended petition setting up the defective condition of the roadbed and track and coupling pin as additional grounds of complaint. Such amended petition did not present a new cause of action.

4. *Same*—A brakeman can not recover damages for an injury that results to him from the ordinary neglect of his fellow servants, and even where the neglect was that of his superiors he can not recover except for gross neglect.

5. *Same—Instructions*—Where the alleged willful neglect consists in the operation of the engine by a fireman, contrary to the rules of the company, and the management of the train by the conductor, who knew that the brakeman had gone between the cars to uncouple them, it is error to instruct the jury that if the risk and danger of going between the cars was apparent, open and visible to the plaintiff when he went in to do the uncoupling they must find for the defendant. Such instruction was misleading since the ordinary danger of uncoupling cars is always open, apparent and visible.

Hugh P. Cooper for Greer.

W. J. Lisle, W. Lindsay and H. W. Bruce for L. & N. R. R. Co.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

James Greer, as plaintiff in the lower court, brought this action against the Louisville & Nashville Railroad Company for negligently driving its car or cars upon and over his leg, crushing it in such manner as to cause its necessary amputation, and alleging that by reason of the defendant's negligence plaintiff lost his left leg and endured great mental and physical suffering, etc., to his damage in the sum of $25,000. He recovered the sum of $2,500. Thereupon the defendant prosecuted an appeal to the Superior Court and the plaintiff prosecuted one to this court. On plaintiff's motion the case in the Superior Court was transferred here, and the two appeals, being one and the same case, are heard together.

At the Lebanon switchyard, on the line of defendant's road, it became necessary to place two gondola cars on one of the sidetracks and some box cars on another. There was some haste required, as the conductor's purpose was to keep from being held there by the next train going south. So Greer was directed by the conductor, when asked if he wanted the cars placed back against the "dead" cars, "to just drop them in clear of the main track," as he was in a hurry. "Dropping them back" meant "to cut them loose whilst moving so that the loose cars would roll back to their place by the dead ones."

The conductor then signaled the engineer to back in, and it appears

Digitized by Google

left, going south several car lengths towards the depot, and when the accident happened was engaged in chalking some cars to indicate their destination.

The plaintiff went in to uncouple or cut loose the two cars in obedience to the instructions as he understood them, not knowing but that the conductor was near at hand to instruct him. He found the pin crooked so that he could not pull it out, and walked with one foot on the outside and the other on the inside of the track for some fifteen or twenty feet, when, as affording him more strength for extricating the pin, he brought both feet within the rails of the track, and after taking a step or two his foot caught on the end of a guard rail, or, as testified to by him, "a splinter on the guard rail at the frog of the switch stuck into the toe of his shoe." With his right hand he had hold of the car in his front and pulled his foot loose, but losing his balance was dragged some distance, when he fell to the ground on his hands and feet and ran in that way some distance.

From the guard rail splinter to where he finally threw his body from under the car when his foot was caught was some twenty-five yards. When he went in to uncouple the cars he testifies they were moving at the rate of about two miles an hour, but their speed was increased rapidly, and they were going, when plaintiff was injured, about five miles per hour. The train struck the "dead" cars violently, knocking them back some seventy feet. A fellow brakeman was on top of one of the box cars and saw Greer when he first started to fall, and testifies that he got down off the car and ran out on the opposite side from him in order to signal Martin, the fireman, who had been left in charge of the engine by the regular engineer.

The fireman was waiting for signals and appears to have known nothing of the trouble until it was about over. In this connection it may be observed that the company introduced an order or certificate of its master mechanic, of date December 11, 1890, to the effect that Martin was declared competent and was authorized to handle an engine, as per rule 207, which made it "the duty of an engineer to handle his engine at all times, but a fireman may do so at a station in the immediate presence of the engine man, provided the master mechanic has declared him competent."

This declaration of competency was done six weeks after Martin had been left in charge of this engine, in violation, it thus appears, of rule 207.

Upon this state of case the defendant company moved the court for a peremptory instruction in their behalf which we think was properly overruled. That there was some negligence we have no doubt, and that too on the part of employes superior to the plaintiff in point of employment and control of the train.

It is true that there must have been gross negligence in this case before the plaintiff can recover, but as was said in the Louisville & Nashville Railroad Co. v. Mitchell, 87 Ky., 337, "certainly the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence."

On the trial much prominence was given to the testimony of various witnesses as to the condition of the guard rail, the crooked pin and the injured condition of plaintiff's arm. This testimony was objected to by the defendant, and we think the objections should have been sustained. These circumstances, if regarded as a mere matter of detail, or as incidents of the transaction, might not have been objectionable, as it is hardly possible to detail the occurrence without stating all the conditions and surroundings as they existed

Digitized by Google

at the time, but witnesses were introduced solely in these matters and for the express purpose of making them the basis of a claim for damages. This was not proper under the pleadings. The unsafe or defective condition of the track, or of any portion of the train's make-up, or the sprained condition of plaintiff's arm, was not the subject matter of inquiry.

These defects were not alleged as grounds of complaint or as matters of negligence. Nor are they so connected or interwoven in any way with the act of driving or operating the train, the only negligence charged in the petition, as to be the proper subject of testimony. That its introduction was prejudicial to the defendant is apparent. Indeed the argument of plaintiff's counsel in this court consists largely in denouncing the negligence of defendant as shown by the unsafe track and the crooked pin. What must have been his appeal to the jury? And while these alleged evidences of negligence are not made the subject of an instruction, and for that reason might be regarded under some circumstances as having been withdrawn from the jury's consideration as a basis for finding damages for negligence, it is evident that such was not the effect in the trial below. But the case having to go back it is proper to say that the amended petition tendered by the plaintiff at the appearance term of the case, setting up these additional grounds of complaint as matters of negligence, should be permitted to be filed.

The cause of action is not charged. The alleged acts of negligence all may have concurred to cause the injury. It was error to the plaintiff's prejudice to refuse to allow it to be filed, but the court having rejected it the defendant was under no legal requirement to meet it by counter proof, and may not have been prepared to try the case on issues not presented by the pleading.

In the case of the C., N. O. & T. P. R. R. Co. v. Barber, decided at this term, where the subject-matter of the negligence charged was the setting fire to a depot, it was held that the construction and combustibility of the structure alleged to have been fired were necessarily and naturally proper subjects of inquiry and of instruction.

In this case the act of driving the car over the plaintiff involved only the operation and management of the train, and was in no way connected with the unsafe condition of the guard rail or the crookedness of the coupling pin.

It is insisted by the company that it was error to its prejudice to permit the witness, Blandford, a life insurance agent, to read as evidence to the jury the American life table, showing the expectancy of a man of plaintiff's age. On this there appears to be no direct authority precedent in this State. The cases in which such testimony has been offered and approved have been those in which loss of life has occurred.

In Thompson's Carriers of Passengers, 565, it is said: "It is also competent for the plaintiff to show that the injuries complained of are permanent in their nature; that he will probably not recover from their effects. And when there is such testimony it is not improper to introduce in evidence standard life tables to show the expectancy of life of one of the age of the injured party as a basis upon which to estimate the amount of damages he should recover."

It is said "that in actions for personal injuries occasioned by the negligence of the defendant, on the question of damages, it is not only proper but important for the plaintiff to show by the evidence his previous physical condition and ability to labor or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary damages" (Joliet v. Conway,

Digitized by Google

119 Ill., 489), and if so, and we think the doctrine appears reasonable, there would seem to be no reason why the ability to labor and the earning capacity of the injured party may be inquired into, the duration of that capacity and ability to labor may not be ascertained by the usual mode of computing the probable length of life. But the proof must be taken subject to the conditions surrounding the particular individual under investigation. Hence the existence of disease tending to shorten life may be shown, and it must also be borne in mind that mere probable continuance of life is shown by such tables; not the duration of ability to work or to earn money in old age. (Sedwick on Damages, volume 2, section 581).

And when we add to these complications that a proper discrimination must be made between the lessening of earning capacity by reason of the loss of a finger and that occasioned by the loss of a leg, we confess the introduction of such testimony will hardly tend to enlighten the jury to any great extent. We can not say, however, that such proof is incompetent. On the whole it would seem better, if the jury are to find for the plaintiff in a given case, that they should be instructed, in estimating the amount of the damages, to take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish resulting from the injury received and the loss sustained by the want of the limb injured and the extent to which he is disabled from making a support for himself by reason of the injury received. (Whalen v. St. L., Kas. C. & U. R. R. Co., 60 Mo., 324.)

By instruction "I," given at the company's instance and properly, the jury were told not to find for plaintiff unless they believed from the evidence "that those superior in authority to plaintiff, in operating the train, with gross negligence ran said train or car wheels over plaintiff's ankle and crushed it."

But in No. 1, given by the court over the defendant's objection, they are told that if the preponderance of the evidence shows that the defendant's employes, in operating their train or failing to control its movements properly, were guilty of ordinary, gross or willful neglect, by which plaintiff was injured, etc., the law was for the plaintiff.

This instruction is erroneous in two respects. The employes must have been those who were superior to plaintiff in point of authority and control, and the negligence must have been gross.

In the leading case of Lou. & Nash. R. R. Co. v. Collins, 2 Duv., 114, and which has been followed invariably since in this court, Judge Robertson said: "It," the company, "is, therefore, responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill—as to strangers, ordinary negligence is sufficient; as to subordinate employes associated with the engineer in conducting the cars the negligence must be gross; but as to employes in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient;" and it may be here added that a fireman, when acting as an engineer, is, of course, an employe superior to the brakeman. (Lou. & Nash. R. R. Co. v. Moore, 83 Ky., 675.)

At the defendant's instance, and over the plaintiff's objection, the jury by instruction "A" were told that if the risk and danger of going between the cars was apparent, open and visible to plaintiff when he went in to do the uncoupling of the cars the jury should find for the defendant.

Digitized by Google

This is misleading and erroneous. The brakeman may, indeed must, take the ordinary risk of going between cars when in motion, as the practice is shown to exist by common acquiesence if not at the express direction of the companies, and such risk is necessarily open and visible, but it by no means follows that the conductor and engineer may desert him in his hour of peril and the company be relieved of the consequences of the gross negligence of their officials if guilty of such negligence, although the danger and risk imposed on the inferior employe be open and visible.

The errors considered on the two appeals appearing to have been to the prejudice of both plaintiff and defendant, this seems to be a proper case for a division of the costs of the appeals, and such may be made.

Let the judgment be reversed and cause remanded, with directions to proceed as herein indicated.

HOWARD INS. CO. V. OWEN'S ADM'X.

(*Filed March* 18, 1893.)

1. *Statute of frauds—Parol contract of insurance*—A parol contract of insurance for one year is not within the statute of frauds.

2. *Insurance—Authority of agent*—The ratification by the company of contracts of insurance made by its agent on property located in a village ten miles from H., his residence, is sufficient evidence to remove all doubt of the agent's authority to issue policies on property in such village under his letter of appointment as agent of the company at H. and *vicinity*.

3. *Same—Contracts*—Where a verbal contract of insurance is made by the agent, and the insured subsequently fills out a written application for insurance upon the assurance of the agent that it was intended simply as a description of the property insured, and not to impair the insured's rights under the verbal contract, the making of such application can not release the company from its obligation under the parol contract.

4. *Same—Instructions to agent*—The fact that the agent of the company violated his instructions in issuing a policy on a certain building constitutes no defense to an action on the policy after a destruction by fire of the buildings.

Augustus E. Willson and Wm. Lindsay for appellant.

R. H. Cunningham and Bullitt & Shields for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

February 24, 1884, appellee J. V. Owen, residing and having a storehouse in the village of Corydon, Henderson county, communicated by telephone with R. G. Adams, agent at the city of Henderson, ten miles distant, of appellant, the Howard Insurance Co., about obtaining a policy of insurance on his building; and it was on that occasion agreed by Adams to insure it for one year for the amount and at the consideration fixed upon by them, Owen being informed by Adams in substance, and relying upon the assurance that the contract was made and his storehouse then insured by the Howard Insurance Co.

But about February 29 Adams requested Owen to make a formal application to the company for the insurance, and sent the blank for

Digitized by Google

that purpose by his special solicitor, Hardwick; though at the same time Owen was assured his right under the verbal contract should not be thereby impaired.

Owen did, as requested, fill up and sign the application, showing situation and character of his house, and delivered or sent it to Adams, who forwarded it to the general manager of the company at Toledo, Ohio.

March 6 Adams made entry of the verbal contract in the policy register kept by him for such purpose, of which he notified Owen; and March 13 he again notified him his property was insured, and also that a written policy, made out in pursuance of the verbal contract, would be sent to him as soon as a supply of blanks, of which he then had none, was received from headquarters of the company.

March 15, Adams having received the policy already signed in blank by the president and secretary of the company, filled up and countersigned it himself as agent. But March 15, at night, after execution, but prior to delivery of the policy to Owen, the storehouse was totally destroyed by fire.

It appears the General manager at Toledo upon receiving the application made February 29 rejected it, and by letter dated and mailed March 12 to Adams, at Henderson, notified him of the rejection. Nevertheless, March 17 Adams accepted from Owen the amount of premium previously agreed upon, though not before paid, and delivered to him the policy, running from March 6 for one year; and this action was brought to recover on it the amount for which it is alleged the storehouse was insured.

On the former appeal, this being the second, the single question was as to the sufficiency of the plea of limitation sustained by the lower, though decided adverse to defendant by this court. But we are now required to revise a judgment in favor of plaintiff for amount sued for.

The statute of frauds has no application to the case, nor does the petition contain two distinct causes of action as counsel argues. In Security Fund Insurance Co. v. Kentucky Marine Insurance Co., 7 Bush, 81, it was held by this court, in accordance with established doctrine, that "a contract to issue a policy as an executory agreement to insure may be binding without any written memorial of it;" and further, that "a court of equity having jurisdiction for specific enforcement would, to avoid unnecessary circuity, adjudge damage just as if a policy had been executed and an action had been brought on it for loss of the thing thereby insured."

This action is not, however, based at all upon the verbal agreement, but alone upon the policy executed and delivered in pursuance of it; and evidence in regard to terms of that agreement, and circumstances under which it was made, would be neither necessary nor pertinent except for the purpose of determining the decisive question whether Owen was legally entitled to the policy, and Adams had authority and was bound to deliver it at the time he did so.

On the trial the jury was instructed that "Adams was general agent of the defendant for the purpose of making contracts of insurance and issuing policies of insurance for the defendant against loss or damage by fire upon property situated in Henderson, Ky., and *vicinity*, subject to the limitations contained in the paper entitled instructions for agents, filed with deposition of Adams and read in evidence."

It seems to us that the defendant had no cause to complain of that instruction, because Adams was, in terms of the paper referred to, appointed its agent and empowered to make contracts of insurance

Digitized by Google

and to issue policies of insurance. Besides, his possession of blank policies, signed by the president and secretary, afforded evidence of his general agency sufficient to justify a person making a contract of insurance with him, and in accepting and treating as valid and enforcible a policy issued and delivered by him.

The qualifying clauses of that instruction, however, might have been prejudicial to plaintiff, if not explained by other instructions, which seems to have been done. For the power of an agent can not be limited by special private instructions so as to affect a contract of insurance unless the insured had notice, or there is something in the nature of the business or circumstances of the case to indicate the agent acted under such special instructions. (May on Insurance, section 126.)

Very many exceptions to ruling at the trial on competency of evidence were taken, and are now urged as reason for reversal of the judgment. But we need not refer to them in detail because satisfied, after examining the bill of exceptions and evidence, that the facts we have recited were, beyond question, established by evidence entirely competent; and as these facts clearly involve an agreement between Owen and Adams for insurance by defendant of the storehouse in question, and for delivery of a policy of insurance and also authority of Adams to make the contract and deliver the policy, there necessarily follows the right of Owen to recover the amount at which the property was agreed to be insured, unless he did some subsequent act equivalent to a waiver or estoppel of his right to the policy or acted in bad faith or collusion with Adams to defraud the Howard Insurance Co. For if he was, in virtue of the parol agreement, entitled to the policy, he was not deprived of that right, nor was the company released from its contract to deliver it by reason of intervening destruction of the property insured.

A question is, however, made as to the meaning and comprehensivenesss of the word *vicinity* used in the letter of Adams' appointment as agent. But it seems to us, if there was any doubt about authority of Adams as agent to make contracts for insurance of property in the village of Corydon, it would be removed by the conduct of defendant sanctioning contracts for insuring other property in that place, which appears from evidence in this case was done.

Although ordinarily an application for insurance would tend strongly to show the contract to insure was not completed, and that the right of a company to decline making it still existed, yet in this case the evidence is that it was distinctly agreed by Adams the application was intended simply as description of the property, and would not impair Owen's right under the previous parol agreement nor release the company from its obligation thereby incurred; and if the application was made by Owen under such circumstances and upon such assurance, we do not see how that act can be now construed as a waiver of his right to the policy already acquired by the parol contract, or as a release of the company.

It appears that the storehouse of Owen was in a range of frame buildings, and Adams was, in his letter of instructions, forbidden to insure property so situated; and, therefore, the general manager probably would, if informed of the fact pending negotiations between Adams and Owen, have prohibited consummation of the contract, as he did reject the application when received by him; but it appears Adams was acquainted with the condition and situation of the property at the time he agreed to insure it, and as the company gave him authority to make the contract of insurance and for delivering the policy, it should suffer for any apparent or real breach

Digitized by Google

of trust by its agent, and not Owen, the insured, who relied and acted upon the faith of the agreement.

There is no evidence that Owen had notice of such restriction or limitation of the authority of Adams as agent, or that he acted in bad faith in any respect whatever, and the jury so found.

It appears that the letter of the general manager rejecting the application was received by Adams before the delivery of the policy, but after the property was destroyed. But if defendant was legally bound by agreement of its agent to deliver the policy, and Owen's right to it had become vested before destruction of the property insured, then Adams did no more in delivering it March 17th than a court of equity would have compelled the company to do.

Whether Owens was entitled to the policy, and, as a consequence, the right to recover on it, was a question to be determined by the jury under instructions of the court, which appear to us to fully and accurately cover every issue; and as there is scarcely any room for controversy about any material fact in the case, the verdict of the jury in favor of the plaintiff was inevitable.

Judgment affirmed.

DICKSON'S ADM'R V. LUMAN, &C.

(*Filed Jan.* 7, 1893.)

Parol authority to sign name of another as surety insufficient—Mortgages—One can not be held liable as the surety of another on a note, even when his name as surety is signed by the other in his presence and by his consent and direction. The authority to sign the surety's name must be in writing.

And the authority to sign the surety's name to a mortgage to secure the debt must also be in writing. The statute applies as well where the property of one is sought to be bound for the debts of another, as where the surety is personally to be held liable.

Cochran & Son and Edward W. Hines for appellant.

R. Reid Rogers and W. J. Hendrick for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Lewis.

In pursuance of a previous understanding between them, James Dickson loaned to H. R. Luman $550, receiving therefor a promissory note already executed by him, and purporting to have been likewise duly executed by E. P., C. A. and J. E. Luman. There was at the same time delivered to Dickson a mortgage previously executed and acknowledged by H. R. Luman, and purporting to have been likewise executed and acknowledged by his three brothers, on a tract of land, in which each of the four persons had an equal and undivided interest.

It appears that H. R. Luman was principal in the note, and as such received and appropriated to his own use the borrowed money, his brothers being merely sureties. It further appears that neither one of the sureties in person signed or in writing authorized H. R. Luman to sign his name to either the note or mortgage, though they admit he did so in their presence and upon their verbal authority. Nor, though a deputy clerk so certified, did either one of the sureties in fact ever acknowledge the mortgage. On the contrary, that offi-

Digitized by Google

cer, as he testified, wrote and officially signed the certificate of their acknowledgment before either of the sureties ever saw the mortgage or their names were subscribed to it.

Section 20, chapter 22, General Statutes, provides that "no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing signed by the principal; or if the principal does not write his name, then by his sign or mark, made in the presence of at least one credible attesting witness;" and, according to the proper and uniform construction of that statute by this court, the sureties in this case clearly can not be held liable on the note for amount of which personal judgment is sought against each of them. (Ragan v. Chenault, 78 Ky., 545; Billington v. Commonwealth, 79 Ky., 400; Simpson v. Commonwealth, 12 Ky. Law Rep., 619.)

In the first mentioned of those cases it was held that even a subsequent parol ratification or admission of liability by the surety will not bind him if he was not already liable in meaning of the statute. And in the other two cases it was substantially held that the fact of actual presence and assent of the surety to his name being signed by another will not make him liable in the absence of written authority; and if the sureties are not in the first instance bound by the note it would at the outset seem unaccountable how a lien on their property for satisfaction of it can exist in virtue of an attempted mortgage, that, though part of the same transaction, was never executed by them in person nor authorized in writing to be executed for them by another; for there is no reason why the statute does not as well and fully apply to the act of an agent in signing without written authority the name of a surety to a mortgage, whereby his property becomes liable, as in signing his name without written authority to a note, for satifaction of which his property becomes just as certainly and inevitably bound.

The language of the statute is comprehensive enough to include a mortgage upon property of a surety made to secure payment of a debt of his principal, and looking to the purpose of it, we think it should be applied to every act of an agent having the effect to bind either the property or person of a surety. And such has been the practical interpretation of the statute by this court.

In Ragan v. Chenault is this language: "The mischief intended to be provided against by this statute was to prevent the use of one's name as surety in obligations so as to fix upon him a liability, with no other evidence than alleged parol authority given the principal or some other person to sign the surety's name." And, as said in Bellington v. Commonwealth, "the language of the statute seems to be imperative and without exception that in all cases of suretyship, in order that the act of one may bind another as surety, such act must be done under written authority from the one held to answer as surety."

But counsel refers to section 1, chapter 22, where it is provided "that no action shall be brought to charge any person upon any contract for the sale of land or any lease thereof for a longer term than one year, unless the contract be in writing signed by the party to be charged therewith or by his authorized agent," and argues that because an agent may, under that statute, though acting under mere verbal authority, bind his principal, he may also, upon mere verbal authority, sign the name of a surety to a mortgage and bind his property for the debt of another.

That statute, it seems to us, even if applicable to mortgages at all, does not relate to acts of an agent having effect to bind the person or

Digitized by Google

property of a mere surety. But section 20, already quoted, which is exceptional in its nature, alone applies to this case, and we think was intended to be not at all restrictive but comprehensive enough to apply to mortgages or other incumbrances upon the property of a surety created or attempted to be created for the purpose of satisfying or answering for the debt of another.

Wherefore, the judgment dismissing the action as to the sureties in this case is affirmed.

LOUISVILLE WATER CO. V. CLARK, SHERIFF.

(*Filed Feb.* 9, 1893.)

1. *The county court had jurisdiction under* section 2, article 7, chapter 92, General Statutes, in force in 1885, not only to examine the tax book and correct errors of the assessor in relation to valuation of property, but to correct errors in the assessment of any tax or county levy against any person for which he was not legally bound.

2. *Same—Judicial act—Res adjudicata*—The action of a county court in determining that the property of a certain corporation could not be legally assessed for taxation for certain years, was a judicial act within its jurisdiction, and is conclusive on the State and county, as well as the taxpayers, until reversed or vacated.

And when the assessment has been so set aside by the county court, the sheriff has no right to attempt to collect taxes for those years.

3. *The pendency of an action in another court to collect the same taxes* did not render the judgment of the county court void when it appears that the other court had no jurisdiction of the matter before it.

T. L. Burnett, Lane & Burnett and William Lindsay for appellant.

Helm & Bruce for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

The Louisville Water Co., a corporation, brought this action November, 1889, for injunction restraining Wm. Clark, sheriff of Jefferson county, levying on and selling its property for satisfaction of State revenue taxes claimed by him to be due for each of the years 1882-3-4-5, which it was alleged in the petition he was about to do.

Reversal of the judgment of the lower court dissolving the injunction, and for the payment of the sum of taxes claimed, is contended for upon two grounds: First, That by an act of the General Assembly, approved April 22, 1882, the Louisville Water Company was in terms exempted from payment thereafter of all taxes, State, municipal and special; second, that by judgment of the Jefferson County Court, November 12, 1885, the assessment of appellant's property for taxation, for the years named, was vacated and set aside.

In 1885 the sheriff, the Commonwealth being united as plaintiff, brought an action, asking that the Louisville Water Co. be compelled to show cause why it should not, within a given time, pay the same taxes now in question into court, and upon its failure to do so that a receiver be appointed. But upon appeal from the judgment, which was rendered according to prayer of the petition, this

Digitized by Google

court, without passing upon any other defense, held that in absence of express legislative authority the taxes could not be recovered by suit, and a reversal followed. (Louisville Water Co. v. Commonwealth, 89 Ky., 244.)

In 1888, the property of the company having been assessed for taxes for the year 1887, and the sheriff being about to sell it therefor, an action like this was instituted for an injunction, which was, by judgment of the lower court, perpetuated. But that judgment was reversed by this court upon the ground the act of April 12, 1882, exempting propperty of the company from taxation was, as held by a majority of the court, unconstitutional; and upon appeal to the Supreme Court of the United States the decision was affirmed. (143 U. S., 1.) But that court did not directly pass upon or decide as to validity of the act of April 12, 1882; the questions mainly discussed, and upon which the decision was rendered, being whether, according to a proper construction of an act of May 17, 1886, the act of April 12, 1882, was repealed thereby, and, if so, whether the Legislature had power to repeal it, both of which questions were determined affirmatively.

There is, however, contention by opposing counsel in this case about the meaning and effect of the opinion of the Supreme Court in regard to the validity of the act exempting property of the company; but we do not deem it now necessary to inquire whether that opinion does in fact or was intended to conflict with the one of this court in same case, because it seems to us the judgment was erroneous as to the second ground of defense.

It is stated in the petition, without denial, that July 20, 1885, the sheriff of Jefferson county reported in writing to the county court clerk that the property of the company not having been previously assessed for taxation for any of the years named, he, the sheriff, then valued and assessed it for each of said years at the sums mentioned in the report, which was on that day filed in the office of the county court clerk; that on notice to the sheriff the company, October 12, 1885, moved the Jefferson County Court to correct as erroneous and vacate the said assessment upon the ground that the property of the company was not liable to but exempt from taxation; that the Commonwealth and sheriff appeared by attorney and objected to the motion, which was, November 12, 1885, heard and tried by the county court; and then and by said court judgment was rendered and entered of record that the property of the company was, in virtue of the act of April 12, 1882, exempt from liability for taxation in any form, and a copy of that judgment, attested by the clerk of the court, was ordered to be delivered to the sheriff of Jefferson county as a credit on and against said assessment.

The effect of that judgment, if effectual for any purpose at all, was to nullify the assessment which the sheriff undertook to make, and, consequently, there existed no authority whatever for the sheriff or any other officer to collect any taxes from the Water Co. for the four years in question, much less to levy on and sell property for that purpose. For the power of the sheriff to collect taxes must be preceded by a legal assessment and ascertainment of amount to be collected from each taxpayer.

Two questions, therefore, arise: First, whether the county court was at that time invested by statute with authority to pass upon legality of the assessment made by the sheriff against the company; second, whether his judgment or order, made in respect thereto, was judicial or ministerial.

Section 2, article 7, chapter 92, General Statutes, then in force, is as

Digitized by Google

follows: "A person improperly charged with any tax or county levy, before he has paid the same, may make proof thereof to the county court in which the assessment was made, and the court may cancel the same. A certificate of the fact by the clerk, if delivered to the sheriff, shall exonerate the person from the payment of so much as may be decided to be a wrongful assessment, which certificate, if produced, shall entitle the sheriff to a credit for the amount in his settlement with the auditor."

As a copy of that judgment was ordered to be delivered to the sheriff the presumption is the duty was performed; besides, the sheriff, being a party to the proceeding, had notice thereof, could have obtained credit in his settlement with the auditor.

It seems to us very clear it was intention of the Legislature to invest by that section the county court with authority to do more than merely to examine the tax book and correct errors of the assessors in relation to valuation of property listed, which duty was, by article 6, imposed upon the board of supervisors appointed by the county court. Indeed the language of section 2, article 7, imports jurisdiction of the county court to correct assessment in every case when it appears a person was improperly charged, not simply in respect to valuation, but with any tax or county levy for which he was not legally bound.

The authority or jurisdiction of the county court being to that extent and for that purpose conferred, it naturally follows that his judgment or order in this case was not a ministerial but a judicial act; and, being so, that judgment or order was, until reversed or vacated, conclusive as to legality of assessment of the company's property, and, therefore, as to authority of the sheriff to collect of it taxes for the four years named.

As heretofore held by this court, those duties of a public officer are ministerial, in the performance of which he is vested with no discretion, even though such performance requires exercise of discretion. But when such officer may exercise both discretion and judgment as to how a duty is to be performed, the performance of the duty is judicial, though being at the same time ministerial. See Cassidy, auditor's agent v. Young, county judge, 13 Ky. Law Rep., 512, where the distinction between an act that is merely ministerial, in regard to the manner of performing which the officer may be subject to writ of mandamas, and an act that is judicial and, consequently, final and conclusive until reversed or vacated in some mode provided by law. The decisions of this court on the subject are in that case cited, and the application of the rule by which the distinction is to be determined, as heretofore made in various cases by this court, is shown.

In that case the question before the county court was whether estate of a certain person deceased should be listed and assessed by the court, there having been, up to that time, a failure and refusal of the person to list the property.

There, though the motion was by the auditor's agent for the property to be assessed, the duty to be performed by the county court was no more judicial than was the duty performed by the county court in this case; for in both alike the question decided was whether the property was legally assessable, and, consequently, if the act in that case could be, as was held to be, judicial as well as ministerial, it is bound to be so held in this case.

It is, however, contended that the order or judgment of the county court was void because rendered during pendency of an action in the chancery court, before mentioned, to recover the taxes

Digitized by Google

by suit. But it is a sufficient answer to that proposition that the chancery court, as decided by this court, had no jurisdiction of the subject of that action.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

BOWERS' EX'OR, &C. V. LINN, ASS'EE, &C.

(*Filed April* 26, 1893.)

Parol testimony to vary note—In an action upon an unconditional promissory note the obligors can not, without an allegation of fraud or mistake, plead as a defense that it was agreed at the time of the execution of the note that they would not be required to pay any part of the note further than such sum as could be realized out of a stock of goods for which the note was executed. To allow such a defense would annul absolutely the written contract.

Fenton Simms for appellants.

L. C. Linn for appellees.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Barbour.

To this action upon a plain note, obligating the obligors to pay the plaintiffs $2,643.39 three months after date, the defendants answered that the note was executed for a stock of goods belonging to Knight, Meadow & Co., which was sold to the obligor, W. E. Brown, by the plaintiffs, as their assignee, for the benefit of their creditors; that it was at the time agreed between the assignors, the assignee and the obligors that neither of the obligors would be required to pay any part of the note further than such sum as could be realized out of said goods; that the goods were to be turned over to the assignors to sell; that this was done, and "they thereafter had full control and possession of them and sold and used them until W. E. Brown's death, when his administrator took charge of the balance of them and sold them and paid the proceeds over to the assignee, which were credited on the note;" that W. E. Brown had no interest in said stock of goods or the profits realized; that the entire transaction, as well as the use of the names of the obligors, was a friendly act on the part of the obligors for the sole benefit of said firm and assignee. There was no mistake or fraud alleged, and if these facts could be pleaded they would annul absolutely the written contract. The answer, therefore, presented no defense whatever.

The record shows that an amended answer was offered, but the court refused to allow it to be filed. It was not made a part of the record by order of the court or by bill of exceptions, and though the clerk, in making out the transcript, has copied into it a paper which is styled an amended answer, we can not consider it.

The judgment is affirmed with damages.

Digitized by Google

MONTAGUE V. BELL.

(*Filed May* 10, 1893.)

1. *Payment of note by renewal*—The intention with which a renewal note is accepted will determine whether or not the original note is paid and discharged by the acceptance of the renewal.

In this case the intention that the renewal note should operate as a payment is shown by the indorsement of the word "paid" upon the old note, with the knowledge and consent of the payee.

2. *Same—Limitation*—Where in an action upon a promissory note the defendant pleaded payment by the execution and acceptance of a new note in satisfaction of the note sued on, and the plaintiff afterward set up the new note by amended petition, more than fifteen years after it matured, the plea of limitation as to the new note should have been sustained, as limitation as to it continued to run until it was made the basis of an action against the defendant, which was not due until the amended petition was filed.

Weir, Weir & Walker for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Presiding Judge Yost.

Is a note given by the payor and accepted by the payee, in lieu and in satisfaction of another note against the same party, a payment of the original note? Although, as a general principle, a promissory note will not of itself discharge the original cause of action, yet if by agreement it is received as payment it satisfies the original contract.

On the first day of July, 1875, J. J. Montague, then a resident of Chicago, Illinois, executed and delivered to one John M. Wilson his promissory note for $290, due and payable at the "Norme National Bank" sixty days after date.

On the maturity of the note Montague proposed to renew the note and Wilson accepted the proposition, whereupon a second note for the same amount, payable to the same party, dated September 2, 1875, and due thirty days thereafter, was signed by Montague and delivered by him to Wilson's son, his agent in the transaction, who promised and agreed to take up the first note in the bank where it was deposited and deliver it to Montague, and we find on the back of the original note the following stamped endorsement: "Central National Bank. September 2, 1875. Paid."

This note was never delivered to Montague, who failed before the maturity of the second note and afterwards come to this State, where he resided until the institution of this action against him.

Several years after these transactions Wilson became involved and sold to the plaintiff and appellee, Joseph Bell, his demand against Montague, delivering to him at the time both notes, signing by mistake, perhaps, his name across the back of the one of date July 1, 1875.

Bell, a lawyer, who received the demand in payment of legal services rendered by him to Wilson, followed Montague to Kentucky, and on August 19, 1889, brought this suit against him on the first note. Montague filed his answer, pleading payment of the note sued on by the execution and delivery to Wilson of the second note. This answer was filed September 1, 1889.

On April 8, 1891, after several intervening orders had been made in the action, the plaintiff filed an amended petition in which he set

Digitized by Google

up and asked for a judgment upon the renewal note of September 2, 1875. To this petition Montague filed answer in which, after pleading payment, he alleged that more than fifteen years had elapsed from the maturity of the note to the filing of the amendment, and this fact he relied upon in bar of the plaintiff's right of recovering them.

The law and facts were submitted to the court, without the intervention of a jury, who, in the separate conclusions, found that "the note of July 1, 1875, was not taken up or renewed or paid by the execution of the note of September 2, 1875, or otherwise, nor has it ever been paid or satisfied," and rendered a judgment against the defendant for the amount sued for, with interest from September, 1875.

We can not agree with the court in this conclusion. It is clear that the note of September 2, 1875, was executed by Montague and accepted by Wilson's agent, his son, J. A. Wilson, in renewal of the first note.

Montague testified that Wilson's agent accepted the new note in payment of the old, and promised and agreed to deliver it to him; that young Wilson did so accept this note is conclusively shown by the endorsement of "paid" on the back of the original note, which was put there certainly by the knowledge and consent of himself and his father, and presumably at their request. This testimony is uncontradicted, and we, therefore, find that the evidence establishes the fact that Wilson agreed to accept the second note in satisfaction of the first.

It is true, as has been often held, that where a bill or note is given in demand of a former one, and the payee returns the original, the renewal, in the absence of a special agreement, operates merely as a conditional payment thereof. The intention with which the new note is accepted will determine whether or not the original note is paid and discharged by the acceptance of another in renewal of it, and this intention is of course best shown by proof of an express agreement of the parties as to the effect of the renewal.

In Castleman, &c. v. Holmes, 4 J. J. M., 1, the court says: "Where a debt is continued by renewing notes, each renewel is to be regarded as a new contract. The old contract is then settled and the old note is then generally canceled, and thus there is no other contract in existence but the new one. Its date, of necessity, then, must be the time when the debt was contracted. Then transactions of running debts by new notes are equivalent to paying the existing debt and again borrowing the money. The old debt is paid off by the new."

Here the old note was canceled. Wilson had no cause of action except upon the new note, and not upon that until its maturity. At its maturity the statute of limitations began to run and continued until it was made the basis of an action against the debtor.

This was not done until the filing of the amended petition, between which time and the maturity of that paper more than fifteen years had elapsed.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Digitized by Google

SUPERIOR COURT ABSTRACTS.

Scott, &c. v. Strauss, Pritz & Co.

Filed March 22, 1893. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *The fraudulent intent of a debtor in making a deed of assignment* for the benefit of creditors invalidates the assignment, although its effect would have been a pro rata distribution of the debtor's property among his creditors.

2. *An act to operate as an estoppel* must be one upon the faith of which some other person has acted to his prejudice.

Where attaching creditors were insisting that an assignment by the debtor was fraudulent and were taking evidence to support their contention, they did not by presenting their demands in a suit by the assignee for a settlement of the assigned estate estop themselves from continuing their attack upon the assignment.

3. *Compensation of assignee where assignment is set aside*—Where a deed of assignment is set aside for fraud the assignee is not entitled to compensation out of the assigned estate for his services.

4. *Rights of parties under fraudulent assignment*—Neither the assignee nor the creditors acquire any rights whatever under a fraudulent deed of assignment.

W. G. Bullitt and Gilbert & Kohn for appellants; Rhey Boyd for appellees.

Commonwealth, by, &c. v. Powell.

Filed March 22, 1893. Appeal from Clay Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Liability of sheriff for taking insufficient replevin bond*—In this proceeding against a sheriff by rule to show cause why he should not pay the amount of a *capias pro fine* which he allowed the defendant to replevy with insufficient sureties, an answer alleging that the sureties swore that they owned property worth a sum which was many times the amount of the *capias* did not constitute a sufficient defense. The answer should show that the sheriff acted in good faith, and should allege that the sureties, at the time of the execution of the bond, severally or jointly, had enough property subject to execution to satisfy the amount of the bond.

2. *Waiver of objection to form of proceeding*—There being no objection either in the lower court or in this court to the remedy or mode of procedure, any objection that might be urged on that account will be treated as waived.

W. J. Hendrick for appellants.

Haycroft v. Walden.

Filed March 29, 1893. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Appeals to circuit court—Time for prosecuting appeal*—The circuit court having upon appeal reversed a judgment of the quarterly court quashing an execution, that judgment of reversal was a judicial determination that there was, when the execution issued, a valid judgment in the quarterly court, and is, therefore, a bar to an appeal from the judgment upon which the execution issued, the appeal not having been prosecuted until after the expiration of sixty days from the issual of the execution. The court will not now inquire, for the purpose of extending the time for prosecuting the appeal, whether at the time the execution issued the orders of the quarterly court, including the judgment upon which the execution issued, had been properly signed, the refusal of the circuit court to quash the execution being conclusive as to that matter.

Digitized by Google

2. *Same—Amount in controversy*—The motion to quash the execution was an independent proceeding, and in testing the appellate jurisdiction of the circuit court the costs embraced in the execution are to be estimated as a part of the amount in controversy.

3. *Reversible errors*—Although the weight of the evidence seems to be with defendant, this court will not, after four jury trials, reverse a judgment for plaintiff upon the ground that the verdict is against the evidence.

4. *Damages from sale of worthless seed—Counterclaim*—In this action to recover the price of seed rye, in which the defendant pleaded as a counterclaim the damages which he alleged he had sustained by reason of the fact that the rye was worthless, the court properly instructed the jury to find for plaintiff if the rye, when delivered, was of the kind and quality and in the condition suitable for seed; and if the rye was not as represented and defendant or his agent did not know or could not ascertain by an examination, or by ordinary diligence, that it was not as represented, that they should find for defendant on his counterclaim the difference between the value of the crop raised and the value of the crop which would have been raised had the seed been good seed.

5. *Evidence to prove uncontradicted allegations*—Although the allegations in the answer that but little of the rye came up, and that it made no crop, are not denied, yet, as defendant introduced witness after witness to prove these uncontradicted allegations, he can not now complain that plaintiff was allowed to introduce evidence tending to contradict their statements.

6. *Presumption as to qualification of special judge*—In the absence of evidence to the contrary the presumption is that the special judge who tried the case was qualified.

Haycraft & Haskins for appellant; C. S. Walker for appellee.

K. C. R. R. Co. v. Musselman.

Filed March 29, 1893. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Railroads—Killing of stock on track*—In this action against a railroad company to recover damages for the killing of stock by one of defendant's trains the evidence was not sufficient to authorize the court to instruct the jury that the statutory presumption of negligence was overcome.

2. *Same—Prejudicial error*—The plaintiff having stated upon cross-examination that he did not make certain statements to defendant's agent, the action of the court in allowing him to state, over defendant's objections, the whole conversation he had with the agent was not prejudicial, as the defendant afterward introduced the agent to prove the conversation he had with plaintiff, and he was examined and cross examined with regard to it.

3. *In the absence of any avowal as to what a witness would state*, if allowed to answer a question, this court will not inquire whether the trial court erred in refusing to permit him to answer the question.

4. *Instructions to jury*—An instruction authorizing a verdict for the plaintiff on a hypothetical state of facts which assumed that the stock were in peril and that there was a collision, when these facts were in issue, would have been erroneous. But such an objection is not well taken to one of the instructions in this case, as the instruction, considered as a whole, as it must be, tells the jury that they can not find for the plaintiff unless they believe from the evidence that there was a collision.

T. T. Forman for appellant; J. T. Simon for appellee.

Brown's adm'r v. Brown.

Filed March 29, 1893. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *In this action upon a lost note*, in which the defense is *non est factum*, a verdict for the defendant is not supported by the evidence.

2. *Instructions as to burden of proof*—In a case like this the court should

Digitized by Google

never tell the jury that the burden is upon one party or the other, as the giving of such an instruction, although not alone ground for reversal, may be misleading.

Kennedy & Kennedy for appellant; Ross & Owens and John P. Norvell for appellee.

CALDWELL v. STEVENS.

Filed March 29, 1893. Appeal from Campbell Chancery Court. Opinion of the court by Judge Barbour, reversing.

1. *Injunction to prevent suit in another State*—When a debtor, resident in this State, has temporarily carried into another State property which is exempt from seizure from debt under the laws of this State, a court of equity in this State may, at his suit, enjoin another citizen of this State from proceeding to subject the property in a court of the State to which it has been carried. By such an injunction the court of this State does not pretend to control the foreign court, but merely acts upon the parties *in personam*, according to the equities between them.

2. *Exemptions*—Under the exemption statute of May 1, 1886, which provides that the exemptions therein provided for shall not apply to debts contracted before the 1st of June, 1886, one who has paid a note upon which he was bound as surety can not be regarded as becoming a creditor of the principal until the debt was paid to the payee.

M. R. Lockhart for appellant; L. J. Crawford for appellee.

COMMONWEALTH v. ENRIGHT.

Filed April 5, 1893. Appeal from Kenton Circuit Court. Opinion of the the court by Presiding Judge Yost, affirming, Judge Brent dissenting.

1. *An indictment for a common nuisance* charged to have been committed by defendant by permitting upon his premises acts not *malum in se*, but merely *malum prohibitum*, is not valid unless in addition to the words "against the peace and dignity of the Commonwealth" it concludes with the words "to the common nuisance of the good citizens of the Commonwealth there lawfully being and abiding," etc., or words of similar import.

This rule applies to an indictment by which the defendant is charged with committing a nuisance "by permitting divers persons to assemble in a house in his occupation and under his control, and then and there engage in betting, winning and losing money on horse races."

2. *Same—Proof of nuisance*—Under such an indictment it is not necessary, after proving the acts alleged, to also prove that they were such an annoyance to the general community as to make them a common nuisance, as that may be inferred. In pleading, however, the rule is different, as all essential facts must be alleged, and a fact not alleged can not be inferred from one that is alleged.

W. J. Hendrick and N. W. Cleary for appellant; O'Neal, Phelps & Pryor and Hallam & Myers for appellee.

KELLAR v. EDMONSON.

Filed April 5, 1893. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *Although one of several instructions taken alone might have been misleading*, yet as it is manifest that it could not, when considered in connection with the other instructions, have misled the jury, the court will not reverse for the error, if any.

2. *Additional instruction given by request of jury*—The jury having, after retiring to their room and considering their verdict for several hours, returned into court and asked an additional instruction as to the mode of ascertaining certain expenses incurred by defendant, an instruction then given by the court telling the jury that they "should deduct" such expenses from the amount they were authorized to find for plaintiff, even conceding that it was

Digitized by Google

in the nature of a peremptory instruction to find for plaintiff, could not have been prejudicial, as it is manifest that when the jury made their request of the court they had agreed upon a verdict for plaintiff, and merely desired to know the credits to which defendant was entitled.

Knott & Edelen and Z. Gibbons for appellant; Watts Parker and Bronston Allen for appellee.

Jones & Denton v. Terhune.

Filed April 5, 1893. Appeal from Fayette Circuit Court. Opinion of the court by Judge Brent, affirming.

Material man's lien—In this action in which a lien is asserted upon a house for materials alleged to have been furnished to defendant under a contract with him and used by him in the erection of the house, as the evidence shows that the materials were furnished to the contractor who had undertaken to erect the house for the defendant, and that the plaintiffs' contract was with the contractor, there can be no recovery. The mere fact that the defendant agreed to pay the plaintiffs out of the money due the contractor, whatever amounts the contractor might order paid to plaintiffs on account of material, does not authorize a recovery, as a cause of action could arise under that agreement, if at all, only upon defendant's failure to pay an account which the contractor gave him an order to pay.

Tanner & Forman for appellants; R. A. Thornton for appellee.

Broadfoot, &c. v. Rowe.

Filed April 5, 1893. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Right of surviving partner to maintain action—Waiver of defect of parties*—Where a contract was made with one who afterward formed a partnership, by the terms of which the contract was to inure to the benefit of the firm, the partner with whom the contract was made having died, the surviving partner was the real party in interest; and if the administrator of the deceased partner was a necessary party to an action by the surviving partner to recover damages for breach of the contract, the defendants should have made the question by answer, the objection being in the nature of a plea in abatement, and failing to do so they waived the defect.

2. *Remission of part of excessive verdict*—When there is a motion for new trial on the ground of excessive damages the plaintiff may, if he chooses, remit a portion of the verdict to obviate the objection. The exceptions to this rule are when the verdict is the result of passion or prejudice on the part of the jury, or when it can not be determined what the jury acted upon or how they made up the verdict under the charge of the court so as to correct the error and arrive at the amount they should have given.

In this case, the jury having found a verdict justified by both the evidence and the instructions, and the excessive damages being due to an error in the instructions, the lower court, with plaintiff's consent, properly remitted so much of the verdict as was necessary to cure the error in instructions, the amount of the damages attributable to that error being manifest.

Husbands & Husbands for appellants; J. E. Rowe and Campbell & Campbell for appellee.

Riley v. Riley.

Filed April 5, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming on original and cross appeal.

1. *Principal and agent—Compensation of agent for services*—In this action for a settlement of appellant's accounts as agent for appellee, the widow of his deceased brother, the chancellor properly refused him an allowance for his services, as he undertook the agency without intending to charge for his services, and the appellee understood that he would make no charge.

Digitized by Google

2. *Same*—The appellant having come to Kentucky from the State of Kansas by request of appellee to manage her business he was entitled to an allowance for traveling expenses in coming to Kentucky and in going back to and returning from Kansas. Although he had been contemplating a visit to Kentucky, yet as the importunities of appellee induced him to come sooner than he had intended, and this entailed upon him considerable loss and also made it necessary for him to return to Kansas to look after his business, as was to be reasonably expected, appellee should not complain of this allowance.

3. *Same*—As appellant is not to be allowed any compensation he should not be charged with interest on several hundred dollars of appellee's money which he used in his business.

4. *Same—Costs*—While neither party was without fault in the disagreement as to the settlement of the agency the court properly charged appellee with the cost of the reference to the commissioner.

Blaine & Kinkead for appellant; W. S. Hogue and Charles Carroll for appellee.

City of Covington v. Simrall, &c.

Filed April 5, 1893. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

Injunction to prevent city from making excavation—Right of lateral support—Injunction lies in favor of the owner of land outside and adjoining the corporate limits of a city to prevent the city from making a threatened excavation, which would result in the withdrawal of the lateral support of plaintiff's land. The city having no jurisdiction over the land the plaintiff's right of lateral support is the same against the city as it would be against an individual property owner.

W. A. Byrne for appellant; William Goebel for appellees.

Mitchell v. Mitchell.

Filed April 5, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

Judgment sustained by evidence—While the court might, as an original proposition, have arrived at a conclusion different from that arrived at by the chancellor below, it can not say that the judgment is against the evidence.

Lieber & Lincoln and Kohn, Baird & Speckert for appellant; J. P. Gregory for appellee.

Wolford v. McDowell.

Filed April 12, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Brent, affirming.

1. *Upon the traverse of an inquest upon a writ of forcible detainer* it was not competent for the defendant, who had not appeared in the justice's court, to show by the constable that his return on the warrant that he had served a true copy on the defendant was not true. Besides, the alleged variance between the copy served and the original being trifling in itself, it was, under the circumstances, waived as a ground of complaint by the taking of the traverse.

2. *Landlord and tenant—Demand for possession*—The claim that no demand was made by the landlord for possession before the warrant was taken out is not sustained by the evidence. And the defendant can not complain that the demand was for immediate possession, as the lease stipulated that notice and demand for possession were waived.

Robert J. Elliott and E. E. McKay for appellant; E. W. C. Humphrey and W. O. Harris for appellee.

Digitized by Google

THE KENTUCKY LAW REPORTER.

EDITOR:

W. J. CHINN, Jr. . . . . Frankfort, Ky.

VOL. 14. JUNE 15, 1893. No. 24

KENTUCKY COURT OF APPEALS.

JOHNSON, &c. v. HOWE, &c.

(*Filed Jan.* 28, 1893—*Not to be reported.*)

Sureties—Mortgages—Sales of real estate—The sureties on three notes of Howe, for $4,000, $2,000 and $1,700, respectively, were secured by a mortgage on Howe's one-half interest in a warehouse and by a mortgage executed by Howe's wife on a house and lot owned by her. After the wife's death the sureties, in an action against her husband and children, alleged that they had paid the $2,000 and the $1,700 notes, and an order of sale of the wife's house and lot was entered, the sale made and confirmed. Subsequently the wife's heirs brought a suit to set aside the sale on the ground that their father and not his sureties had paid the notes mentioned. The evidence showed that Howe and his sureties (credit being given the sureties alone) had borrowed $6,000 from a third party with the understanding that a part of it was to be used to pay the $2,000 and a balance ($1,686) due on the $4,000 note, and the remainder to be used by H. in his grocery business, on the stock of goods of which the sureties were to have a lien. The sureties stated that they were unwilling to release any existing lien they held, and took an additional mortgage on Howe's life interest in his wife's house and lot. The sureties paid the $6,000 note. *Held*—

First. The payment of the $2,000 note and the balance of the $4,000 by the proceeds of the $6,000 note, under the circumstances, did not extinguish or release the lien of the sureties on the wife's property.

Second. The fact that the attorney who filed the petition of the sureties for the sale of the mortgaged property also filed the answer of Howe therein does not evidence any fraudulent purpose of the sureties to deprive the wife's heirs of their real estate.

Third. The release of the mortgage lien of the husband's one-half interest in the warehouse does not operate as a release or waiver of the mortgage on the wife's land, when it appears that the proceeds derived from the sale of one-half of the warehouse were applied as a partial payment on the $4,000 note.

Fourth. Since the mortgaged property was sold partly for the $1,700 note, instead of $1,678, balance of the $4,000 note, there must be a resale of so much of the property as is in the hands of the original purchasers; but where an innocent vendee has purchased for value a part of the property from the purchaser at the judicial sale his title can not now be disturbed.

Digitized by Google

Wm. Lindsay, Stone & Sudduth, Wm. J. Hendrick and Reid Rogers for appellants.

Wood & Day for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The facts out of which this litigation arises are, in substance, these: The appellants, Johnson and Hendrick, became the sureties of one W. T. Howe to the Farmers Bank of Mt. Sterling on a note for $4,000, and to secure them in their liability a mortgage was executed on a house and lot in Mt. Sterling belonging to the wife of Howe, and also on the one-half of a warehouse building owned by Howe in his own right. The wife united in the mortgage that is dated on the 18th of May, 1874. On the 10th of April, 1878, Howe and wife executed to the appellants a second mortgage on the house and lot to indemnify them as sureties in another note to Melvin Congleton for $2,000. On the 19th of November, 1877, there was still another mortgage executed to indemnify them as sureties on a note for $1,700, payable to the Farmers Bank at Mt. Sterling.

In April, 1884, the wife of Howe (the debtor) died, and shortly after her death the sureties, Johnson and Hendrick, brought a suit in equity against W. T. Howe and his children, some of whom were infants, and the heirs-at-law of Mrs. Howe, in which it is alleged that they had paid the note to Melvin Congleton, as sureties, and had also paid the note of $1,700 to the Farmers Bank, for which the mortgage of September 19, 1877, was given to secure.

In that proceeding a judgment was rendered selling the house and lot to reimburse the sureties, and one part of the lot was purchased by Robert Marshall for $1,200 and the remaining portion by Hendrick and Johnson for $3,284, and the sale was confirmed.

In September, 1886, the children of Mrs. Howe instituted the present action, asking to have the sale set aside on the ground that the sureties had never paid their debts, but the same had been paid by their father out of his own means. They maintain (the children of Mrs. Howe) that it was paid by their father in this way: When the Congleton debt fell due and the balance of the $4,000 note executed to the Farmers Bank remained unpaid, which was $1,686, the creditors were pressing the sureties for payment. Howe had no means to meet his indebtedness, and the sureties were on his paper only as such, and for the purpose of aiding Howe in his business. The sureties were compelled to meet these debts or to make some arrangement to pay them. It was suggested, and, perhaps, by Howe, that he could borrow from one Ragan $6,000, and with it have their debts paid and the remainder he would use in business. They borrowed the money from Ragan, and as the proof clearly shows, on the credit of Johnson and Hendrick; and that the money was to be paid over to them, or as they might direct. An attorney was selected by the parties to receive the money and pay it out, and from the proceeds the Congleton note for $2,000 and its interest was paid off, and Howe, by the consent of Hendrick and Johnson, was allowed to use $2,000 of the money to invest in the grocery business, Johnson and Hendrick retaining a lien on the groceries or on Howe's interest to secure them.

Howe sold out his interest to his partner, Barnes, and from the proceeds was paid the note of $1,700 executed to the Farmers Bank. This payment was made in January, 1883, and constituted a part of

Digitized by Google

the indebtedness for which the house and lot was sold. It is evident, therefore, that when the house and lot was sold this $1,700 note had been paid.

The appellants amended their pleadings, in which they admit the mistake as to the note and say that it was the balance due on the $4,000 note amounting to $1,683, with its interest that had not been paid, and the Congleton note for $2,000, and the facts show clearly that Howe never paid the $6,000 borrowed of Ragan, but it is claimed that, as the Congleton note was taken up by the proceeds of this note and the balance on the $4,000 note paid in the same way, this released the wife's property from the incumbrances upon it, and that Hendrick and Johnson must look to Howe alone and not to the wife's estate for the money.

The fact that Howe was insolvent and without credit is clearly shown, and that the money from Ragan was in fact a borrowing by Hendrick and Johnson, and further that Johnson told Howe at the time that they did not intend to release, but to hold on to all the security they had. The only additional security they took was a mortgage from Howe on his life estate in the lot that they already held. The lien on the goods was simply a security for refunding their own money they had permitted Howe to use in his grocery. The proof clearly shows that the appellants had no intention of releasing the security they then had, and it is unreasonable to hold that under such circumstances they were willing not only to release the security but to involve themselves in a much larger sum, and with no other motive than to aid Howe in his pecuniary troubles.

The second mortgage by Howe was not, in law or equity, a waiver of the first, but, on the contrary, the testimony shows that such was not the purpose or intention of the parties.

It is argued that Cornelison, the attorney for Johnson and Hendrick, filed the original petition under which this property was sold, and also filed the answer of Howe, and from this, connected with the mistake made, the fraudulent intent of the parties to deprive these children of their estate is assumed. While it is better always, even in a friendly litigation, to have counsel on each side, still it is not doubted but that Howe knew about the amount these parties had paid and for which the property sold was liable, and the presumption that the appellants and the father of these children were defrauding them out of their estate is not authorized from the proof.

It is also argued, as the first mortgage embracing the one-half of the warehouse property belonging to the husband was released by appellants, that this released the property mortgaged by the wife. There might be something in this proposition if the proceeds of this property had not been applied in part payment of the $4,000 note. It is not pretended that it was not its real value, or that the money was applied to the payment of any other debt than that for which the mortgage was given. The equity of this case requires that these sureties should be reimbursed to the extent of the Congleton note, with its interest, and to the balance due on the note of $4,000 to the bank. As, however, the house and lot was sold originally for the $1,700 note and interest, when that note had been paid, there must be a resale of the property, except that part of the lot sold by Marshall to the church. The amount received by Johnson on that sale should be credited on the claim. The church had no notice of the imperfection of the judgment. The sale had been confirmed, and, therefore, it holds the property as an innocent vendee. The appel-

Digitized by Google

lants will pay all the costs up to the rendition of the judgment below dismissing their petition.

Judgment reversed and remanded for proceedings consistent with this opinion.

HILL v. THIXTON, &c.

(*Filed Feb.* 23, 1893.)

Bills and notes—Estoppel—The maker of a note, who executed and delivered simultaneously with it a writing addressed "to whom it may concern," in which he stated in substance that the note represented a *bona fide* debt, against which there was no set-off, discount or counterclaim, and which would be paid without defense to the payee or his assignee, may plead and prove that such writing was obtained by fraud and duress in an action on the note by a holder, who alleges that he purchased it on the faith of such writing, in any case where he will be permitted to set up such fraud or duress as a defense to the action on the note itself. The note and the writing together constitute one transaction when executed simultaneously, and fraud and duress may be shown in the procurement of the one as well as the other. (Distinguished from Crabtree v. Atchison, *ante* 317. Chief Justice Bennett, dissenting.)

J. A. Dean for appellant.

Weir, Weir & Walker for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

In the summer of 1888 Hill, the appellant, who was a timid and unlettered man, was visited by a stranger, who induced his assistance toward starting his lightning rod enterprise in the neighborhood by obtaining a promise to let him rod his house, assuring him that it would cost him only $4.

In a few days some four other strangers appeared and proceeded to decorate his humble shanty with the most improved lightning conductors "known to science."

After completing the job they asked him to sign some papers which they called "recommendations," purporting to prove to the neighbors the good character of the work. He signed his name to two of these papers. He could not read writing and could scarcely write his name.

They then presented him a note to sign for $107.10, due in six months. He refused to do so. They became mad and told him he had to sign it. Angry words passed, threats were made and finally appellant called on his mother for help. The talk was continued, the men declaring that he must sign the note. They threatened to sell his home in the United States Court. To stop the excitement among the men and prevent a difficulty he finally signed it. Coleman, a witness who was present and working for the strangers, and who had come there with them, testifies that he was employed by the lightning rod men; that "Hill refused to sign the note; Mr. Medanich told him he must sign the note; that they employed lawyers by the year, and that a number of suits did not cost them any more than one suit; that they did not sue in these little courts here but they did all their business in the United States Court; Mr. Hill still refused to

Digitized by Google

sign the note and pretty hot words followed; Mr. Hill seemed to be a very timid man and they scared him into signing the note by threatening him; these men were very vicious, bulldozing kind of men and were very dangerous men; that from conversations with the men he learned that the cost of the rod put up for Hill was about $7, and that the profits were about $100 on the job."

In June, 1889, the appellees, Thixton and Atchison, claiming to be the owners and holders of the note, sued Hill, the appellant, thereon, in the Daviess Circuit Court. He answered that the note was not his act and deed; that the words "negotiable and payable at the Bank of Owensboro, Ky.," had been inserted therein after he had put his name to it and without his knowledge or consent; that it had been procured in its original form by fraud, oppression and intimidation, and he had executed it to save himself from personal violence and to avoid bodily harm, with which he was threatened. He also alleged that the plaintiffs' assignors were peddlers and had no license as provided by law.

Upon the state of case thus presented, we presume that no court would sanction the enforcement of the contract and collection of the note sued on. As a matter of fact on the trial there was no contrariety of testimony, the foregoing facts being established by Hill, the appellant, and Coleman, the employe of the payees of the note, and, while denied in the reply, were not contradicted by the proof. But in their reply the appellees rely on the following writings, signed and delivered, as they allege, on the day the note was executed, as an estoppel against any defense to note sued on and as precluding a court of justice from relieving this timid and ignorant countryman from this bold robbery. The writings are as follows:

"RECOMMENDATION.

"To all whom it way concern:

"This is to certify that J. Medanich & Co., agent of the Franklin Lightning Rod Co., has erected their copper-covered lightning conductor on my residence and has done me good work and given satisfaction in every respect. I take pleasure in recommending them to all in need of rods. (Signed.) "W. H. HILL.

"July 7th, 1888."

"To all whom it may concern:

"This is to certify that a note executed by me to J. Medanich & Co. for $107.10, due in six months, is a *bona fide* debt against me, and there is no offset, discount or counterclaim or defense against the same, and the same is good against me for the full amount thereof, and will be paid at maturity to said J. Medanich & Co. or to such persons as they may assign said note to."

"Given under my hand this, the 7th day of July, 1888.

"(Signed.) W. H. HILL."

Appellees also attempted to avoid the alleged want of license by filing one granted regularly to Medanich, Shay & Co. (the company being Freeman), alleging that Shay had retired from the firm and that the business was being conducted by Medanich & Freeman, the surviving members, and this, we think, was a valid license and not such a transfer as the statute denounces.

The appellee alleged that the certificate of recommendation showed on its face that the work had been done by the Franklin Lightning Rod Company, which produced no license, and that the plaintiffs' assignees were only agents.

Digitized by Google

The second certificate was lost, and he alleges want of knowlege or information as to signing it, and that if he did so it was procured by fraud, overreaching and deceit, and with intent to estop him in his defense, of which facts the plaintiffs had notice before they bought the note, and knew also that the transaction and circumstances under which the note originated were suspicious and sufficient to have put them on inquiry.

The trial court properly instructed the jury on the subject of the alteration of the note after its execution and delivery, and as to its procuration by fraud, threats, etc., but expressly modified the instructions by telling the jury to find for the plaintiffs even if they believed the note to have been materially altered or had been obtained by fraud, threats, etc., provided they further believed that the plaintiffs bought and became the owners of the note in good faith, relying on the statements contained in the two certificates named above, and provided the defendant had signed the papers.

Thus is presented for our consideration the real question in this case, and that is, what effect is to be given the certificate agreeing not to set up any defense.

The court below assumed that the note itself, containing an absolute promise on its face to pay the sum named at its maturity, and importing absolute verity, might be impeached for fraud in its procurement, and yet the certificates executed at the same time, importing nothing more than is certainly and definitely implied in the note, could not be so impeached.

If the maker may have been overreached in the execution of the one, why may he not have been in the execution of the other? And if he can impeach one, why may he not the other? The case of Crabtree v. Atchison, decided by this court on Oct. 1, 1892 (*ante*, 313), is relied on by the appellees, and who are also the appellees here. In that case it is said that "the writing delivered to the payees of the note and exhibited to the appellees by the payees to induce them to purchase it, and upon the assurances of which they relied in making the purchase, was equivalent to personal assurances made to the appellees by the appellant, face to face, to induce them to make the purchase, and upon which they relied in making the purchase."

That is, that the assurances that he had no defense was a continuing, ever-present and existing truth, asserted "face to face," to "whom soever it might concern," and as such must estop the appellee from denying the truth of such assurance.

But was not the absolute promise of the appellee contained in the other writing executed at the same time (the note), agreeing to pay the sum of $107.10 in six months after date at the Bank of Commerce of Owensboro, Ky., a continuing and existing promise, and which the payees were at liberty to exhibit to the appellees and the world as an inducement to buy the paper?

And why shall the one be said to have the force of a "face to face" assurance that "the same is good against me for the full amount thereof and will be paid at maturity" any more than the other is a "face to face" assurance that "I will pay the sum of $107.10, which" was the full amount of the note, "in six months," which was at its maturity?

In the case of Crabtree v. Atchison, *supra*, the answer was not deemed sufficiently explicit to raise the question of fraud in the procurement of the certificate, and the case was reversed on other grounds. The principle announced followed the case of Wells, &c. v. Lewis, &c., 4 Met., 269, and no fraud was properly alleged by the defendant as to the obtention of the certificate.

Digitized by Google

We are clear that there is no difference in principle between the assurance given in the note and that given in the certificate. And yet we know that a subsequent "face to face" assurance, given by the maker of a note, that he would pay the amount of it at its maturity, is an estoppel against his assertion of any defense thereto. We conclude, therefore, that as the promise in the note can not be given the force of a personal and continued assurance, so can not that effect be given the other and accompanying paper. They are, in effect, a single transaction, and are to be considered as if embodied in but a single paper, executed and delivered together; they stand or fall together; what may be used to impeach the one may be used to impeach the other.

There is not an idea or thought expressed in the one paper which is not expressed in the other. In the certificate we have that which is but the extended meaning of the note—"*bona fide* debt against me." Certainly the note distinctly imports as much. "No offset or discount or counterclaim or defense;" of course not. Says the note by clear implication, "the same is good against me and will be paid at maturity." Truly these assurances are even in express terms embodied in the note.

The case of Wells, &c. v. Lewis, &c., 4 Met., 269, cited against this view, was where neither the note nor the accompanying paper was attacked for fraud. The consideration alone of the note was sought to be impeached, and its makers, having voluntarily given the certificate that they had no offset in order to give currency to their paper, would have been guilty of perpetrating a fraud on the innocent holder if defense had been allowed.

If the note and its accompanying "letter of credit" were executed voluntarily and free from imposition and fraud, then recovery should be had; if the note or its "certificate of good character" were not so obtained, then whatever defense, discount or offsett might have been used against the original obligee may be used against the assignee.

Such is the purport of the statute regulating the assignment of such paper. Moreover, we are by no means certain that the appellees were free from notice sufficient to have put them on inquiry. They had been told by a party from whom they were seeking information as to his solvency that Hill was poor; that his brother was putting up the money with which to buy the little farm; that he was too good a man to be imposed on by lightning rod men, and that there was certainly something wrong about the note. Upon presentation of the note alone of the appellant, importing, as it did, a valid consideration, and containing an express promise to pay in the usual form, a purchase would have been more in accordance with the usual course of trade than when the holder shows evidence of the necessity of fortifying his property by a suspicious overshow of virtue. It was a statement on which they had but slim right to rely. It was indeed calculated to arouse and excite suspicion. An ordinary and unsuspicious-looking promissory note was in bad company when it had to be backed up by such an unusual paper.

The majority opinion of the court, in Jaqua v. Montgomery, 38 Ind., 36, sustains this view. In that case Gregory, C. J., who delivered one of the opinions, in speaking of such an accompanying paper, says "it looks too much like the act of the thief in attempting to cover up his crime."

The judgment below is reversed, with directions to allow the case to proceed according to the principles of this opinion.

Chief Justice Bennett dissenting.

Digitized by Google

Chief Justice Bennett delivered the following dissenting opinion:

The appellees, as the assignees of J. Medanich & Co., sued the appellant on a note for $107. To the plea of no consideration, fraud and duress the appellees replied that they were purchasers of the note for value and without notice of the matters alleged, and were induced to make the purchase by the representations of the appellant contained in a writing signed by him and delivered to Medanich & Co., to be used by them in inducing the sale of the note, and which induced the appellees to purchase it. Said writing represents the debt as being *bona fide* against the appellant; that "there is no offset, discount or counterclaim or defense against the same; that the same is good against me for the full amount thereof, and will be paid at maturity to said J. Medanich & Co., or to such persons as they may assign said note to."

The appellees relied upon said representations as an estoppel to the defenses indicated, which the lower court sustained, and which the Superior Court affirmed (13 KY. LAW REP., 333). It will be seen that the opinion of the majority of the court reverses the lower court and the Superior Court upon the ground that the estoppel plead was not available if J. Medanich & Co. had defrauded the appellant in obtaining the note and writing. That this is the meaning of the opinion there can be no doubt.

In order for the court to reach its conclusions it found itself compelled, although disclaiming it verbally, to ignore and overrule the cardinal feature of the law of estoppel as expressed by its own reported decision, to-wit: If a person, by his false speech or conduct, induce another person to act differently from what he would have otherwise acted, such person can not thereafter deny the truth of his speech or conduct and show the real truth of the matter, because such showing would be a deception and fraud practiced upon an innocent person. Such person is estopped to deny the truth of his speech or conduct, although he may have been deceived and defrauded into such speech or conduct by other persons, provided the person thus influenced was innocent and ignorant of the fraud of such other persons. So, also, if such person authorizes a person to make certain assurances to another person, that certain things are true, and which assurances such person does in good faith act on as true, it is equally well settled that the person authorizing the assurances can not deny their truth; for to allow him to do so would be a fraud upon the person thus acting upon them. In such case the person authorizing the assurances would not, as against the person acting upon them, be allowed to show that the person whom he authorized to make them in his behalf had obtained the authority by defrauding him, because the person who acted on the assurance would be, nevertheless, defrauded by the person giving the authority. It seems to be perfectly settled that if two persons are defrauded, and loss must fall upon one or the other, that one that aids in bringing the fraud about must suffer the consequences—the loss must fall on him. He, in equity, is the wrongdoer. He has entrusted the authority to another to say to still another or others that he would do so and so in order to induce them to act, and if such others rely upon that information as true, and act upon it, but it turns out that the person giving the authority was defrauded by the person to whom it was given, he must bear the loss, for to allow the person giving the authority to repudiate the act because the person to whom he gave it defrauded him would be to allow him to defraud the person who acted in good faith upon the authority given.

Digitized by Google

Therefore, which one of these innocent persons should bear the burden of the fraud? I say it is perfectly well settled that the person giving the authority must bear the burden, because but for him the person acting on the authority would not have been defrauded, and he must bear the loss as far as such person is concerned and look alone to the person that wronged him for redress. It may be that his hope from that source is nonavailing, but that fact does not justify him in perpetrating a wrong upon such person whom he has induced to act upon a falsehood and worst his condition.

I say that in a case like this it is the fraud practiced by the person upon another that estops him from denying the truth of his assertion, upon the truth of which the other person has been induced to act and change his condition.

The opinion holds that the note and paper giving the assurance that Hill had no offset or defense to the note, and it would be paid to the assignee, were simultaneously executed, and must be regarded as one and the same transaction. And as the promise contained in the note implied as much as said writing expressed, and as the payor was not cut off from his defense of fraud, etc., in the obtention of the note in the hands of the assignee, so likewise he might make the same defense to the simultaneous writing, both being but one transaction and subject to the same defenses in the hands of the assignee. This view of the case certainly in effect overrules the Crabtree case decided by this court, and marked to be reported, in October last, for the same written assurance was relied on in that case as in this case, and the pleas of no consideration and fraud made, and the plea of estoppel made to said pleas as in this case; and this court, all of the judges concurring, decided that the assurances given in said writing, and which induced the assignee to make the purchase, estopped Crabtree from asserting the truth by showing no consideration and fraud.

Say what you please, but I have given the plain, practical meaning of the decision, which is another's will in effect overruled. But the court seems unable to see the difference between the note's promise and the promise contained in the agreement; but let us see if there is not a wide and valid difference. A promissory note, by chapter 22, section 6, General Statutes, is subject to all defenses in the hands of an assignee that might be used against the payee; therefore, the promise to pay contained in the note is made subject to defenses, etc., but it is undoubtedly the law that the payor may agree and bind himself for a valuable consideration to make no defense as against the payee; and also he may without the valuable consideration estop himself from making defenses as against an assignee of the note. Why? Because if he gives assurance to the assignee that the note is not subject to defense and the assignee is induced to buy it upon the faith of that assurance, the maker would commit a fraud upon him if allowed to deny the truth of the assurance. Therefore, to prevent the fraud, he is estopped to deny it. But the opinion says, if it is a simultaneous agreement, it becomes a part of the note, and the rule does not apply.

Well, suppose the agreement was contained in the note itself and the assignee should be induced to purchase it upon the faith of the assurance, would not the maker be estopped to deny it? Why not? The assurance is an agreement, not an essential part of a simple promissory note, but an addition to it. The simple promise by the note to pay is made subject to all defenses in the hands of the assignee that could be made against the payee, and the agreement, although contained in the note, is an addition or collateral to the

Digitized by Google

simple promise and estops the payor from setting up defenses as against the assignee, because of the fraud that he would practice upon him by so doing.

Now, as to the simultaneous agreement not affecting an estoppel, it seems that this court is fully committed the other way.

In the case of Barbaraux v. Barker, 4 Met., 47, the appellant and Halbrooke executed to each other their respective promissory notes for preceding indebtedness, agreeing that each might use the note executed to him for the purpose of raising money. Barbaraux, at the time he executed his note, gave to Holbrooke a writing, saying: "You may use my notes anywhere you can, except," etc. To a suit by Holbrooke, assignee on the note executed by Barbaroux, the latter plead Halbrooke's note as an offset, but the court held that Barbaraux was estopped from pleading the offset against the assignee, because to allow it would be a "fraud" upon him.

In the case of Meth v. Stone, 17 B. M., 170, the assignee's agent asked the maker of the note, before the assignment, if the note was all right, and he replied that it was and would be paid at maturity; and upon the faith of which the note was purchased, it was held that the maker was estopped from making defense to the note in the hands of the assignee, because it would be a fraud upon him.

Now, the two cases in 4 Met.—one referred to in the opinion—show that the agreements that estopped the makers of the instruments were made simultaneously with the promises, and that the court held such simultaneous agreements to work an estoppel in favor of the assignee. And, without fatigueing the reader with any more citations, I can assure him that there are many more authorities, including this court, to the same effect. But it is said that in as much as the simultaneous writing was obtained by fraud, Mr. Hill is not estopped from defending, although innocent parties were induced by the assurance to buy the note. But it seems to me that this view destroys in a great measure the doctrine of estoppel, the controlling and essential feature of which is to prevent fraud by estopping a person whose assurance has been given to induce others to act, and but for which they would not have thus acted, from denying the truth of the assurance. To allow the person giving the assurances to say he was mistaken or he was defrauded into making them by a third person would defeat the very object that equity has in view in estopping him, and strip the doctrine of its beauty, for there is nothing more repulsive to honesty and fair dealing than to allow a person to say it is true "I, in order to induce you to buy this note at its fair value, agree with you that it would be subject to no defense in your hands, and it would be promptly paid to you, and, thus induced, you did buy it at its fair value and without notice of any infirmity; but as the person to whom I gave the assurance in order for him to give it to you obtained the assurance by fraud, I am, therefore, authorized to defraud you." "But," says the other person, "it is well settled that if a loss is to fall upon either of us by reason of the fraud of that other person it should fall upon you, because you authorized him to give me your assurance, which he did, and by which I was influenced to make the purchase; and I did not know, and had no reason to believe, that he obtained the assurance from you by fraud; but you, nevertheless, gave out the assurance and caused the fraud to be practiced upon me. You should, therefore, bear the loss, and not me, who is entirely innocent." "Oh, oh!" says the other, "you forget that the written assurance that I sent you by that person was made simultaneously with said note; therefore, I am not estopped to deny it even as against you, an innocent purchaser, deceived and

Digitized by Google

defrauded by the assurances given out by me, that it was obtained from me by fraud; but if I had sent it out just an hour or two afterwards as an independent agreement you would have had me bound hard and fast, but, as it is, I have got you, old boy, the loss must fall upon you, and I go scot-free. It is true I recognize the equity of the rule that if I give out assurances intending you to act on them as true, and you do act upon them as true, I can not thereafter say, so far as you are concerned, they were untrue, if my saying so would affect your rights acquired upon the faith of those assurances, although the assurances were obtained from me by the fraud of the person that gave them to you for me, because it would be a fraud upon you for me to do so; and, although I was defrauded by such person into giving the assurances upon which you acted, I should bear the loss instead of you, because the loss should fall upon the one that caused it; and as I, so far as you are concerned, caused it, I should bear the loss and not you; but the court has, luckily for me, but wholly unexpected by me, come to my relief because I happened to execute a note about the same time that I executed the assurances upon which you acted, which was obtained from me by the fraud of another person, and which fraud releases me and shifts the loss upon you, who had nothing whatever to do with the fraud upon me, but was an innocent party all the way through. Natural justice requires that I should bear the loss instead of you, because I sent those assurances to you independently of the simple promise in the note as an additional inducement to you to buy the note. But law is law, and thus it is recently written, and we are all bound thereby." "But here are the Met. cases, the B. M. cases and others, and lastly the Crabtree case, that say the fact that the agreement was made simultaneously with the note makes no difference; that the agreement is not merely a simple promise to pay and subject to all defenses, but it is a substantial agreement that binds the party, and he is estopped to deny it if the denial affects the rights of the person acquired upon the faith of the agreement." "Yes, yes; that is all true, but you had just as well take leave of the late lamented Crabtree, who, in October, 1892, was required to pay out his hard dollars because he was estopped from denying the truth of this same agreement, because the denial would defraud you. But in February, 1893, there was new light turned on by Indiana, and I am released from the very same obligation, because the fraud I perpetrated upon you does not estop me from showing that that sweet-scented geranium that I sent to you as the bearer of my assurances, and upon which you acted in good faith, acted the rascal with me, and in order to get even with him I am privileged under the sporadic decision of Indiana to act the rascal with you and mulch you for acting upon the truth of the assurances. You should have known better, you idiot. And for your folly you must bear the loss—not me. I should have known better! How could I have known better? "Instinct, instinct, Hal, is a great thing—you should have known better on instinct."

But there is another precedent in favor of the Indiana opinion that I came near forgetting. I allude to the celebrated speech of Old Man Sixty before Judge Cissell, of Henderson, Ky. He said: "Everybody cheats me and I cheats everybody, and everybody dat I cheats must submit, because everybody cheats me. Dat is equity for you, sir."

But it is stated in the opinion that the Crabtree opinion was reversed on "other grounds." Well, it was reversed upon the one ground of error in the lower court as to the order of argument; but

Digitized by Google

is as true as truth itself that it was in all other respects affirmed, because, the simultaneous writing having induced others to act, Mr. Crabtree would have committed a fraud upon them had he been allowed to deny the truth of the writing.

CRAIG V. WILCOX'S EX'OR, &C.

(*Filed March* 30, 1893—*Not to be reported.*)

Sale of real property—Contingent remainders—Trusts—An executor to whom an estate is devised in trust for the testator's infant daughter during her life, remainder to her children, and in the event of her death unmarried, or without issue attaining the age of twenty-one years, then remainder over to certain parties, holds the testator's estate as a trustee for the benefit of the devisees designated, and, under the amendment of April 15, 1882, to section 498 of the Civil Code, by joining all the parties in interest, may maintain an action for the sale of unproductive real estate for reinvestment when he alleges and proves that such sale would be beneficial to all the parties concerned. And since the proceeds of the sale are to be paid into court for reinvestment no bond is required of the trustee before or after the sale.

Orlando P. Schmidt for appellant.

James W. Bryan for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Hazelrigg.

Jesse Wilcox, by his will, duly probated in the Kenton County Court, provides for the payment of his debts, etc., out of that portion of his estate that is thereinafter placed under the control of his executors and the survivor or survivors of them, and which was not specially bequeathed to others. He confers on them and the survivors of them all other power and authority which he could give or confer in the premises and all the power and authority which they needed in order to carry into full effect and execution all and singular the provisions and purposes of his will, including the power to rebuild in case of damage or destruction by fire or otherwise, etc.

He instructed his executors to pay his widowed sister $200 annually during her lifetime.

After providing for the payment of other specific sums to his nephews and nieces, he gave to his only daughter, Jesse, then a minor, a life interest in the remainder of his estate of every kind and description, to have, hold and enjoy the *income* of the same during her natural life. If she married and was blessed with children they were to enjoy the same with her. After the death of the daughter then her children, if any, were to have the benefit and full enjoyment of the said life interest in equal proportions until the youngest shall have reached its majority, when the entire property was to be divided among the surviving children. In the event of his child's death without issue, or without issue attaining the age of twenty-one years, then the judge of the circuit court where the home of his daughter was in her lifetime was to appoint a suitable agent or commissioner to sell the property and effects remaining and pay the proceeds into court, less costs, and one-half the same was to be given the New Jerusalem Printing and Publishing Society, located in the city of New York, and the other half to his nephew and nieces

Digitized by Google

named theretofore, the latter to take life estates with remainder to their children.

Crawford, one of the appellees, alone of the two executors appointed in the will qualified. He took charge of the property, and since 1875 has controlled and managed it in pursuance of the provisions of the will. Finding the real estate in Covington unproductive, the houses becoming dilapidated and in need of expensive repairs, he brought this action, in November, 1891, in conjunction with the daughter, Jessie Wilcox Wilson (she having married), and her husband, also Mildred Wilson, a minor, the child of Jessie Wilcox Wilson, who sued by her next friend, W. A. Crawford, and the nephew and nieces named as contingent remaindermen in the will of the testate, as plaintiffs against the New Church Board of Publication, alias the New Jerusalem Printing and Publishing Society, of New York, as defendant, setting up the provisions of the will, the unproductiveness of the realty under his control and the beneficial results to be attained from the sale of the property, and the reinvestment of the proceeds in other and more productive estate. The chancellor granted the relief.

The appellant, Craig, became the purchaser of one of the parcels sold, but resists a confirmation of the sale because of alleged irregularity in the proceeding. He insists that this is an action under section 491 of the Civil Code, providing for the sale of real property and the reinvestment of its proceeds; and as no bond was executed or other requirements of that section were complied with, the judgment of sale and the sale itself were absolutely void and no title could pass to the purchaser; but we do not think that this was an action under that section, but one under the amendment of April, 1882 (Carroll's Civil Code, page 241), providing "that when lands are held in trust by one person for the life of another, with remainder over to a class of persons or to any person not ascertained or to be ascertained until the death of the person upon whose life such estate for life is made to depend, * * * it shall be competent for the circuit courts or courts of like jurisdiction in the county in which such land or a part thereof is situate, in an action to which all persons having a present or vested interest in such land are parties, to direct the trustee to either sell or mortgage such land; but in such action it must be averred and proven to the court that such sale or mortgage would be beneficial to all the parties concerned, and facts showing such benefits must be alleged and proven," and the deed or mortgage so executed "shall have the same effect as if executed by every person having a vested or contingent interest in or ownership of such land, and as if executed by all persons or classes who could take under the limitations or provisions of said deed, * * * and as if every claimant, present or future, under such deed or power was under no disability."

It seems to us that the executor was a trustee. His duties were not merely to pay debts and legacies, but the body of the property was put under his "control," out of which he was to pay the income to the widow and child of the testator and an annual sum to one of the legatees "during her lifetime." He appointed two executors and expected them both to qualify, and upon the death of one he continues the powers given to the "survivor," thus showing the permanency of the power and authority granted to carry into effect the provisions and purposes of the will, including power to rebuild the houses, etc.; and the trustee held for the life of the daughter, Mrs. Wilson, with remainder over to a class—her children, if she had any, or if she had none, or none reaching the age of twenty-one,

Digitized by Google

then over to others. These were all parties to the action, and we think it matters not in this proceeding whether they are before the court as plaintiffs or as defendants. This amendment requires the execution of no bond by guardian or committee for the obvious reason that such fiduciaries do not get the proceeds of the sale, the provision being that "the proceeds of the sales authorized by this section shall be paid into court and shall be reinvested by the court," etc.

It is necessary to aver and prove facts showing the sale to be beneficial to all the parties concerned, and this was alleged in this case and shown beyond question. The amendment of April, 1882, was a substantial reenactment of the second section of an act amending chapter 36 of the Revised Statutes, approved February 16, 1858, and sales and reinvestments were upheld under that act in proceedings similar to the one now under consideration. (Paul v. Paul, &c., 3 Bush, 484, and Ewing v. Riddle, &c., 8 Bush, 568.)

The case of Burnett v. Bull, 81 Ky., 127, relied on by the appellant, was one under section 491 of the Code. We find no case determined under the amendment of April, 1882, but obviously the same construction should be adopted in considering it as was adopted when the analogous section of the act of 1858 was considered and construed.

The appellant, Craig, gets a good title under his purchase, and the judgment to that effect is affirmed.

CHRISTIE, &C., V. GARRITY, &C.

(*Filed Apr.* 1, 1893—*Not to be reported.*)

1. *The attorney appointed to defend for a nonresident defendant* should state in his report to the court that he has been employed by the defendant to represent him, if such be the fact, and when the attorney files an answer and report, in which no such statement is made, it will not be presumed that he represents or appears for the nonresident. In such case the proceeding against the defendant must be regarded as against one only constructively summoned.

2. *Actions—Complicated accounts*—In this proceeding, where the actions of two creditors against a debtor are consolidated and where there are controversies between the parties to the actions and the accounts are lengthy and very complicated, where it appears that the chancellor rendered a judgment without reference to a commissioner and the grounds of the judgment do not appear in the record, it must be reversed when several errors in the credits and charges against the parties appear.

3. *Same—Judgment not prayed for*—It is error to enter a judgment in favor of the defendant, against the plaintiff, when the defendant was only constructively summoned, did not appear in the action and did not pray for any judgment.

4. *Same*—It was error to adjudge that such defendant was entitled to certain land which he did not claim and had previously conveyed to one of the plaintiffs.

5. *The allowance of* $3,000 *to the attorney for the nonresident defendant was improper.*

Charles Pattison and Geo. B. Eastin for appellants.

S. S. Russell and C. S. Hill for appellees.

Appeal from Marion Circuit Court.

Digitized by Google

Opinion of the court by Judge Hazelrigg.

The appellee, Garrity, and the appellant, the Second National Bank of Warren, Ohio, each brought suit—the one in the Marion and the other in the Taylor Circuit Court—against the appellee, H. G. Stratton, and each sued out attachments against his property. Stratton was proceeded against as a nonresident. He had been engaged as agent for Garrity in the purchase of lumber at Campbellsville, Ky., and his transactions were numerous and complicated. His dealings also with the bank, or with the appellant, Christie, who represented the bank, were also on a large scale, and his accounts complicated.

The action in Taylor was transferred and consolidated with that in Marion county. Garrity controverted the claim of the bank, and also sought to set aside a conveyance of some sixteen hundred acres of land made by Stratton to the bank in payment of his indebtedness to it some months before, on the ground that it had been paid for with his (Garrity's) money.

The appellee, C. S. Hill, jr., was appointed attorney for the nonresident (Stratton) and in the Garrity suit, and, without reporting whether he had been employed by the nonresident to represent him, as is made his duty in case of such employment, filed, in March, 1889, what purported to be an answer controverting the claims of Garrity. He appears to have taken some part in the preparation of the case, and just before the final judgment, in December, 1891, he filed his report as nonresident attorney, saying that he had informed the nonresident of the proceedings against him, and that he did not believe him to be indebted to plaintiff in any sum, and asking the court's protection.

After the consolidation of the two cases and the completion of the pleadings, the main question before the court was the ascertainment of the state of account between Stratton and these plaintiffs respectively. The witnesses were not very numerous, but statements and exhibits involving hundreds of items and calculations are filed, such as usually grow out of large sawmill operations and extensive shipments of lumber. The chancellor, however, without a reference to a commissioner, undertook to audit the complicated accounts, or, at least, render judgment between the parties.

No basis is given in the judgment for the court's conclusion, and ordinarily we should assume it to be correct; but after a review of the testimony and examination of the issues as presented by the pleadings, we are constrained to reverse his judgment.

First. He has evidently failed to give the bank credit for the sum of $4,500 due from Stratton when he first came to Kentucky. Some feeble attempt is made to draw the conclusion from the testimony of Christie that this debt was paid by other securities left in Ohio; but that it was unpaid is evident, and in fact the proof of its validity is uncontradicted.

Second. The proof supposed to sustain the charge that Stratton bought the 1,600-acre tract of land with Garrity's money is insufficient for that purpose. Hoskins alone testifies on this point. He says: "I think I gave him (Tartar) in cash $250 and check for $300. * * * I *think* it was to be used in buying some land of Butler, Mowser & Co." This is unsatisfactory, to say the least. There is no evidence of what this land cost, and even if the $550 thus put in was Garrity's money it does not follow that he is the owner of the land.

Third. The chancellor adjudges that "*Stratton recover of the bank*

Digitized by Google

the sum of $3,907.40," with interest and costs, and this in spite of the fact that Stratton nowhere asks any relief, and nowhere shows himself entitled to any, and in his deposition taken in the case at Spokane, Washington, testifies that he was indebted to Christie and the bank in a very large sum.

Fourth. After giving Stratton this unsolicited judgment the title was adjudged in him to a tract of 2,900 acres of land, which he had theretofore in due form conveyed to Christie in payment of what he insists was a just debt; indeed, Christie and the bank had paid the deferred payments on it of some $4,000, and had also paid Stauffer the first purchase money note, with interest and costs, amounting to $2,849.65, and on which suit had been brought against Stratton.

Fifth. After thus enriching Stratton, a special chancellor, on motion of the nonresident attorney, adjudges such attorney the sum of $3,000 as his fee in the case. A lien is given him on the $3,900 judgment against the bank, and a lien also on the 2,900 acre tract. To this allowance no one excepts save Christie and the bank.

Sixth. Stratton is treated as if personally before the court. He must be regarded as being only constructively summoned. If the corresponding attorney be employed after his appointment the law makes it his duty to so state. In this case the attorney so appointed does not so state, and, moreover, files the usual report as attorney for the nonresident, making no reference to the former pleading purporting to be an answer. This answer is not signed or sworn to by Stratton, and neither it nor the report are filed in the case in which Stratton is given the judgment. No bond is executed by Garrity, such as section 410 of the Civil Code requires of plaintiffs obtaining judgments against parties only constructively summoned, and no affidavit made as provided by section 230 thereof.

Let the judgment, including the orders as to the allowance, be reversed and set aside.

On the return of the case it should go to the court's commissioner in order that a just accounting may be had between the parties.

BOHANNON, &C. V. TRAVIS, &C.

(*Filed Feb.* 16, 1893.)

1. *A wife can not convey land held by her as general estate to her husband or another person* in any other manner than that authorized by section 20, chapter 24, General Statutes, which is by joint deed of her husband and herself, or by a separate deed executed by her after the husband has first conveyed his interest therein. Therefore, a deed executed by the wife alone, by which she attempted to convey to her husband land held by her as her general estate, did not pass the legal title to him.

2. *Contracts between husband and wife—Equity—Conveyances*—Although postnuptial contracts between husband and wife are void at law, equity will, under particular circumstances, give full effect and validity to them at the request of either the husband or the wife.

But equity will not enforce a contract between a husband and wife in favor of either unless it is fair and just, founded on a valuable consideration and reasonably certain as to its stipulation and the circumstances under which it was made.

In this case a court of equity is asked to enforce a parol contract between a husband and wife concerning the wife's real estate twenty-eight years after it was made and after the death of the wife; the evidence does not show any valuable consideration for the alleged contract or with cer-

Digitized by Google

tainty the terms or the circumstances attending it, therefore its specific execution should be refused.

Jep. C. Johnson and W. A. Taylor for appellants.

Wm. B. Noe for appellees.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Lewis.

In 1858 Jacob Moone, bachelor, married Adel Green, widow, having one child, though there was no issue of their marriage. And in 1860 D. M. White conveyed to her a tract of about 100 acres of land, which they occupied until her death in 1888; but in 1889 Jacob Moone attempted to convey and pass to C. B. and Sallie Travis absolute title to 47 acres, supposed to be half the tract.

This action was brought in 1891 by A. K. Bohannon and two other grandchildren, only heirs at law of Adel Moone, to recover of C. B. and Sallie Travis the parcel of 47 acres which they hold possession of and claim under the deed from Jacob Moone, who was also made party defendant, though has since died.

As defense it is stated in the answer that Jacob Moone in fact purchased the 100 acres from White at the price of $600, of which $315 was at the time advanced and paid by Adel Moone; but, at her request and under agreement between them, the deed was made to her for the only purpose of securing repayment of the money she so advanced; that thereafter and until her death the 47 acres was treated and recognized by both and used by him as his own land. It is further stated and shown by written instruments filed as exhibits that March 12, 1870, Adel Moone executed a bond by which she covenanted to convey by April 1st, to Jacob Moone, half the 100 acres, and in 1874 she did attempt to convey directly to him, by deed executed and acknowledged, 47 acres identified and described as was subsequently done in his deed of 1889 to Travis.

The effect of the deed from White was to invest Adel Moone with legal title to the 100 acres, and, being her general estate, she could not convey it in any other manner than directed in section 20, chapter 24, General Statutes, as follows: "The conveyance may be by the joint deed of husband and wife or by separate instrument, but in the latter case the husband must first convey, or have theretofore conveyed. The deed as to the husband may be acknowledged and proved and recorded as heretofore provided."

It is manifest the deed in question was not executed in the manner required by statute, for, he being the grantee, it was not nor could be a joint conveyance of husband and wife, nor did or could he by separate instrument convey. And as a wife can not, independent of the statute, by deed direct to her husband divest herself of legal title in real property nor invest him therewith, it results the deed mentioned was not effectual for that purpose and the title bond was likewise unenforcible.

But although contracts between husband and wife are at law void, they are not always so in equity.

In Story's Equity, section 1372, it is said that, notwithstanding there is deemed at common law a positive incapacity of husband and wife to contract with each other, courts of equity will, under particular circumstances, give full effect and validity to postnuptial contracts. And the general doctrine that for many purposes equity treats husband and wife as distinct persons, capable of entering into

Digitized by Google

contracts with each other that will sometimes be enforced even against creditors of the husband, has been frequently recognized and applied by this court, though we think in every case so far it has been done at suit and for benefit of the wife. But in Maraman v. Maraman, 4 Met., 84, where the doctrine was somewhat elaborately considered and numerous cases cited in which it had been and ought to be applied, the case of Livingston v. Livingston, 2 John C. R., 537, was referred to with approval where a parol agreement between husband and wife, that he should purchase and improve a lot for her and be repaid by sale of another lot belonging to her, having been partially executed by him, was, at his suit, specifically enforced against her.

In the case of Moore v. Freeman, Bunb R., 205, referred to by Story as an illustration of the doctrine, a wife having a separate estate entered into a contract with her husband to make him a certain allowance out of the income of such estate for a reasonable consideration, the contract, though void at law, was held obligatory and enforcible in equity. In Hendricks v. Isaacs, 117 New York, 44, the husband having advanced to their daughter a certain amount, upon a written agreement by the wife to repay him out of rents and income of an estate devised by his father for support of her and the children, it was held in an action by him against her administrator the contract was reasonable and just, and his claim for reimbursement was sustained.

The case of Hausman v. Burnham, 59 Conn., 117, is very much like this. There the husband, being in feeble health and intending to make provision for his wife after his death, conveyed land to an attorney, who on the same day conveyed it to her. The consideration for the deeds was a promise by her to reconvey to him when requested. She did subsequently attempt to do so by a deed executed by her alone, her husband not joining. After her death, in a controversy about the land between her children by a former husband and her surviving husband first, and then, he having died, his heirs at law, it was held by the court that the promise of the wife was based upon a valuable consideration enforcible in equity; that, although the deed she executed was void, the court would look through the deed to the contract back of it and enforce that.

But a contract between husband and wife will not be enforced in equity in favor of either unless it is fair and just, founded on a valuable consideration and reasonably certain as to its stipulations and the circumstances under which it was made.

It is not in terms stated in the answer that Adel Moone promised to convey the tract of 100 acres, or any part of it, to Jacob Moone upon repayment to her of the money advanced, though we will assume it to have been substantially alleged. Nor are the allegations in the answer in respect to character and terms of the contract consistent with the claim now set up, or with the deed she attempted to execute, for, while it is stated in the answer of Jacob Moone that the land was purchased by him and deed therefor made to Adel Moone for the sole purpose of securing to her repayment of money advanced by her, he did not thereafter claim nor attempt to convey Travis more than what he supposed to be half the tract. Moreover, while it is stated in the answer she paid only $315 of the purchase price, of which, as alleged, he subsequently repaid to her $200, in the title bond of 1870 the consideration for her covenant to convey to him half the land is $400, receipt of which is then acknowledged. Nor do either the stipulations of the bond or allegations of the answer at all harmonize with recitals or stipulations in the deed of 1874, for in the latter instrument it is recited that Adel Moone had

Digitized by Google

paid of the original purchase price of the land $600, and Jacob Moone only $200; and instead of an acknowledgment of full payment of consideration of the 47 acres as was recited in the title bond, it is expressly stipulated in the deed that in consideration of conveyance of half the land to him she should take at his death, in addition to her distrubitive share under the statute, personal property of his estate of the value of at least $600.

The legal title remained in Adel Moone up to her death, a period of 28 years, and she held it after 1874, fourteen years, without any demand by him or attempt by her to divest herself of it. And though there is some evidence tending to show he claimed exclusively 47 acres as his own, it does not satisfactorily appear he ever did pay to her any part of the original purchase price she advanced; on the contrary, if the deed of 1874 is to be treated as evidence for any purpose, it shows he had not then paid any part, but owed her $600—original price of the land. It does, however, appear he paid taxes for which the land was annually assessed, but it is not shown the amount thereof was agreed to be accepted in payment of his part of purchase price of the land, nor, inasmuch as he had use and enjoyment of the land, can such payment be now taken into account.

The court is thus called on to enforce a parol contract between husband and wife concerning her real estate twenty-eight years after it is alleged to have been made, the character and terms of which are not with any degree of certainty shown, and which the evidence conduces to show has never been fully, if at all, performed on his part. And such relief if afforded will inure to benefit, not of *bona fide* purchasers, but of persons claiming under a voluntary deed made by the husband after death of his wife.

The statute of limitation pleaded and relied upon in bar of the claim of her heirs at law manifestly can not avail the defendants, vendees of the husband, for it is not pretended the wife ever was out of actual possession of the 100 acres a day. Equally unavailing is the plea of estoppel, for the void deed can not be treated as such.

The essential conditions of a valuable consideration paid or performed for the alleged parol contract and of reasonable certainty as to its character and terms are lacking. It would, therefore, be neither just nor fair for a court of equity to enforce it, especially in view of the long period that has elapsed since it is alleged to have been made, and delay until after her death of any claim to relief.

Wherefore, the judgment of the lower court is reversed and cause remanded for proceedings consistent with this opinion.

CROAN, &C. V. PHELPS' ADM'X, &C.

(*Filed March* 25, 1893.)

When a bastard dies, leaving surviving as next of kin only his widow and collateral kindred of his mother, his widow takes his entire estate under the statute of descent and distribution.

The collateral kindred of the mother of a bastard can not inherit his estate through her.

Chas. Carroll and J. W. Croan for appellants.

Fairleigh & Straus for appellees.

Digitized by Google

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

Wesley Phelps, at quite an advanced age, died intestate and without issue, the owner of a large estate in Bullitt county, Ky.

The proof is clear that he was the illegimate son of Alice McDaniel, whose death preceded his some years. He left a widow, who claims the entire property. It is also claimed by the descendants of the brothers and sisters of Phelps' mother, Alice, and the sole question presented upon this appeal is, who takes the property. The lower court gave it to the widow, or rather to her devisees and legatees, she having died after instituting this action.

The appellees base their claim to the estate under subsection 9, section 1, chapter 31, of the General Statutes, which provides that if there be neither paternal nor maternal kindred the whole estate shall go to the husband or wife of the intestate. They say that by "kindred" is meant such as can lawfully inherit. The mother being dead, and there being no legal father, and no provision for the transmission of inheritance from a bastard to collaterals, the appellees contend it is as if the paternal and maternal kindred were wholly extinct, and that the contingency arose upon which the widow became entitled to take the whole estate.

The appellants contend that under section 5 of the statute quoted the mother, if living, would have taken, and that her brothers and sisters or their descendants must now take in her stead; that the intestate was capable, under the statute, of transmitting the estate to and through his mother on to them. That section is as follows: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other as if such bastards were born in lawful wedlock of the same parents."

It is insisted that the expression "on the part of or to the mother" must be construed liberally and as meaning transmissability of estate not only "to" but through the mother and on to her collateral kindred.

In determining the meaning of these words and the proper, legal exposition of the statute, we must keep in mind that by the rules of the common law a bastard had no inheritable blood and could neither receive from nor transmit an inheritance to his father, mother, brothers or sisters.

The Kentucky Statute of Descents of December, 1796, was an innovation on the common law and was as follows: "Bastards also shall be capable of inheriting or transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother."

This was a copy of the Virginia statute of 1787, and with reference to which the Supreme Court of the United States, in Stevenson's heirs v. Sullivant, 5 Wheat., 255, said: "We understand it to be that they (bastards) shall have a capacity to take real estate by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants in like manner as if they were legitimate."

The expression "on the part of their mother" was not held to confer the right to inherit on the mother from her bastard child, but the whole effect of the section and this expression was simply to enable the bastard to take by inheritance from or through the mother

Digitized by Google

in the direct line, and to pass that inheritance with the same directness to his own issue, and the illegimate brothers in that case were denied the right to inherit from their legitimate brother. While *quasi* legitimate in some limited respects, they were, nevertheless, said to be bastards in all others, and as such could have neither father, brothers or sisters, and their inheritable blood was confined within the narrow limits of the very letter of the law. This restricted construction was followed by the Kentucky courts until the act of 1840, though not without a strong dissent in Scroggin v. Allen, 3 Dana, 363, decided in 1834. This act provided "that the mother shall be and is hereby rendered capable to inherit as heir or distributee of her bastard child, and brothers and sisters of the same mother born out of wedlock shall be capable to inherit and take by descent or distribution from each other as though born in wedlock and as brothers and sisters of the whole blood." And notwithstanding the seeming generous intention of the statute to make the illegitimate child legitimate *ex parte materna* to all intents and purposes as though born in wedlock, yet, in Remmington v. Lewis, 8 B. Mon., 606, decided in 1848, the court used this language: "It is impossible, upon any admissible construction of the *language of the act*, to consider it as establishing a legal relationship for the purpose of inheritance between a bastard and any other of his natural relations but his *mother* and such other *illegitimate* issue as she may have. It does not operate to establish a right either in the illegitimate children to inherit from the legitimate, or in the legitimate children to inherit from the illegitimate."

"Under this construction," says the court, "the bastard has, in view of the law of descents, no brothers or sisters except the illegitimate children of the same mother, and *no other collateral kindred* who can take his estate as heirs; and upon his death without issue, without lineal, maternal ancestor alive, and without brother or sister, the illegitimate issue of his mother or their descendants, his wife, if he leave one, is his heir, under the 14th section of the statute, and not the legitimate son of his mother."

If the legitimate son of the mother of the bastard can not inherit his estate through their common mother, how can the collateral kindred of the mother in this case hope to do so? It can not be contended that our statute is more liberal than that of 1840. Indeed it is only by a forced construction that the mother herself can be said to inherit from her bastard child. The plain act of 1840 confers for the first time that right on her in its opening clause thus: "That the mother shall be and is hereby rendered capable to inherit * * as heir * * of her bastard child" was not inserted in the revised statutes (1852) or the General Statutes (1873). Instead thereof the old 18th section of the Kentucky act of 1796, copied from the Virginia act of 1787, was adopted with the interpolation of the words "or to" after the words "on the part of." And suppose we adopt the construction given this statute by the Supreme Court of the United States in Stevenson's heirs v. Sullivant, *supra*, and followed by a majority of this court in Scroggin v. Allen, above quoted, we would have this state of case: "Bastards shall be capable of taking real property by descent immediately or through their mother or on the part of their mother, and of transmitting that same estate without alteration to their own issue and to the mother."

The old statutes were consistent and harmonious, simply empowering the bastard, though within narrow limits, to inherit property from his mother, which, under the common law, he could not do, and transmit the same to his own issue. Now, singularly enough,

Digitized by Google

after so inheriting it he is permitted to transmit it "*to the mother*," from whom he has just inherited it.

The well-known legal meaning of the expression "on the part of the mother," as construed by the courts, must, therefore, be discarded, and it must be supposed that they were used in the statute in the sense of "*from* the mother," hence the meaning is as if the reading was "bastards shall be capable of inheriting and transmitting an inheritance from or to the mother." And even this solution is well-nigh spoiled by the rejection of the alternative "or," properly used in the old statute, and inserting the word "and" in the present one, thus requiring the same estate to be inherited and transmitted to or from the mother. However, the statute must be construed to mean that bastards shall be capable of inheriting from the mother and of transmitting an inheritance to the mother, and so must be held to embody in substance the provision of the acts of 1796 and of 1840, but certainly not to extend or broaden them.

In the case of Sutton, &c. v. Sutton, 87 Ky., 217, some progress was made toward liberalizing this section, and there the legitimate children of a bastard take what he, if alive, would have taken from an illegitimate brother of the same mother, but it was done under the statute making bastards capable of inheriting and transmitting an inheritance on the part of each other as if born in lawful wedlock of the same parents. There is no such statute in aid of the collateral kindred of the mother.

In Allen v. Ramsey's heirs, 1 Met., 635, and Berry v. Owen's heirs, 5 Bush, 452, the right of the bastard to inherit from the mother's collateral kindred was very decisively negatived. In Jackson v. Jackson, 78 Ky., 390, this court, through Judge Cofer, held that the bastard could not inherit through his mother from her ancestors. "It must be regarded," says the court, "as the settled law of this State that a bastard can not inherit from collaterals from whom his mother, if living, would have inherited. * * And it would seem to follow, as a necessary logical sequence, that he can not inherit from the ancestors of his mother."

And while the exact question was not before the court, the learned judge added: "And this construction is somewhat fortified by the fact that a bastard can only transmit an inheritance in the ascending line to his mother," and to preserve harmony in the construction of the statute the court was constrained to adopt this confessedly strict construction.

Whatever might have been the original intention of the law makers towards broadening the inheriting capacity of the innocent offspring of their mother's incontinence, it must be confessed that a rather illiberal view of the statutes respecting them has obtained, which, however, must now be adhered to.

Let the judgment below giving the estate to the wife's beneficiaries be confirmed.

Digitized by Google

KENTUCKY SUPERIOR COURT.

L., ST. L. & T. RY. CO. V. STEPHENS, TRUSTEE.

(*Filed May* 17, 1893.)

1. *A dedication of real estate to a public use may be made by parol*, but there is no such thing as a parol dedication of real estate to a private use; and a railroad corporation is to be regarded as a private institution within the meaning of this rule.

2. *Grant by married woman of right of way to railroad company*—A writing signed by husband and wife, but not acknowledged by either, granting to a railroad company a right of way through the wife's land, was at most but the executory contract of a married woman, and did not pass either the legal or equitable title. But even if it could have been operative as a grant, as the road was not built on the way named in the writing, it can serve no purpose except as a fact or circumstance to be considered with other facts in determining whether the wife is estopped to claim damages for the injury to her other land from the building of the road.

3. *Same—Estoppel*—The fact that a married woman has, even by writing, granted to a railroad company a right of way through a particular part of her land, in order to induce the company to construct its road through that part of her land rather than through some other part, does not estop her from claiming damages for the injury to her land from the construction of the road.

4. *Same*—A married woman can not be estopped to assert title to her lands except upon the ground of fraud, either by concealment or active conduct.

5. *Acquiescence in construction of railroad over one's land—Estoppel*—Where one permits the construction of a railroad through his land he should not, for reasons of public policy, be allowed to recover the possession of the land taken, and this rule perhaps should apply to persons *non sui juris*. But the owner is not thereby deprived of his action in damages for the value of the land taken or for injuries done him by the construction or operation of the road.

Helm & Bruce for appellant.

Fairleigh & Straus and James W. Lewis for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Barbour.

We will ignore the fact that the legal title to the land through which appellant's road was constructed was in Stephens, the trustee, for Mrs. Minor, and treat the case as if she was the owner of the legal as well as the equitable title.

The defense presented by the pleadings and in argument here is twofold: First, that the appellees, Minor and wife, dedicated the right of way to the use of the appellant, the railroad company; and second, that Minor and wife by their conduct are estopped from setting up any claim for damages growing out of the construction and operation of the road through her land.

A dedication of real estate to a public use may be made by parol, but there is no such thing as a parol dedication of real estate for private use. A railroad corporation is not a public institution. It is

Digitized by Google

true that it serves a public purpose, and for that reason the law has conferred upon it the right to condemn land for its use, and makes it, in many particulars, subject to the control of the courts; but it is, nevertheless, a private institution created and operated for the purpose of private gain.

Minor and wife, by a writing signed by them, but not acknowledged by either, granted to the appellant sixty feet of land as a right of way through her land. By the express terms of this writing the road was not to run within 300 feet of their residence. The road as constructed runs within 100 feet of their residence.

It must be conceded that this writing neither passed the legal or equitable title, as it was, at most, but the executory contract of a married woman. But even if it should have been operative as a grant, as the road was not built on the way named in the writing, it can serve no purpose, except as a fact or circumstance to be considered with other facts, in determining the question of estoppel.

The question of estoppel is one of more difficulty. The facts relied upon as an estoppel are these: The company had in contemplation two routes for its road, both of which run through appellee's farm, the back route and the front route. Appellees signed the writing referred to to induce the adoption of the front route. That route was adopted. After its adoption the company changed the line through appellees' land, so as to run nearer their residence.

The writing provided that the road should not run within 300 feet of the residence—the road as built runs within 100 feet of it. This change was made with the assent of the appellees, and after they had expressed a preference for the change. The appellees neither misrepresented or concealed any fact. The company, with a full knowledge of all the facts (knowing that the writing relied upon was void), built its road through the land.

There was evidence showing that the farm was materially damaged by reason of the construction and operation of the road, and also evidence for the defendant tending to show that the value of the farm had been enhanced by reason of the road.

The court, ignoring the question of estoppel, instructed the jury that they should find for the plaintiffs such actual damage, if any, as they may have sustained by the construction, maintenance and operation of the railroad through their farm, and that such damage was the decrease, if any, in the market value as a whole, resulting from the construction and permanent maintenance and operation of the road through the farm; but if the market value of the farm has not been diminished, because of the construction and operation of the road through it, they should find for the defendant.

The appellant certainly has no cause to complain of these instructions as to the measure of damages. They gave no right to recover for the value of the land taken, and if the plaintiffs' property was enhanced in value, by reason of the road, they could not recover even nominal damages.

The question then is, do the facts which we have stated, and which, for the purpose of this appeal, must be taken as admitted, estop Mrs. Minor from recovering the actual damage done her farm by reason of the construction and operation of the road through it?

Mr. Bigelow, in his work on Estoppel, page 437, says that the following elements must be present in order to constitute an estoppel by conduct: First, there must have been a misrepresentation or concealment of material facts; second, the representation must have been made with knowledge of the facts; third, the party to whom it was made must have been ignorant of the truth of the matter;

Digitized by Google

fourth, it must have been made with the intention that the other party would act upon it; fifth, the other party must have been induced to act upon it.

Several of these elements are wanting in this case; but the case of Connelly v. Branstler, 3 Bush, 702, is relied upon by appellant's counsel as conclusive of the question. In that case the plaintiff was seeking to recover dower in her first husband's land which she, for the purpose of facilitating an advantageous sale, had induced the defendant, at a public sale, to purchase and pay for upon her express renunciation of any claim to dower.

The court said that, although her declaration to the bidder did not legally alienate her dower, yet the sale being made on the faith of it she is equitably estopped from asserting dower against the purchaser, for the disability of coverture would not exonerate her from fraud. But we venture to say, notwithstanding this authority which we do not question, that no court would hold that a wife who should say to one purchasing her husband's land, that if he would buy it she would claim no dower, would be, upon the death of her husband, estopped from claiming dower against the purchaser, who, relying upon her statement, bought the land and accepted a conveyance from the husband, in which she did not join.

The case before us is unlike the Connelly case, or even the supposed case. The appellees are not seeking to interfere with the operation of the railroad, or to recover the land taken by it.

While the petition sounds in damages for a trespass *vi et amis*, by the instructions of the court they are not allowed to recover for the value of the land taken, but are confined to the damage, if any, done to the farm by the road. If the road benefited the land they were not allowed to secure anything.

As appellees counsel say, we know of no case which holds that a married woman is estopped to assert title to her lands, except upon the ground of fraud, either by concealment or active conduct. There was no fraud upon the part of Mrs. Minor. Her conduct could not have misled any one. The only evidence affecting her in the slightest is that she signed the writing relinquishing the right of way to sixty feet of land through her farm, on a line not within 300 feet of her residence, and that after this, upon one occasion when the line was being surveyed upon which the road was afterwards built, she said that "it was just where they wanted it; that if it went nearer the river it would destroy the bottom."

We would be slow to hold that a married woman should be estopped from claiming the value of the land taken, or the damage done to her other land by the appropriation of part of it for a right of way for a railroad, simply because she remained silent while the road was being built, or expressed satisfaction with its location. The evil consequences, aside from the complete subserviency to the husband's will, which would result from such a rule are obvious. There would in many cases, so many as to make them the rule rather than the exception, no longer be a necessity or a reason for a married woman's pursuing the plain requirement of the statute relating to the manner in which she can part with her title to land. For if by simple acquiesence in the building of a railroad she loses not only the title to the land, but also the right to recover its value or the injury to her other lands, there can be no reason why the rule should not apply in all cases where she consents to or acquiesces in the improvement of her land by another person.

When one permits the construction of a railroad through his land he should not, for reasons of public policy, be allowed to recover the

Digitized by Google

possession of the land taken; and this rule perhaps should apply to persons *non sui juris*.

The law applicable to such a case, as it seems to us, is well stated by the Supreme Court of Louisiana, in the case of St. Julien v. Morgan, &c., R. R. Co., 35 La. Am., 924: "One who permits a railroad company to occupy and use his lands, and construct its road (a *quasi* public work) thereon without remonstrance or complaint, can not afterwards reclaim it free from the servitude he has permitted to be imposed upon it.

"His acquiescence in the company's taking possession and constructing its works under circumstances which make imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action in damages for the value of the land or for injuries done him by the construction or operation of the road."

The evidence objected to was drawn out by the appellant's cross-examination. Besides, it could not possibly have misled the jury in view of the instructions.

The judgment is affirmed, with damages.

SUPERIOR COURT ABSTRACTS.

Atkinson v. Tennill.

Filed March 29, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Corporations—Acceptance of charter—Discounting of note by incorporated bank*—In the case of private corporations the rule is that the charter is ineffectual to constitute a corporate body until it is accepted by the corporators. If the charter depends upon any precedent conditions an acceptance made in strict compliance therewith is necessary to render it operative either as a grant to or an obligation upon the corporation.

A firm which was doing a private banking business obtained a charter from the Legislature, authorizing them to organize and carry on their business as a corporation, but it was provided that certain steps must be taken before the corporation could organize or commence business. Before these things were done the note sued on was discounted by the bank. *Held*—That the note was not discounted by an incorporated bank, and was, therefore, not placed upon the footing of a foreign bill of exchange.

2. *Negotiable instruments—Notice of infirmities*—Even when a note has been discounted at a regularly incorporated bank, at which it is made payable, and thus placed upon the footing of a foreign bill of exchange, the holder takes it subject to infirmities of which he had notice when he received it.

C. T. Atkinson and J. A. Fulton for appellant; Nat. W. Halstead for appellee.

Lee, Adm'r, &c. v. Smith.

Filed March 29, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Husband and wife—Husband's constructive possession of wife's personalty*—The wife's personalty in possession of her agent or trustee is con-

Digitized by Google

structively in the possession of the husband, and if it be the wife's general estate the husband owns it absolutely and unqualifiedly.

2. *Same—Descent and distribution*—Under the statute of descent and distribution the husband becomes entitled to the whole of the wife's personalty at her death to the exclusion of her relatives, subject to the claims of her creditors.

3. *Waiver by husband of marital rights*—Where a husband consented that his wife might assign to her mother certain notes which she owned in payment for land purchased by the mother for her, he thereby waived his marital rights as to the notes, and upon the death of the wife was not entitled to the notes.

John D. Wickliffe for appellants; John S. Kelley for appellee.

CECIL v. BRANNIN, BRAND & GLOVER.

Filed March 29, 1893. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Yost, affirming.

Separation of conclusions of law and fact—Motion for new trial—In an ordinary action submitted to the court upon the law and facts there is nothing upon which to base a motion for a new trial until there has been a separation by the court of its findings of law and facts. And if the appellant fails before making his motion for new trial to ask for a separation by the court of its conclusions of law and fact, this court can not review any error of law occuring at the trial or inquire whether the judgment is supported by the evidence.

Stone & Sudduth for appellant; O'Neal, Phelps & Pryor for appellee.

FAULKNER, &c. v. CUMBERLAND VALLEY BANK.

Filed March 29, 1893. Appeal from Knox Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

Sureties—General and special deposits in bank—If at the maturity of a note payable to a bank the principal, who was then insolvent, had a sufficient sum of money to his credit as a "general" deposit in the bank to pay the note good faith towards his sureties required that the bank should appropriate the amount for that purpose, and its failure to do so released the sureties. If, however, any amount which may have been to his credit was placed there by him as a "special" deposit to meet checks already drawn by him, the bank merely held it in trust for the benefit of the holders of the checks, and was bound to pay it out on the presentation of the checks. And as the burden was on the sureties to show that the principal had in the bank on "general" deposit a sum sufficient to meet the note, and the court found that they failed to do this, this court can not, in the absence of evidence, reverse that finding.

A. K. Cook and W. H. Holt for appellants; James D. Black for appellee.

DAY, &c. v. RENAKER.

Filed March 29, 1893. Appeal from Harrison Chancery Court. Opinion of the court by Presiding Judge Yost, reversing.

An amended petition filed after the action was dismissed can derive no support from the original petition, and as the amendment standing alone states no cause of action a demurrer thereto should have been sustained.

J. Irvine Blanton for appellants; W. T. Lafferty for appellee.

OWSLEY v. GRISSOM.

Filed March 29. 1893. Appeal from Cumberland Circuit Court. Opinion of the court by Judge Barbour, reversing.

Assignment—Payment—In this action upon an assigned note the evidence fails to sustain the defendant's plea that he had paid the note to the assignor

Digitized by Google

before he had notice of the assignment, and the chancellor erred in dismissing the petition.

Sandidge & Sandidge for appellant; M. O. Allen for appellee.

East End Improvement Co. v. Sipp.

Filed April 5, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, affirming.

1. *Injury from defective covering of cellar under sidewalk*—Excavations under sidewalks, if their coverings are kept in such repair as not to interrupt the safe and convenient use of the street, are not unlawful or nuisances; but lot owners constructing and maintaining such open areas in the sidewalk adjacent to their property, and covering them so insecurely as to render them unsafe and dangerous to passing pedestrians, are liable for any injuries sustained thereby.

2. *Same—Respective liability of landlord and tenant*—For injuries resulting from such a defect in rented premises the landlord is liable if there is an express agreement between him and the tenant that he will keep the premises in repair, or if the nuisance or defect existed at the time of the making of the lease. And whether the tenancy be from year to year or from month to month, if the landlord renews the lease after the tenant has erected or maintained a nuisance thereon, he will be liable.

In this action against the landlord to recover damages for injuries to plaintiff resulting from the defective covering of a cellar under the sidewalk, the court properly instructed the jury that the renting by defendant to its tenant "was by the month," and that if they believed that at the beginning of the tenant's rental month during which plaintiff was injured the door was not reasonably safe to persons passing along the sidewalk in front of the house, and defendant knew thereof, or might have so known by the exercise of ordinary care, they should find for plaintiff.

O'Neal, Phelps & Pryor for appellant; James C. Klein and Stone & Sudduth for appellee.

Smith v. Owenton, &c., Turnpike Company.

Filed April 12, 1893. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

1. *Former adjudication—Dismissal upon demurrer*—A judgment dismissing petition upon a demurrer because it presents no cause of action constitutes no bar to another action on the same contract. A judgment must have been a decision upon the merit of the case determining the rights of the parties before it is a bar to a second action.

2. *Stockholder testifying for corporation does not testify for himself*—In an action to which a corporation is a party it is not error to permit stockholders of the corporation to testify in chief for the corporation after it has introduced other testimony. The provision of the Civil Code, that no person shall testify for "himself" in chief after introducing other testimony, does not apply.

3. *Subscription to turnpike company*—Where one who subscribes to the capital stock of a turnpike road company ratifies a change subsequently made by the company in its name and the route of its road, and promises to pay his subscription, he is bound, notwithstanding the change. And he is likewise bound when he ratifies in the same way the action of the company in releasing other subscribers.

Lindsay & Botts for appellant; Thomas R. Gordon for appellee.

Mitchell v. Owenton, &c., Turnpike Company.

Filed April 12, 1893. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Digitized by Google

Subscription to turnpike company—Ratification of change in road—In this action by a turnpike road company to recover the amount subscribed by defendant to aid in the construction of plaintiff's road, although it appears that a change was made in the terminal point of the road after defendant made his subscription, yet, as a decided preponderance of the testimony shows that defendant stated that he was pleased with the change and then promised to pay the sum originally subscribed by him, he is bound.

Lindsay & Botts for appellant; Thomas R. Gordon for appellee.

NICKELS v. CLAY.

Filed April 12, 1893. Appeal from Boyd Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Trusts—Statute of frauds—Where one of two persons who have purchased land jointly has the land conveyed to himself alone, without the knowledge or consent of the other, a trust results by implication in favor of the latter. The statute of frauds forbids the enforcement of a trust or equity created by contract and not such as results from the nature of the transaction by implication of law.

Moore & Everett for appellant; T. R. Brown for appellee.

CALDEWAY v. BICKEL.

Filed April 12, 1893. Appeal from Louisville Chancery Court. Opinion of the court by Judge Brent, affirming.

Attachments—Equities—Where one who had advanced a merchant money with which to carry on his business, and incurred obligations in the conduct of the business, received the proceeds of the merchant's stock of goods and business when sold, with the understanding that he was to be reimbursed for the sums advanced by him, and also that all obligations incurred by him in the conduct of the business were to be paid out of the fund, his equity is superior to that of a creditor who has attached the fund in his hands, there being no evidence of fraud or collusion.

Willson & Thum for appellant; John Barret for appellee.

EDWARDS v. MCKINSEY'S ADM'R.

Filed April 12, 1893. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, reversing.

Mistake—Limitation—Where the directors of a corporation have, by mistake, signed a note in such a way as to make themselves liable as individuals when the debt was, in fact, that of the corporation, and it alone was intended to be bound, they may in an action on the note plead and prove the mistake and thus escape individual liability. And this is true however long a time may have elapsed since the execution of the note, as limitation can not be pleaded as a bar to such a defense.

J. W. Greene for appellant; Thomas R. Gordon for appellee.

L. & N. R. R. CO. v. RICHERSON.

Filed April 12, 1893. Appeal from Taylor Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Railroads—Injury to passenger in alighting from train*—In this action against a railroad company to recover damages for injuries received by plaintiff in alighting from a train upon which he was a passenger, the court properly instructed the jury that if the preponderance of the evidence showed that plaintiff, "relying on the assurances of defendant's agent (the brakeman) that it was safe, or obeying his command under force or apprehension of force, did alight while the train was in motion, by which he was thrown down and injured, the law is for plaintiff." And the court properly

Digitized by Google

refused an instruction as to contributory negligence, as the plaintiff could not as matter of law have been guilty of contributory negligence if the facts which the jury were required to find in order to return a verdict for plaintiff existed.

2. *Same—Evidence*—It was competent for plaintiff to prove by his mother what his appearance was when he came home on the night of the accident and what she did to relieve his apparent suffering. And even if it was incompetent for her to state that he "complained very much with his head and said it hurt him and held it in his hands," it could not have prejudiced the defendant.

3. *Excessive verdict*—A verdict for "$1,000 as compensatory damages and $1,500 as exemplary damages" is not excessive, as the plaintiff fell between two moving trains, and his mental suffering while lying there must, aside from his physical injuries, have been intense.

4. *Punitive damages*—As the conduct of the brakeman, if the plaintiff's witnesses are to be believed, was *quasi* criminal, the case warranted punitive damages.

Wm. Lindsay, H. W. Bruce and John McChord for appellant; Montague & Collins, J. M. Wood and Samuel Averitt for appellee.

Bowman v. Wood.

Filed April 12, 1893. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Forgery of signiture to renewal note—Right of recovery on old note—Where a creditor holds a note on two or more obligors and accepts what purports to be a renewal note signed by all the obligators, and it turns out that the names of some of them were forged, or that the renewal note is as to some of them invalid, their obligation on the original note revives and the obligee may bring suit thereon and recover judgment against them. And it is no bar to an action on the old note that an action on the new note has resulted in a judgment for defendants, the right to recover on the old note being in no way involved in that action. While the plaintiff may in such an action set up the old note by way of amendment and recover thereon, he is not prejudiced by his failure to do so.

George S. Fulton for appellant; John D. Wickliffe for appellee.

Cincinnati, &c., R. Co. v. Stakhouse.

Filed April 12, 1893. Appeal from Fayette Circuit Court. Opinion of the court by Judge Barbour, affirming.

In this action against a railroad company to recover damages for the killing of stock on the track a verdict for plaintiff is not flagrantly against the evidence.

C. B. Simrall and R. A. Thornton for appellant; Bronston & Allen for appellee.

Lostutter v. Dailey.

Filed April 19, 1893. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

1. *Master and servant—Defective machinery*—A master is not liable to the servant for injuries caused by defects in the materials furnished the latter for use unless he failed to exercise ordinary care in the selection or inspection or failed to warn the servant of a known defect therein.

In this action by a servant against his master to recover damages for injuries received while bailing hay, the injuries resulting from a defect in the hay press furnished by the master for the servant's use, as there is nothing to show that the master knew or ought to have known of the defect, or that he is chargeable with such negligent ignorance as is equivalent to knowledge, he is not liable.

Digitized by Google

2. *Same—Servant's knowledge of defect*—If a servant continues without objection to use a machine known to him to be dangerous, he does so at his own risk, and if he is injured the master is not liable. As the servant in this case had actual knowledge for several days before he was injured of the unsafe condition of the hay press he was using, and made no complaint, he can not recover, even though the master was negligent in furnishing such a machine for his use.

George C. Drape, Gaunt & Downs and J. A. Donaldson for appellant; P. U. Major and T. J. McElrath for appellee.

L. & N. R. R. Co. v. Higginbotham.

Filed April 19, 1893. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Yost, affirming.

Railroads—"Timely warning"—In this action against a railroad company to recover damages for injuries received by plaintiff alleged to have resulted from the negligence of defendant's servants in failing to give warning of the approach of an engine to a public crossing, it was not improper to instruct the jury that if they believed from the evidence that those in charge of the engine failed to give "timely warning" of its approach by ringing the bell, such failure was negligence upon their part. The term, "timely warning," was sufficiently specific as to the time when or place where the signal should have been given.

J. W. Alcorn for appellant; R. J. Breckinridge and Robert Harding for appellee.

Evansville Grain Co. v. Stout.

Filed April 19, 1893. Appeal from Crittenden Circuit Court. Opinion of the court by Presiding Judge Yost, reversing.

Remission of part of verdict—Where a verdict is so flagrantly excessive as to indicate that it was influenced by passion or prejudice, the wrong can not be righted by the remission of any part of the verdict or by any act short of giving the party complaining a new trial before an unbiased jury.

Blue & Blue for appellant; Nunn & Cruce for appellee.

Merchants' Dispatch Transportation Co. v. Hoskins.

Filed April 19, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Yost, reversing.

1. *Carriers of goods—Special contract—Burden of proof*—Where a common carrier who is sought to be made liable for the loss of goods he has undertaken to carry relies upon a contract limiting his liability, the burden is upon him to show not only that the limited contract has been made, and that the loss arose from a cause excepted therein, but further, that his negligence did not contribute to the loss. Therefore, when the carrier stipulates by such a contract that he shall not be liable for the loss of the goods by fire, the burden is upon him to show, not only that the goods were lost by fire, but that the fire was not caused by his negligence. But as the plaintiff in this action upon such a contract assumed the burden of proof, and failed to show that the fire by which the goods were destroyed was caused by defendant's negligence, a verdict for plaintiff is not sustained by the testimony.

2. *Railroad companies are not required to keep a continuous watch during the night* in their depots in small towns. And the mere fact that a depot had, on several occasions, been broken open and articles of small value taken, did not impose upon the company such a duty.

Wm. Lindsay, Lyttleton Cooke, Edward W. Hines and I. T. Woodson for appellant; Blain, Kinkead & Grinstead for appellee.

Digitized by Google

L. & N. R. R. Co. v. MURRAY.

Filed April 19, 1893. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. *Repeal of statute by new Constitution*—The act of February 21, 1890, providing a special method for selecting jurors in Jefferson county, was not repealed by the new Constitution. The Constitution does not purport to regulate the summoning and empaneling of jurors, and of necessity the existing laws must be continued in force until additional legislation is had.

2. *The leaving of an uncovered ditch under a railroad track* over which it was to be reasonably expected that employes would push cars, and which they could not see while so engaged, was negligence on the part of a railroad company. And whether a laborer engaged in pushing cars over the track knew there was a ditch under the track, or whether from his having prior to that time observed the men at work on each side of the track, he should have taken the precaution to see whether the ditch was under the track, were questions for the jury.

3. *Instructions to jury*—If the instructions were not as specific as defendant had the right to ask that they should be, it should have presented instructions which would have cured the omission.

4. *Punitive damages*—The evidence warranted an instruction as to punitive damages.

Lyttleton Cooke, Wm. Lindsay and Edward W. Hines for appellant; W. P. D. Bush and Findlay F. Bush for appellee.

Digitized by Google

INDEX TO VOLUME XIV.

ACCEPTANCE OF DEED— Page.
finding of jury that a deed was accepted by evidence 764
ACTIONS—See Commissioners, 2; Bailment, 1; Appeal Bonds, 1; Parties to Actions, 3; Trusts, 10; Conflict of Law, 1; Guardian and Ward, 14; Assignment by Operation of Law, 13, 14—
1. action by executor to compel bank to transfer stock of decedent in manner directed by will is transitory 17
2. where agent of different parties ships goods in his own name under one bill of lading, right of action thereon of each principal is separate—agent not being a joint one 108
3. right of separate action for damages of each of several principals who had a common agent, by whom goods were shipped under one bill of lading and lost 268
4. when action for use and occupation of land may be maintained ... 599
5. to enforce or rescind contracts transitory as a general rule 782
6. action to enforce contract and seeking sale of land to satisfy lien thereby created is local 782
7. action for injunction in this State to prevent suit in another State, 894
ACTIONS TO QUIET TITLE—See Quia Timet; Res Adjudicata, 6—
judgment quieting title erroneous before survey made showing that land is within plaintiff's boundary 830
ACCOUNTS—See Limitation, 8—
1. application of partial payments thereon 88
2. action involving complicated accounts reversed for reference to a commissioner 910
ADMISSIONS BY GRANTORS IN DEED—See Evidence, 30.
ADVANCEMENTS—See Consideration, 2; Parol Evidence to Vary Written Instruments, 1—
1. children to be charged with advancement under provision of particular will 140
2. testator's intention in such case determines what is to be charged as such advancement 140
3. recital in will by testator that he has kept "an account" of advancements—children charged with money not included in said account 140
4. equalizations of when one child lost land advanced and was compelled to account for rents thereof 373
5. lien for amount adjudged child in distribution of father's estate for advancement so lost exists only on father's lands and not on lands advanced the other children in certain case 473
6. note of heir to ancestor may be treated by parties as an advancement, or shown to be, by extrinsic evidence 668
ADVERSE POSSESSION—See Ejectment, 3; Roads and Passways, 8; Ways, 1, 2; Mortgages, 9; Vendor and Vendee, 8; Interference Between Patents, 1; Quia Timet, 2—
1. by defendant after commencement of suit to recover land, not considered in aid of plea of limitation 77
2. possession of certain party presumed to be hostile rather than friendly to former owner of land 85
3. claim of one under title of record superior to claim by adverse possession alone, with no definite enclosure and with a boundary uncertain and in doubt 283
4. of land for seventy years confers perfect title even if whole tract is not included by deed under which the claim is made 436
5. evidence shows that a father held certain land adversely to his son and not by agreement with the son 458
6. evidence authorized finding of jury that son held land adversely fifteen years under verbal gift by a father 514

Digitized by Google

ADVERSE POSSESSION—Continued. Page.
7. instruction defining adverse possession correct in certain case..... 514
8. possession by enclosure of certain land not adverse in certain case unless included in deed of person in possession 582
9. certain possession not adverse, even if there was an enclosure—limitation..... 657
10. for more than fifteen years shown in certain case 852
AGENTS—See Principal and Agent, 1—
contract by agent of different principals, whereby goods of all are shipped under one bill of lading, right of each principal to maintain separate suit to recover damages for loss of goods..... 268
ALIMONY—See Divorce, 3—
1. agreement by a wife with her husband not to sue for alimony or divorce, within certain period, void..... 628
2. alimony allowed, reasonable in particular case 628
3. alimony and attorney's fee should have been allowed wife in certain case 660
ALLEGATION AND PROOF—
party averring particular contract must rely throughout the case upon contract so pleaded, and can not rely upon another one filed with deposition of a witness..... 238
ALTERATION OF WRITTEN INSTRUMENTS—
1. note materially altered by holder, without knowledge or consent of maker, is useless for any purpose 368
2. addition of place of payment to nonnegotiable instrument is a material alteration 368
3. maker signing note with unfilled blanks impliedly gives holder authority to fill blanks in accordance with general character of instrument.. 368
4. when innocent purchaser must take notice of fact that note has been materially altered without maker's authority..... 368
APPEALS—See Judgment, 2; Costs, 1; Separation of Conclusions of Law and Fact, 1; Practice in Criminal Cases, 10; Elections, 2; Res Adjudicata, 3; Practice in Civil Cases, 7, 16; Eminent Domain, 1; Peremptory Instructions, 7; Instructions, 3; Bill of Exceptions, 1, 2; New Trial, 17; Evidence, 63—
1. constable has such interest in property on which he has levied execution as authorizes him to appeal from judgment giving it to claimant 40
2. execution levied being for $100—and value of tobacco $600—Superior Court has jurisdiction of appeal..... 40
3. creditor with debt less than $100—seeking to have conveyance made by debtor operate as involuntary assignment—appellate court has no jurisdiction of appeal by him. 48
4. error of $12 65 in controversy involving $900—too small to authorize reversal 48
5. chancellor's finding of facts supported by evidence..... 76
6. weight given judgment of chancellor concerning the evidence to support grounds of attachment..... 109
7. judgment of chancellor affirmed in certain case 113
8. on appeal pleadings will be construed favorably for appellee to support judgment 143
9. agreement below to consider answer and evidence in another case as part of this one—such answer and evidence not considered on appeal, although the record of the other case is sent out with this one 170
10. appellee has right to file transcript at any time after granting of the appeal..... 205
11. weight of judgment of chancellor on appeal—reversed if clearly against preponderance of evidence 220
12. appeal dismissed where record of former appeal in the case, necessary to decision of this appeal, is not filed in this case 236
13. case wherein certain charter is assailed as unconstitutional, being transferred to Superior Court by Court of Appeals, that charter will be treated as valid in former court 236
14. constitutional question not considered in case transferred to Superior Court by Court of Appeals 240
15. judgment requiring garnishee to pay money into court affirmed because partial transcript does not enable court to determine whether or not the judgment is proper 257

Digitized by Google

APPEALS—Continued. Page.
16. weight of judgment of chancellor on question of fact in contested election case ... 274
17. in contested election case appeal to circuit court stands for trial at first term after appeal is taken ... 278
18. chancellor's judgment on issue of fact sustained by evidence in certain case ... 311
19. chancellor's finding on purely legal issue to be treated as verdict of properly instructed jury ... 334
20. infant defendant on appeal may complain of judgment below to which no exceptions were taken ... 328
21. correctness of judgment ordering sale of land to satisfy lien not considered on appeal taken more than two years after its rendition. 351
22. but correctness of order confirming report of sale of such land may be considered if appealed from within the two years ... 352
23. premature submission no ground for reversal until motion to set aside judgment is made in lower court ... 431
24. grounds for new trial sufficient to raise correctness of certain instruction on appeal ... 466
25. amount of defendant's dismissed counterclaim added to amount of plaintiff's judgment is amount in controversy on defendant's appeal ... 474
26. distance between two points being material in certain case and indicated by witness as same as that between objects in courtroom, whose distance apart are not known to appellate court—in absence of knowledge of such distance, material evidence treated as absent from record and verdict affirmed ... 477
27. material evidence treated as absent from record in certain case ... 487
28. chancellor's finding on question of fact treated as verdict of properly instructed jury ... 497, 527
29. weight given verdict of jury on appeal ... 514
30. appellee may file transcript and move to affirm as a delay case ... 519
31. abandonment of appeal from order discharging attachment for rent by landlord ... 525
32. judgment affirmed when incorrect reason is given by trial judge for proper judgment ... 527
33. in absence of cross appeal case not reversed for errors prejudicial to appellee ... 527
34. chancellor's finding of facts authorized by evidence ... 558
35. verdict locating boundary line sustained by evidence ... 570
36. transcript on appeal presumed to be complete ... 574
37. reply lodged in record treated as filed ... 621
38. evidence sufficient to support certain verdict ... 624
39. appellate practice—attachment suits heard together—transcript in one case not considered in another ... 669
40. error waived by failure to complain on former appeal ... 670
41. from judgment respecting opening of county road—only errors of law considered ... 677
42. in such case, in absence of separation of conclusions of law and fact, judgment affirmed ... 677
43. appeal lies from judgment of county court sustaining demurrer to information of auditor's agent ... 733
44. pendency of petition for new trial no bar to an appeal ... 760
45. no appeal lies from void judgment before motion to set it aside ... 767
46. sufficiency of pleading to support judgment only question considered on appeal in ordinary action submitted to court without a jury, where there is no separation of conclusion of law and fact. 815
47. party may waive objection to consideration of appeal from void judgment before motion made to set it aside by failing to move to dismiss appeal ... 821
48. only sufficiency of pleadings to support verdict considered when evidence is not in the record ... 847
49. every presumption in support of judgment indulged on such appeal ... 847
50. objection to answer as not verified made too late for first time on appeal ... 858
51. mode of procedure and remedy not being objected to below, objection considered as waived ... 892
52. although weight of evidence is for defendant, after four trials judgment against him will not be reversed ... 893
53. certain judgment sustained by evidence ... 896

Digitized by Google

APPEALS TO CIRCUIT COURTS—See Courts, 1; Roads and Passways, 4— Page.
1. time for prosecuting appeal 502
2. appeal from judgment quashing execution—amount in controversy. 502
APPEAL BONDS—
1. liability on—petition on bond not necessary, issual of summons being all that is required 502
2. in proceeding upon an appeal bond, errors alleged to have been committed on trial of the appeal not inquired into or considered.. 502
APPELLATE JURISDICTION—
1. judgment enforcing lien on land does not involve title to freehold —amount in controversy determines whether Superior Court or Court of Appeals has jurisdiction of appeal 109
2. charter of Louisville allowing appeal direct from city court to Superior Court, where validity of an ordinance is involved, applies only in criminal and penal cases 109
APPEARANCE—See Assignment by Operation of Law, 16; Pleadings, 14—
1. appearance of nonresident corporation treated as entered by reason of the making of certain motions by it 142
2. after appearance by answer, motion to vacate judgment on ground that defendant was not served with process was properly overruled 718
ARBITRATION AND AWARD—See Insurance, 38, 39, 40, 41, 42—
1. when specific execution of an award will be decreed or refused 527
2. certain party not entitled to specific execution of an award 527
3. award not set aside, as there is no evidence of mistake of law or fact by arbitrators and no allegation of fraud, etc. 80
4. failure to furnish each party a copy of the award does not invalidate it, but merely postpones right to judgment thereon 80
ARREST OF DEBTORS—See Bail, 4.
ARSON—See Indictment, 10.
ASSIGNMENTS—
debtor had not assigned certain fund to himself as executor of his father's estate 98
ASSESSMENTS—See Municipal Taxation, 2, 3, 7, 8, 9, 10; Pleadings, 8; School Tax, 1, 8; Taxation, 1, 2, 3, 8, 9.
ASSESSORS—See Offices and Officers, 1, 2.
ASSESSMENT FOR STREET IMPROVEMENT—
wholly within one-quarter of square in Louisville—mode of assessment 816
ASSIGNMENT FOR BENEFIT OF CREDITORS—See Estoppel, 1; Set-off, 1; Sureties, 6; Sales of Personal Property, 8—
1. surety on bond executed to assignee not liable for certain funds... 109
2. assignee can not bind trust estate by contract with attorneys for specific compensation—chancellor must allow only reasonable attorney's fee 194
3. assignment for creditors made for purpose of cheating, etc., creditors, is void, and assignee acquires no rights thereunder 207
4. insolvent debtor may maintain action against trustee to whom he assigned his estate to compel him to properly execute the trust .. 397
5. to such an action the creditors of the debtor are necessary parties. 397
6. power to make such assignment for partnership may be conferred on one partner expressly or impliedly 480
7. recording of deed of assignment accepted by assignee within period prescribed by statute relates back to date of execution, so that assignee's rights are superior to creditor attaching property after execution of deed 480
8. execution of deed of assignment—attachments—recording of deed of assignment 480
9. death of assignor—settlement of his estate—failure of assignee to settle—exemptions 574
10. if assignee act as his own attorney, only his commission as assignee can be allowed him 645
11. assignee not a purchaser for value, but stands in position of his assignor 858
12. assignment for creditors invalidated by fraudulent intent of assignor 898
13. compensation of assignee when assignment is set aside for fraud.. 898
14. rights of assignee and creditors under such fraudulent assignment. 898

Digitized by Google

ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued. Page
15. creditors, by presenting claims to assignee, not estopped to attack assignment as fraudulent 892
ASSIGNMENT BY OPERATION OF LAW—See Appeals, 3—
1. mortgage by insolvent debtor of exempt property not an unlawful preference 204
2. preference of creditors—fraudulent conveyances—consolidated actions 367
3. fraudulent transfer of property to one creditor for the purpose of cheating other creditors may operate as an assignment 621
4. preference of creditors—fraud—attachments—priorities 621
5. infancy of debtor at time of alleged preference must be pleaded by him—not available as plea for attaching creditor 622
6. act of preference—rights of subsequent creditors—pleading 669
7. subsequent creditors entitled to share in estate 669
8. presumed that transfer of property by insolvent debtor to creditor was with design to prefer 669
9. such presumption may be rebutted—how 669
10. act of 1856 constitutional and valid 695
11. presumed that transfer of property by a certain insolvent debtor was with intent to prefer 695
12. such presumption conclusive in certain case 695
13. action by one creditor to have unlawful preference declared an assignment inures to benefit of all creditors 695
14. when original plaintiff dismisses such action other creditors may prosecute it to judgment 695
15. consolidation of actions—nonresident plaintiff in one action considered as appearing to another action 695
16. mortgage of homestead of debtor not an unlawful preference 695
17. day on which mortgage was lodged for record must be computed as first day of six months after which it may be assailed as an unlawful preference 794
18. when intent to prefer is presumed from insolvency of grantor or mortgagor 867
19. when conveyances by an insolvent operate as an assignment 867
ATTACHMENTS—See Appeals, 6, 15; Jurisdiction, 3; Assignment for Benefit of Creditors, 7, 8; Assignment by Operation of Law, 3, 5; Final Order, 5; Summons, 3; Prejudicial Error, 5—
1. mode of issuing, which has been used for many years, should be upheld as valid 1
2. orders of attachment endorsed on a summons, regarded as part of summons 1
3. where such summons runs in name of "The Commonwealth of Kentucky," attachment regarded as having same style 1
4. fund deposited to individual credit of defendant subject to attachment—fund was not assigned by debtor to himself as executor ... 98
5. garnishment for taxes—no judgment to be rendered against garnishee where it does not appear he is indebted to delinquent taxpayer 140
6. evidence sufficient to support grounds for attachment in particular case 143
7. constructive fraud by debtor in disposing of his property will not authorize attachment on ground that debtor has disposed of property with intent to defraud, etc.—actual fraud necessary to sustain such attachment 141
8. corporation organized under chapter 56 incurring debts in excess of limit fixed by articles—no ground of attachment therefor 144
9. burden is on plaintiff when grounds of attachment are traversed by answer 206
10. specific attachment available where property in lien to plaintiff is about to be sold by defendant regardless of defendant's intention. 578
11. order of attachment void when not issued in name of Commonwealth and addressed to no one 719
12. in absence of bill of exceptions, judgment sustaining attachment not reversed on appeal 668
13. advancement of money to merchants—receipt of proceeds of sale of goods—attachment 925

Digitized by Google

ATTORNEY AND CLIENT—See Insurance, 5, 87; Privileged Communications, 1; Assignment for Benefit of Creditors, 2, 10; Evidence, 9; Municipal Corporations, 20—
1. right of attorney to retain money collected for a client who is indebted to him in sum exceeding amount collected 407
2. where debt due attorney by client is subject of litigation, attorney may retain money collected for client until the litigation is decided 407
3. rule on attorney to pay over money to client—sufficiency of response of attorney 407
4. certain contract between attorney and client champertous and void. 42
ATTORNEY FOR NONRESIDENT DEFENDANTS—
1. if employed by defendants, must so state in his report to court.... 910
2. excessive allowance to such attorney 910
AUDITOR OF COMMONWEALTH—See Constitutional Law, 13, 14, 15, 16, 17—
right to contest constitutional validity of appropriation acts, valid on their face 529
AUDITOR'S AGENTS—See Texation, 8; Appeals, 41—
1. fee for collection of demands due State 477
2. information by—sufficiency of 732
AWARDS—See Landlord and Tenant, 9.
BAIL—
1. bail of defendant held by examining court to next term of circuit court not released by failure to return indictment at such next term—defendant must appear if indictment be returned at second term after bond is given or the bail are liable 203
2. bail of debtor, for whom order of arrest was issued in civil action, not liable unless plaintiff has return of "not found" on an execution issued against body of debtor within twenty days after it might have been issued 271
3. execution against body of defendant may issue in such action upon judgment without an order of court therefor 271
4. court at subsequent term has no right to amend judgment in such action, entered at previous term, so as to order such execution to issue 271
5. such bail released because of failure to issue the execution within the twenty days in certain case 271
6. officers authorized to take bail before commitment of accused to jail by examining court and afterwards 301
7. statements subsequently made by a surety on bail bond can not give validity to a bond which was void at the time it was executed 301
8. after forfeiture of bail bond and return of process for arrest of accused "not found," surety on bail bond can not plead that on day of forfeiture of bond accused was too sick to appear 334
BAIL BOND—
forfeiture of—when sureties are liable 672
BAILMENT—
1. right of borrower to maintain action to recover damages for injury to thing loaned while in his possession 203
2. right of borrower of buggy to recover damages for injury to it, resulting from negligence of street car company 203
3. bailees of live stock for hire not insurers of safety of stock, but must use ordinary care 858
BANKS—See Decedents' Estate, 1; Interest, 1; Parties to Action, 1; Set-off, 1—
1. misrepresentation of bank's condition by its president in order to sell its stock—damages 112
2. general and special deposits by principal on note in bank—release of surety by failure to apply general deposit to note 993
BANK STOCK—See Dividends, 1.
BILL OF EXCEPTIONS—
1. in absence of, judgment sustaining attachment not reversed on appeal 606
2. where bill of exceptions contains no part of evidence instructions will not be held erroneous on appeal 718

Digitized by Google

BILLS AND NOTES—See Consideration, 1; Evidence, 27, 61; Estoppel, 3, 8, 9; Alteration of Written Instruments, 1, 2, 3, 4; Pleadings, 46; Limitation, 15— Page.
1. renewals of note with change of sureties—when a novation 126
2. note of corporation drawn without authority by one of its officers—caveat emptor applies even to innocent purchasers for value .. 510
3. negotiable note of corporation, signed in its name by an officer thereof and payable to and indorsed by such officer individually, bears marks of its irregularity on its face purchaser must be on inquiry as to it 510
4. plaintiff must aver execution and delivery of 583
5. plea of non est factum completes the issue—no reply necessary 583
6. plea of "no consideration" is affirmative, and reply is necessary .. 583
7. reply to plea of no consideration necessary, although petition alleged that note was executed "for a lot of land" 583
8. assignment of note by endorsement upon separate piece of paper does not make it a negotiable instrument under the statute.. 617
9. verbal agreement by parties discounting note to bank to be liable as endorsers of negotiable paper does not make such paper negotiable as to them, or their liability that of endorsers of negotiable paper 617
10. liability of assignor of note—diligence required of assignee 764
11. assignment of note in payment of legacy—diligence in collection required of assignee to hold testator's estate liable 765
12. failure of title to note accepted in payment of legacy—mortgages 765
13. payment of note by renewal—when old note is considered as paid. 890
14. action for lost note—non est factum—evidence 893
15. failure of bank to accept charter—its notes not considered discounted by an incorporated bank 922
16. negotiable instruments—notice of infirmities before purchase of bill of exchange 922
17. release of surety on note—general deposit of principal in bank 923
18. payment of note by maker to payee before notice of its assignment. 923
19. mistake in execution of note by directors of corporation—individual liability—limitation 925
20. forgery of signature to renewal note—right of recovery on old note. 926

BENEFIT OF BENEVOLENT SOCIETIES—
1. who may be beneficiary of insurance granted by Knights of Honor. 80
2. who may be beneficiary of "benefit certificate" issued to member of Knights of Honor 231
3. members of "general department" of American Mutual Aid Society must look to fund of that department for payment of claims. 576
4. under charter of said society, policy payable to one not having insurable interest in life of assured, not recoverable by such beneficiary 576
5. when such beneficiary can not take, fund goes to persons for whom it was by charter created 576

BIGAMY—See Criminal Law, 1.

BONDS—See Assignment for Benefit of Creditors, 1; Sureties, 11; Estoppel, 5, 6—
1. when interest on certain bonds issued by railroad to a county began to run 402
2. declaring of one fourth of one per cent. stock interest on railroad bonds did not terminate right of county thereafter to stock interest thereon in certain case 402
3. directors of railroad not authorized to stop payment to county of stock dividends on bonds at certain time 402
4. conversion by taxpayer of tax receipts for railroad tax into railroad bonds did not affect right of county to interest on railroad bonds held by it 402

BOUNDARY—See Counties, 1; Appeals, 35; Adverse Possession, 8—
1. of land sold by title bond—natural objects mentioned therein control location of division fence 93
2. dispute between vendor and vendee as to location of division line—vendee's deed controls 650
3. location of division line—adverse possession—limitation 657

BRIDGES—See Corporations, 1, 2; Negligence, 19; Constitutional Law, 25, 26, 27.

Digitized by Google

BROKERS— Page.
1. compensation of, for effecting an exchange of property 304
2. entitled to no compensation when they attempt to act as agent for both vendor and purchaser 304
BURDEN OF PROOF—See Wills. 5; Attachments, 10; Ejectment, 1, 4; Taxation, 8; Malicious Prosecution, 3; Office and Officers, 3, 4; Trusts, 21; Carriers, 15—
1. conveyance by client to attorney attacked as voluntary and procured by fraud—cured by fraud—burden on attorney to show that conveyance was not fraudulently procured 191
2. in action on contract burden is on plaintiff where defendant traverses the allegations of the petition 208
3. on defendant who pleads no consideration and fraud in action on note 313
4. failure to allow such defendant, the burden a reversible error 313
5. burden of proof on plaintiff in action by passenger against a common carrier to recover damages for injuries alleged to have been caused by the carrier's neglect 397
6. on party claiming homestead in land to establish right thereto, although adversary has affirmatively alleged that such right does not exist 505
7. plaintiff must prove willful neglect—it can not be presumed 559
8. party alleging that ground from which he seeks to have obstructions removed has been dedicated as public alley of a city must prove such dedication 617
9. on claimant to land under sale of taxes, even when he is in possession and is sued by delinquent taxpayer 639
10. negligent killing by railroad of stock on track—burden of proof 668
11. burden on plaintiff claiming under senior patent to show that land in dispute is within his boundary 830
12. burden of proof—conclusion of argument 854
13. when court should not instruct jury as to what party has burden of proof 893
CARRIERS—See Selections, 2; Pleadings, 27; Bonds, 1, 2, 3, 4, 5; Street Railways, 2, 3—
1. liable for full value of goods lost through its negligence, notwithstanding bill of lading limits amount of its liability 108
2. can not, by special contract, limit its liability for damages resulting from its own neglect 118
3. provision in bill of lading limiting amount of damage to be claimed in case of loss not applied where injury results from carrier's neglect 118
4. passengers on a railroad train must be allowed a reasonable time to leave train with safety 239
5. liable for value of goods lost through their neglect, notwithstanding contract limiting amount to be claimed as value of goods if lost 268
6. liability of carrier as to passsenger's baggage 430
7. liability as carrier continues how long after baggage is delivered at destination 430
8. venue of action against carrier on contract for transportation of live stock 431
9. unexplained delay in transportation of goods—presumption of negligence 766
10. common carrier can not, by contract or otherwise, obtain exoneration against loss resulting from its own neglect 775
11. carrier liable for full value of goods lost or injured by its neglect, notwithstanding contract of shipment placed an agreed value thereon 775
12. notice of claim for injury to stock not required where injury resulted from mere delay in transportation 814
13. unexplained delay in transportation of stock makes out prima facie case of neglect 814
14. special contract—burden on carrier to show that loss did not occur through its neglect 827
15. special contract against liability for loss arising from certain causes —burden of proof 855

Digitized by Google

CEMETERY COMPANIES— Page.
1. owner of lot in Cave Hill Cemetery at Louisville can not transfer his rights therein by devise 347
2. such lot owner can transfer lot only with written consent of the company 347
3. mandamus does not lie to compel said company to give its written consent to a transfer of a lot by the owner thereof 347
CERTIFICATE OF CLERK—
collateral attack of 342
CHAMPERTY—
1. certain contract between attorney and client champertous 42
2. certain judgment not binding on one not a party to suit so as to prevent him to plead champerty to prevent its enforcement 42
3. certain deed champertous 772
CHARITABLE INSTITUTIONS—See Jurisdiction, 1.
CHECKS—
action on assigned check—assignee accepting check, knowing of its invalidity, not an innocent holder 768
CHURCHES—
1. division in church whose government is congregational—title to property 863
2. minority in such church not to be deprived of its interest in property by mere arbitrary will of majority 863
3. certain division in church amounts to a "schism"—right as to use of property 863
CLAIMANT'S BOND—
parties thereon held liable and property also subjected in certain case. 36
CLERICAL MISPRISION—See Sales of Infants' Real Estate 10—
judgment in certain case erroneous and not a mere clerical misprision 760
COMMISSIONERS—
1. failure to pay over money collected—chargeable with interest 26
2. commissioner's bond being joint and several—joint action against all parties thereon maintainable 26
COMMISSIONERS' SALES—See Judicial Sales.
COMPROMISE—See Evidence, 42.
COMPUTATION OF TIME—See Assignment by Operation of Law, 17.
CONCEALED DEADLY WEAPONS—See Deadly Weapons.
CONFESSIONS—
1. what bystanders said to one accused of crime at the time of an alleged confession by him admissible as evidence—when 258
2. confession of one accused of crime not admissible against another jointly indicted with him when not made in the other's presence. 258
3. confession of defendant sufficiently corroborated by evidence that crime was committed in certain case 570
CONFLICT OF LAW—See Insurance, 23—
action may be maintained in this State against railroad for negligent killing of an employe in another State 579
CONSIDERATION—See Mortgages, 8; Contracts, 21, 22; Bills and Notes 6, 7—
1. consideration for particular note sufficient 144
2. release by distributees of an estate of right to be made equal by way of advancements with other distributees a valid consideration to support a contract 478
3. consideration for promise of one surety to indemnify cosurety against loss 497
4. where consideration for such agreement by the surety fails he is not bound to indemnify this cosurety 497
5. land "to be conveyed" being alleged consideration of note—conveyance or ability to convey must also be alleged or the consideration fails 588
6. when want of consideration for contract may be raised by demurrer and when by plea—practice 620
7. particular consideration for contract sufficient 620
CONSOLIDATION OF ACTIONS—See Assignment by Operation of Law, 5.
CONSTABLE—See Appeals, 1.
CONSPIRACY—See Criminal Law, 26, 27.

Digitized by Google

CONSTITUTIONAL LAW—See Criminal Law, 4; Appeals, 13, 14; Remainders, 2; School Taxation, 11, 12; Corporations, 15, 16, 17, 18, 19, 20; Assignment by Operation of Law, 10; Dedication, 5, 6— Page.
1. warning order not such "process" as must run in name of "Commonwealth of Kentucky" ... 1
2. act of legislature diverting part of common school fund from certain district school to an incorporated academy on certain conditions unconstitutional ... 129
3. laws for registration of voters, whether local or general, valid under Constitution of 1849 ... 273
4. for what crime persons when convicted may be disfranchised ... 274
5. municipal ordinance concerning forfeiture of stock running at large on streets valid ... 366
6. owner of stock entitled to notice before forfeiture—mere verbal notice not "due process of law" ... 367
7. sale of such stock without notice to owner is not "due process of law" ... 367
8. legislature has right to enact laws regulating practice of profession of medicine in this State ... 376
9. acts requiring physicians to give certain evidence of their qualification, and to register in certain manner, valid ... 376
10. municipal ordinance for forfeiture of stock running at large on street valid ... 391
11. what "notice" to owner before forfeiture of such stock is "due process of law" ... 391
12. title of certain act "defining" certain county line not misleading ... 410
13. right of State auditor to question constitutionality or validity of appropriation acts valid on their face ... 529
14. appropriation for exhibition of resources of State at World's Columbian Fair is for a public purpose, and legislature authorized to make it ... 529
15. final passage of a bill by one house of the legislature after being amended by the other house ... 529
16. regular enrollment of such bill, and signature of speakers and governor thereto, creates only prima facie presumption of its constitutional enactment ... 529
17. mandamus does not lie to compel auditor to draw warrant on treasury in favor of another State officer to pay appropriation admitted by both parties not to have been constitutionally enacted, even if it is regularly signed by the speakers and approved by the governor ... 530
18. title of act of April 13, 1886, relating to sale of fertilizers, sufficient ... 684
19. such act is not invalid and does not authorize double taxation of fertilizers ... 684
20. such act does not impose impost on interstate commerce ... 684
21. charter of railroad authorizing subscription to capital stock by counties valid ... 745
22. validity of act extending limits of a town—taxation ... 755
23. passway over lands of one for private benefit of another can not be condemned by virtue of power of eminent domain or in any other way ... 798
24. statute forbidding opening of lateral roads within one mile of turnpike constitutional ... 823
25. charter of bridge company not a contract whereby State surrenders its right to regulate rate of toll thereon ... 836
26. bridge over Ohio river not carrier of interstate commerce to the extent that State may not regulate its tolls in absence of act of congress ... 836
27. act reducing rate of tolls on a bridge not taking of private property for public use without compensation ... 836
28. act reducing rate of toll of ferry below actual cost of transportation a destruction of the franchise and a taking of private property without just compensation ... 836
29. act of February 21, 1890, concerning selection of jurors in Jefferson county not repealed by new Constitution ... 928
CONSTRUCTIVE POSSESSION—See Interference Between Patents.
CONTEMPTS—See Injunction, 12.
CONTINGENT REMAINDERS—See Remainders, 1, 2.

Digitized by Google

CONTINUANCE— Page.
1. affidavit for, must show when subpœna for absent witnesses was placed in officer's hands 15
2. action for damages for personal injuries—defendant not prejudiced by failure to grant continuance to allow its attorney more time to interview witnesses to accident 239
3. where indictment has been pending a long time, discretion of trial court, concerning granting of a conitnuance, is very broad 337
4. where witnesses for a party attend court without service of subpœna, and surprise him by departing before being called, he may be entitled to a continuance 766
5. where one of several defendants departs from court before trial, other defendants expecting to use him as a witness are entitled to a continuance 766

CONTRACTS—See Champerty, 1; Usury, 1, 2, 3, 4, 5; Trusts, 3; Turnpikes, 1, 2; Banks, 1; Carriers, 1, 5, 10 11; Partnership, 2; Municipal Corporations, 2, 19; Instructions, 7, 29; Burden of Proof, 1; Husband and Wife, 3; Liens, 4; Agents, 1; Damage, 8; Sales of Personal Property, 4, 5, 7, 8; Vendor and Vendee, 2, 3, 4, 5; Frauds, Statute of, 4; Corporations, 7, 12, 13, 14, 19, 20; Reformation of Contracts, 1, 2; Specific Performance, 5, 6, 7; Warehouses, 1; Bills and Notes, 9; Consideration, 6, 7; Limitation, 9; Alimony, 1; Master and Servant, 11; Real Estate Agents 1; Judicial Sales, 14; Insurance, 31; Constitutional Law, 25 28; Pleadings, 47—
1. breach of contract of marriage—when existence of contagious disease is good defense 11
2. city ordinance granting right of way to railroad treated as a contract and construed 44
3. will of man revoked by marriage, notwithstanding terms of antenuptial contract 73
4. contract is void unless mutually binding on parties 91
5. contract granting option on land not binding on vendor unless vendee is also bound—specific execution 91
6. contract for or about matters or thing prohibited by statute, void . 102
7. contract for sale of fertilizer, not labeled as required by statute, void 102
8. contract for future use of mare, for purpose of breeding and retaining foal, valid 121
9. such contract passes right to foal and right to possession of mare until colt is born 121
10. dismissal of suit to recover possession of mare by party claiming under such contract not a bar to subsequent suit to obtain colt dropped afterwards 121
11. failure of water company to supply water to protect property in city against fire—action by property owner on contract by water company with city 141
12. evidence of bystanders at fire concerning sufficiency of water supply competent 141
13. certain writings concerning exchange of lands held all to be parts of one contract 154
14. construction of particular contract of exchange of farm for "tobacco plant"—guaranty 154
15. must be mutually binding 174
16. sale of stock of goods with agreement not to engage in like business construed 174
17. contracts of this character not to be enlarged by construction ... 174
18. must be binding on both parties 201
19. merchants' contract to furnish tailor "not exceeding" one hundred coats each week to manufacture, construed 201
20. when "end of contract" occurred in certain case 202
21. contract based on illegal consideration will not be enforced 297
22. illegality in consideration of contract not raised by implication, but may be shown by proof 297
23. contract not to prosecute one guilty of embezzlement in consideration of agreement of his friends to repay the money embezzled is based on illegal consideration and not enforcible 297
24. when a contract to pay for acts of kindness, voluntarily rendered, will be implied 301
25. contract based on illegal consideration will not be enforced 237

Digitized by Google

CONTRACTS—Continued. Page.
26. contract to keep embezzlement of funds by employe "quiet" in consideration of note to make good the embezzlement—note based on illegal consideration and not enforcible 227
27. damages allowed for breach of contract of employment 524
28. contract of employment by the day—binding only for one day and considered as renewed each day 568
29. contract to dig a well, without specification as to quantity of water to be secured, construed 575
30. when contract to pay for private entertainment is implied 622
31. when contract to pay for "nursing, washing and feeding stock" is implied 622
32. breach of contract to provide for one by will—evidence 622
33. specific execution of contract—when granted by a court of equity 642, 653
34. when contract prohibited by statute is void between parties to it 684
35. contract to allow one and his "family" to travel road free of toll construed—contract does not run with land 720
36. sale of lumber—evidence as to meaning of technical term 717
37. objection to mode of performance of contract waived 717
38. sale of logs—evidence sufficient to authorize verdict respecting contract 768
39. evidence not sufficient to show any contract by a church not to use certain property jointly owned by the parties while a school was in session 829
40. certain contract between city and gas company did not give gas company exclusive right to furnish electric light to city 845
41. instructions as to what parties might have "understood" as to terms of contract improper 861
42. between husband and wife void at law 912
43. contracts between husband and wife may create an equity in parties that will be enforced 912
44. when parol postnuptial contract between husband and wife will create such an equity in husband's favor as to require its enforcement by court of equity 912

CONTRIBUTION—See Sureties, 12; Trusts, 27, 28.

CONVEYANCES—See Injunction, 11; Reformation of Written Instruments, 3; Specific Execution, 1; Escrow, 1; Joint Owners, 1—
1. interest of cestui que trust in certain property not conveyed by particular deed 57
2. deed by father to son so indefinite in description of property conveyed as that chancellor ought not to disturb bona fide purchaser under subsequent deed 58
3. evidence not sufficient to show that deed was procured by fraud upon grantor 214
4. conveyance to "J. and her heirs" vests fee simple in J.—"heirs" in such case not equivalent to children 243
5. parol evidence inadmissible to prove how grantor intended such words in the conveyance to be construed 243
6. not to be assumed that parties contracted concerning real property with reference solely to its existing condition and without at all contemplating its future relation to adjacent property 293
7. certain deed binding grantor not to erect building more than one story high on adjoining lot construed 294
8. evidence shows sufficient mental capacity in grantor of certain deed 318
9. construction of certain clause in deed restricting character of houses to be built on lots conveyed 502
10. such restriction as to building for benefit of house of grantor and not for purchaser of subdivision of property sold 502
11. deed to a wife, although not recorded, can not be altered after the wife's death by grantor so as to substitute husband for wife as grantee—such alteration does not vest title in husband 571
12. title to said land being in wife at her death passes to her heirs, and second wife of the husband, after his death, has no dower interest therein 571
13. certain contract of sale of mineral rights not specifically enforced because inequitable 642
14. when inadequacy of consideration alone is sufficient ground for setting aside a conveyance 747

Digitized by Google

CONVEYANCES—Continued. Page.
15. inadequate consideration for conveyance by father to son—no fraud shown to have been practiced on the father 747
16. such conveyance to son held to be for benefit of father and mother and sisters 747
17. surrender of deed by grantee to grantor does not reinvest grantor with title 769
18. particular conveyance champertous 772
19. conveyance by brother to his sister passed his title and divested him of interest in land described in the deed 774
20. conveyance by father to son in consideration of support—surrender of deed by son and failure to support—subsequent conveyance by father of same land to another son for same consideration—rights of sons under the conveyances 769
CORPORATIONS—See Parties to Actions, 2; Attachments, 8; Appearance, 1; Jurisdiction, 5; Evidence, 65. Bills and Notes, 19—
1. particular bridge company, having dedicated its bridge to use of street railways, now required to permit street railways to use it at reasonable rates of toll 52
2. discrimination by such company in rates of toll—street car not entitled to same rate as ordinary two-horse vehicle 52
3. corporation can not change its name except in mode prescribed by law 141
4. assumption unlawfully of new corporate name works forfeiture of franchise and corporate rights 141
5. company unlawfully doing business under such new name—members of corporation liable for the debts as if it were a partnership. 141
6. service of process on captain of a boat belonging to a Tennessee corporation sufficient in certain action 142
7. acquiescence of stockholders in contract 431
8. when corporation may be proceeded against by constructive service of process 431
9. can not change corporate name except in manner prescribed by law 469
10. unauthorized assumption of new name by corporation a surrender of rights and franchises thereof—corporators acting under new name liable as partners 469
11. creditors dealing with corporation under new name not estopped to deny corporate existence or to charge corporators as partners.. 469
12. contract between officers of, for their own benefit, concerning corporate property, not binding on corporation, even if made in its name 595
13. endorsement by a director of president's individual note to a bank not sufficient consideration to support contract entered into by president in corporation's name 595
14. board of directors can not ratify such contract 595
15. when one corporation is, by act of legislature, severed and two distinct corporations created in lieu of it, neither of the new corporations are entitled to the exemption from legislative control of rate of toll possessed by the old corporation 689
16. sale of a large part of its road by one of the new corporations also took away its claim of such exemption 689
17. corporation takes its franchise subject to the right of eminent domain by the State 689
18. reduction by legislature of rate of toll not equivalent to taking of private property for public use without just compensation 689
19. amendment to charter of corporation enacted in 1865 not an irrevocable contract 690
20. act fixing maximum rate of toll to be charged by a corporation not a contract 690
21. purchase of all stock by one person—forfeiture of franchise—liability of sole stockholder 705
22. failure of stockholders to pay in amount required by law before commencing business—fraud 705
23. claim of corporation against stockholder for stock unpaid for an asset of corporation which may be subjected by the creditors 705
24. claim of president of insolvent corporation on account of interest coupons paid by himself disallowed 721
25. summons not served so as to bring corporation before court—judgment against it void 767

Digitized by Google

CORPORATIONS—Continued. Page.
26. corporators stand in confidential relation to each other and subsequent members of corporation 861
27. original corporators not permitted to purchase property for company and sell to it at an advance without disclosing the facts—fraud 861
28. can not be consolidated or absorbed without unanimous consent of shareholders 864
29. right of one corporation to become shareholder in and controller of another 864
30. one corporation owning stock in and operating another railroad company can not be sued for stock killed by said railway—the corporation and not its stockholders is liable 864
31. acceptance of charter—compliance with conditions precedent .. 922
COSTS—See Practice in Civil Cases, 4; Married Women; Trusts, 21, 22; Principal and Agent, 5—
1. on appeal to Court of Appeals by defendant convicted of felony, defendant liable for costs, although judgment is reversed 169
2. liability of guardian for 615
COUNTERCLAIM—See Appeals, 25—
action to recover logs lodged on defendant's lands—damages occasioned by such lodgment subject to counterclaim 529
COUNTIES—See Constitutional Law, 12—
division line between two counties binding on public road—in certain case one county has jurisdiction over entire roadbed 190
COUNTY COURT—See Taxation, 12; Appeals, 41—
1. are clothed with authority to determine when a county needs a new poorhouse 159
2. can not be enjoined from purchasing a farm to be used in conjunction with the county poorhouse 159
3. can not appropriate money collected for specific purpose under specific enactment to other purposes 159
COUNTY JUDGE—
1. failure to take sufficient surety on guardian's bond—limitation 718
2. right of action against county judge not lost by failure of ward to sue guardian for nearly one year after arriving at full age 718
3. when county judge is liable for taking insufficient surety on guardian's bond 718
4. action against judge therefor—evidence 718
COURTS—See Special Judge, 1—
appeal allowed from city court to circuit court, although city charter gives city court authority to determine "finally" prosecutions for violation of city ordinances 802
CRIMINAL LAW—See Appellate Jurisdiction, 2; Continuance, 3; Costs, 1; Evidence, 5, 6, 13, 21, 28, 33. Indictments, 1, 16; Insanity, 1, 2; Instructions, 1, 2, 6, 9, 10, 12, 13, 27, 28; Practice in Criminal Cases, 1, 8, 11, 12, 13; Prejudicial Errors, 2; Verdict, 3—
1. verdict convicting of bigamy supported by evidence 56
2. evidence in certain case sufficient to convict of setting up, conducting, etc., a game of cards called poker, for compensation, etc 163
3. addition to words of statute, the words "in any form whatever" after word "compensation" in instruction, in such case not prejudicial 163
4. penalty for such gaming not cruel and unusual punishment—constitutional law 163
5. conviction of grand larceny sustained by evidence 165
6. verdict convicting of murder supported by evidence 166
7. forcibly breaking, etc., into railroad car—verdict sustained by evidence 167
8. accused on trial for murder entitled to an instruction in particular case that deceased was not a peace officer at time of homicide ... 177
9. owner of land may "stand his ground" and use necessary force to defend self and property from trespasser entering with intent to dispossess him 185
10. evidence sustains verdict of murder 212
11. violation of election law of Louisville by policemen—"dereliction of duty"—sufficiency of indictment 215
12. fifteen years' imprisonment for manslaughter not excessive punishment in certain case 217

Digitized by Google

CRIMINAL LAW—Continued. Page.
13. verdict convicting of willful and malicious cutting and wounding sustained by the evidence ... 245
14. conviction of felony for the third time—indictment—penalty ... 245
15. poisoning cattle, thereby causing their death—verdict sustained by evidence ... 246
16. defacing brands on saw logs—indictment in certain case therefor sufficient ... 257
17. certain act was not felonious taking of a cow by defendant—merely a trespass at most ... 259
18. when killing by reckless use of firearms amounts to manslaughter. 260
19. killing of prisoner by guard by reckless use of firearms—instructions ... 260
20. unlawful burning of dwelling house by setting fire to adjoining building ... 283
21. verdict convicting of murder sustained by evidence in certain case. 288
22. evidence authorized conviction of larceny in certain case ... 290
23. larceny correctly defined in instruction ... 290
24. evidence showing murder by choking with a scarf sustains indictment for murder by choking with hands ... 288
25. evidence sufficient to support verdict convicting party of stealing saw logs ... 320
26. on trial of one under indictment for murder committed in pursuance of a conspiracy, accused is entitled to testimony of his alleged co conspirators where the evidence wholly fails to establish such conspiracy ... 344
27. in such case evidence concerning the guilt of the alleged co-conspirators is incompteent against defendant on trial ... 344
28. whether certain woman was detained against her will, a question for jury ... 517
29. right of self-defense should not have been qualified by instructions in certain case ... 592
30. volunteer who joins one of two groups that are fighting, necessarily in the wrong as to members of the other party ... 592
31. breaking into outhouse with intent to steal—elements of the crime. 569
32. conviction for manslaughter authorized by evidence ... 677
33. unlawful detention of insane woman—instructions ... 729
34. when defendant's motion for change of venue must be granted ... 729

CROSS APPEAL—See Appeals, 33.

CROSS PETITION—
1. allowed only on cause of action which affects or is affected by the original cause of action ... 80
2. no such pleading allowed as cross petition by defendant against plaintiff ... 527

CUSTOM—See Evidence, 58, 59.

DAMAGES—See Frauds, 1; instructions, 35; Master and Servant, 1, 2, 11; Municipal Corporations, 6, 7, 10, 11; Neglect, 69; Railroads, 24, 36, 47, 48, 59; Roads and Passways, 11—
1. verdict of $1,125 not excessive for cruel ejectment of trespasser from train in certain case ... 108
2. mode of determining amount of compensatory damages for personal injuries not resulting in death ... 175
3. $1,250 excessive as compensatory damages for loss of one joint of right thumb ... 175
4. $2,000 excessive for loss of end of left thumb ... 175
5. punitive damages authorized in certain case ... 204
6. damages to be allowed for suffering which party injured by neglect of railroad is reasonably certain to endure in the future ... 239
7. $2,000 not excessive for painful injury resulting in curvature of the spine ... 239
8. measure of, for failure to deliver quantity of corn agreed to be delivered ... 271
9. $2,000 for permanent injuries, rendering plaintiff unable to do "any work of any consequence," not excessive ... 432
10. punitive damages not allowed passenger for injury resulting from ordinary neglect of carrier ... 432
11. measure of compensatory damages for loss of life by neglect of railroad ... 467
12. for breach of contract of employment ... 524
13. damages for lodgment of one's logs on land of another ... 522

Digitized by Google

DAMAGES—Continued. Page.
14. instruction concerning punitive damages for willful trespass not correct in certain case ... 575
15. for destruction of spring by railroad ... 602
16. injury to abutting property by construction of railroad—measure of damages—evidence ... 604
17. punitive damages not authorized by evidence—no gross neglect shown ... 604
18. instruction allowing recovery of $1,000, when only $600 prayed for, not prejudicial when verdict for less than $600 ... 671
19. verdict of $1.000 not excessive where party suffered for many months from injury by railroad ... 787
20. measure of, for delay in transportation of stock by carrier ... 815
21. injury to and amputation of first joint of thumb—$2,000 damage excessive ... 859
22. for sale of worthless seed—measure of damages ... 868
23. $1,000 as compensatory and $1.500 as punitive damages for injury occasioned by fall in alighting from train not excessive ... 926
24. conduct of employe causing injury to passsenger being quasi criminal, punitive damages are authorized ... 926
25. excessive verdict resulting from passion or prejudice of verdict—remission of part thereof does not cure error ... 927
DEADLY WEAPONS—
razor a deadly weapon within meaning of statute concerning the carrying of concealed deadly weapons upon the person .. 207, 299, 862
DEBTOR AND CREDITOR—See Assignments—
debtor not permitted to dictate to creditor how he shall pursue his remedies ... 303
DECEDENT'S ESTATE—See Parties to Actions—
1. court in which decedent died acquires no jurissdiction over bank in another county in which decedent owned stock by service of process on bank in that county to appear in action to settle decedent's estate ... 17
2. joint judgment against devisees for testator's debt erroneous in particular case ... 61
3. proof necessary to establish claim against estate for personal services by member of deceased's family ... 216
4. intestate's property exempt from distribution not liable for funeral expenses ... 227
5. claims for unpaid municipal or State taxes against the estate of a decedent must be verified by affidavit as other claims are ... 327
6. in an action to settle a decedent's estate it is a reversible error to allow claims for taxes not so verified ... 327
DEDICATION—See Streets and Alleys, 5—
1. the dedication and acceptance of a highway may be shown by parol evidence of its adverse and uninterrupted use by the public for fifteen years ... 699
2. evidence sufficient to establish such dedication and acceptance in certain case ... 696
3. evidence not sufficient to show a dedication or acceptance of certain land as a street ... 817
4. of real estate to public use may be made by parol ... 919
5. no such thing as dedication of real estate to private use ... 919
6. no parol dedication of right of way to a railroad known to law .. 919
DEFEASIBLE FEES—See Duress, 1.
DEEDS—See Duress, 1; Conveyances.
DESCENT AND DISTRIBUTION—See Advancements, 4, 5; Consideration, 2; Devises, 17—
1. widow paying lien debts on deceased husband's real estate to prevent sacrifice of it subrogated to rights of lien holder. ... 139
2. contribution by heirs to pay debts secured by lien on testator's land allotted to heirs ... 434
3. release of claim to equalization in advancements—consideration for contract ... 478
4. part of estate not devised by decedent passes according to statute of distribution—heirs being charged with devises as advancements 498
5. distribution of personalty regulated by law of decedent's domicile. 735
6. interest in remainder in personalty of a resident of Texas, under a certain bequest, distributed according to laws of Texas, although personalty was, at date of remainderman's death, in possession of life tenant in Kentucky ... 735

DESCENT AND DISTRIBUTION—Continued. Page.
7. liability of heir for ancestor's debts ... 811
8. heir not liable for ancestor's debt without allegation of assets received by him as heir—proof alone without such allegation being insufficient ... 811
9. collateral kindred of mother of bastard can not inherit his estate. 915
10. widow of bastard takes his entire estate when only kindred surviving him are collateral heirs of his mother ... 915
11. husband entitled to all of wife's personalty at her death ... 923
12. waiver by husband of his marital rights as to his wife's estate ... 923
DEPOSITIONS—See Final Order, 1.
DEVISE—See Wills, 3, 15; Executors and Administrators, 4; Married Women, 4; Cemetery Companies, 1; Advancements, 5; Life Estate, 6; Descent and Distribution, 6; Bills and Notes, 11, 12—
1. devisee took estate in her own right and not under a parol agreement to hold in trust for testator's widow ... 75
2. but such devisee, having suffered the widow to qualify as executrix and use estate for her maintenance, can recover from widow's devisee only estate received from widow ... 75
3. particular devise by husband to wife not intended to be in lieu of dower ... 132
4. value of such devise not charged to wife in estimating value of her dower ... 132
5. devisees of real estate for a term of years chargeable with taxes during such term ... 132
6. particular devise created defeasible fee in testator's grandchildren. 363
7. devise of estate to trustees—rights of life tenants and remaindermen—equitable conversion ... 385
8. devise to a trustee for benefit of one for life, with remainder to her children, with power in trustee to use any part of trust estate for benefit of life tenant—error to permit trustee to surrender entire estate to life tenant ... 489
9. partial testacy—undevised estate not devised to certain children by implication ... 493
10. devisee took life estate with discretion to give part of income to remainderman—no trust created in life estate for benefit of remainderman ... 556
11. devise to one in trust for another for life—trustee took remainder in fee in his own right ... 656
12. to widow for life, remainder to grandson on condition that he support widow—remainder not defeated by refusal of widow to be supported by grandson ... 675
13. dower not assigned so as to include dwelling house, if it will defeat a devise. ... 675
14. devise to a daughter and the heirs of her body vests fee simple estate in daughter ... 732
13. no abandonment of husband by wife shown, and divorce properly denied him ... 744
DOMICILE—See Guardian and Ward, 3.
DOWER—See Conveyances, 11, 12; Devises, 3, 4; Husband and Wife, 11; Mortgages, 4—
1. widow may show by parol evidence that deceased husband was once vested with fee simple title to certain land ... 658
2. need not necessarily be so allotted as to include dwelling house ... 675
3. where allotment, including dwelling house, would defeat a devise, dower should be assigned in money or other lands ... 675
4. potential right of dower not lost by execution sale of husband's land to satisfy his liability as surety of sheriff on revenue bond .. 804
5. assignment of dower—value of land considered as of day of execution sale ... 804
DURESS—
clerk's certificate of wife's acknowledgment of mortgage conclusive in absence of allegation of fraud or mistake of mortgagee or clerk, although wife alleges that her signature was obtained by duress of her husband ... 342
DYING DECLARATIONS—
1. statement of deceased made at time when he said he knew he was going to die not admissible as dying declaration in particular case ... 177, 182
2. statements of deceased properly admitted as his dying declaration. 180

Digitized by Google

DYING DECLARATIONS—Continued. Page
3. only those dying declarations are admissible which state facts that the deceased could testify to if alive—expressions of opinions by him are incompetent 185
4. admission of certain statement as dying declaration not prejudicial even if erroneous 217
5. certain declaration properly admitted as dying declaration of deceased 450
6. certain affidavit made by deceased, charging defendant with his murder, incompetent as a dying declaration 450
EASEMENTS—See Questions for Court and Jury, 3; Water Courses, 1—
1. stipulation in conveyance of lot that no high building was to be erected on adjacent lot created an easement annexed to lot conveyed 294
2. damages to one lot by filling another so as to stop flow of surface water over it 450
3. right of owner of house to lateral support of adjoining house owned by another 625
EJECTMENT—See Adverse Possession, 6; Pleadings, 40; Streets, 1—
1. plaintiff has burden of proof and must show his better right to land in dispute by a preponderance of the evidence 273
2. defendant, who is an intruder, not permitted to rely on title with which he has no connection or claim 408
3. adverse possession for over thirty years settled boundary line between plaintiff and adjacent owner in certain case 408
4. burden of proof on defendant in certain case 513
5. right of appeal from decision of contesting board—estoppel 701
6. statement of voter that he was born on certain day sufficient evidence of his qualification as a voter 701
7. plaintiff must recover on strength of his own title 772
8. when possessory title will authorize a recovery by plaintiff 772
ELECTIONS—See Indictments, 13; Local Option—
1. under "Wallace Election Law" it is the duty of election officers of Louisville to state in their "return" the number of ballots received by each candidate 250
2. on appeal to circuit court, in contested election case, only depositions read before contesting board can be heard 273
3. contestant for office can rely only on grounds set out in notice of contest—incumbent restricted to grounds set out in his answer. 273
4. registration law, whether local or general, valid under Constitution of 1849 273
5. legal voters, although fraudulently registered, not stricken from records in a contested election case 273
6. effect of registration by qualified voter in wrong voting place of his precinct 273
7. evidence necessary to show that voters were registered or permitted to vote after hours for registration or election to close 273
8. certain person of foreign birth held to be a naturalized citizen and qualified voter 274
9. bribed votes are illegal and not to be counted in a contested election case 274
10. crimes for which, when convicted, citizens are disfranchised 274
11. effect of conviction in U. S. courts for crimes as to disfranchisement—pardon by president of the U. S. 274
12. evidence necessary to show mistake by clerk of election in recording votes 274
13. authority of county court to change boundary of voting precincts and to transfer citizens from one precinct to another 274
14. weight of judgment on chancellor a question of fact in contested election case 274
15. failure to publish required notice of election 660
16. election concerning issue of bonds by county in aid of railroad—validity of where county judge alone enters order for election 745
17. right of appeal from decision of contesting board—estoppel 701
18. statement of voter that he was born on certain day sufficient evidence of his qualification as a voter 701
EMINENT DOMAIN—See Railroads, 24, 25, 26—
error to dismiss appeal, in certain case, of railroad from judgment of county court assessing value of right of way taken, although railroad had not paid amount of such judgment before appeal was called for trial 330

Digitized by Google

EQUITABLE CONVERSION—See Devises, 7. Page.
EQUITY—See Turnpikes, 1.
ESCROW—
delivery of deed as escrow—repossession of deed surreptitiously obtained by grantor—fraud 749
ESTOPPEL—See Corporations, 11; Guardian and Ward, 11, 12; Interest, 2; Railroads, 71, 72, 73; Supersedeas, 4—
1. creditors claiming their pro rata of an assigned estate not estopped to claim that purchaser of assigned estate holds it for the benefit of assignor 36
2. party seeking decision of particular court as to his rights estopped after judgment to object to its decision and the proceedings taken thereunder 202
3. maker of a note who executed writing, waiving all defense against the note, estopped to make any defense thereto against one purchasing same on faith of said writing 313
4. heirs of party not estopped to claim that ancestor held certain land adversely to a plaintiff who produces writing signed by the ancestor acknowledging that his possession was friendly, not adverse. 514
5. certain county estopped by act of its county court from subsequently claiming dividend on railroad bonds held by it 673
6. silence of sinking fund commissioners of county now estops them to question authority of county court to act in the matter 678
7. act does not operate as an estoppel unless some one has acted on the faith of it to his prejudice 892
8. maker of note not estopped to plead fraud in its procurement, even against assignee, for value purchasing on faith of a written certificate of maker, executed simultaneously with note to effect that there was no defense to note—certificate also being obtained fraudulently by payee 900
9. fraud in procurement of such certificate may be shown whenever it may be shown in procurement of note itself 900
10. acquiescence in construction of railroad over one's land—estoppel. 919
EVIDENCE—See Certificate of Clerk, 1; Confessions, 1, 2; Constitutional Law, 16; Contracts, 12, 36, 39, Conveyances, 5; Criminal Law, 26, 27; Dower, 1; Dying Declarations, 1, 2, 3; Elections, 2, 7, 12, 18; Estoppel, 4; Husband and Wife, 4, 5; Insanity, 2; Instructions, 3, 4; Insurance, 21, 22; Intoxicating Liquors, 1; Neglect, 3, 64; Railroads, 4, 37, 45, 50, 51, 60, 74; Sales of Infants' Real Estate, 4; Sheriffs, 8; Subscriptions, 1; Tax Sales, 1; Wills, 6, 13—
1. evidence in rebuttal to contradict an accused properly admitted in certain case 16
2. parol proof concerning ownership acquired by written contract 40
3. action for injury to abutting property by operation of railroad—evidence that property further from road than plaintiff's was affected by operation of road competent 44
4. parol evidence to vary written contract of lease of land 48
5. motive for murder proven by exhibition of indictment against accused for robbery with deceased's name thereon as witness 95
6. evidence of details of such alleged robbery improper 95
7. contents of records of assessment of property for taxation must be proved by certified copy of record, not by deposition of custodian thereof 107
8. evidence to contradict record of city council can not be introduced unless the validity of the record is assailed by the pleading 109
9. on trial for murder by whipping child, evidence of other cruel treatment competent to prove malice 166
10. goods stolen from railroad car presumed to be of some value 168
11. fact that car was one of a C. & O. train sufficient proof of its ownership in criminal case 168
12. husband and wife can not both testify in joint action by them to recover damages resulting from withdrawal of natural support from their house and lot 146
13. testimony concerning insignia of peace officer worn by decedent when killed, but who was not such peace officer, incompetent on trial of accused for murder 177
14. when outcry of bystander at scene of homicide is admissible as res gestæ 179
15. when such cry heard by accused is competent to show bona fides of his conduct during commission of the homicide 179

Digitized by Google

EVIDENCE—Continued. Page.
16. evidence concerning conduct and conversation of deceased three hours before the homicide, not in the presence of accused and not relating to him, incompetent 180
17. on trial for murder by poisoning—evidence of threats made against deceased by one having no connection with accused not competent, 183
18. on such trial proof that such third party had purchased poison inadmissible, there being no evidence to show accused's connection with the purchase 183
19. neither a jury nor a chancellor is concluded by statements of witnesses as to value of legal services of an attorney 194
20. impeachment of credibility of witnesses in criminal case by cross-examination as to offenses previously charged against them 219
21. on trial of one for attempt to commit rape, prosecuting female may testify after other witnesses for Commonwealth are first introduced 248
22. proof of contradictory statements made by prosecuting female on trial for rape—cross examinations 255
23. physicians testifying as experts concerning a defendant's insanity must base their opinion on hypothetical questions 285
24. evidence of statement of a deceased witness at an examining trial comptent on trial for murder in circuit court 288
25. evidence of quarrel between deceased and defendant competent to show malice and a motive for murder 288
26. right of party to contradict his own witness by proof of conflicting statements made by him 324
27. in action by assignee and holder of a note the maker can not testify concerning transactions with the payee, who is dead 330
28. proof, on second trial for murder, of statement on first trial of a witness who thereafter became insane 338
29. when a party may prove contradictory statements of his own witness 338
30. when admissions by grantors in deed are admissible against grantee, 399
31. right to interrogate witness concerning contradictory statements made by him 426
32. credibility of female defendant testifying for herself may be impeached by evidence of her bad reputation for morality and virtue. 450
33. on trial for murder, evidence that accused and wife of deceased were on friendly terms after the homicide, incompetent 492
34. discretion of court concerning order of introducing of witnesses in criminal cases 517
35. specific act of unchastity of female prosecuting witness on trial for detaining a woman against her will, etc., not competent 517
36. whole record of certain case was competent evidence—error to exclude part of it 525
37. mode of proving pedigrees of stock killed by railroad 526
38. a map on file, purporting to show original plan of a town, not sufficient proof of dedication of alley shown thereon when it is authenticated in no manner 577
39. on trial for murder—evidence of crimes and general lawlessness of certain clans incompetent 605
40. testimony of what witness reckoned incompetent 605
41. evidence of certain co conspirators not admissible for the accused. 605
42. testimony concerning efforts by attorneys of parties to affect a compromise incompetent 622
43. action for divorce—adultery can not be shown by general reputation as to chastity 628
44. character not involved in action for divorce on ground of adultery so as to allow evidence of general reputation 628
45. general reputation of wife for violent temper not competent in suit for divorce 628
46. volunteer witness testifying for husband, of adulterous intimacy with wife, to be regarded with suspicion 628
47. admission of certain immaterial hearsay evidence not prejudicial 668
48. evidence of other crimes committed by a defendant on trial for murder incompetent 706
49. competency of rules of railroad as evidence against it—negligence. 717
50. introduction of testimony—refusal to permit real plaintiff in interest to testify after other witnesses were introduced 720

Digitized by Google

EVIDENCE—Continued. Page.
51. unless evidence was objected to and exception taken party can not complain on appeal of its admission ... 766
52. refusal to permit certain witness to testify not an abuse of discretion in certain case ... 800
53. evidence of value of stock killed by railroad—proof of actual sales. 807
54. hypothetical question as to value of stock killed ... 807
55. testimony as to transactions with a decedent—entries in account book against decedent made before his death ... 813
56. where payment is pleaded as made at one time, payment at subsequent date can not be proven ... 813
57. introduction of evidence—order of ... 813
58. when proof of a custom is admissible for the purpose of affecting a contract ... 861
59. evidence of particular custom, which would defeat plaintiff's claim, not admissible unless pleaded ... 861
60. personal injuries resulting from neglect—expectancy of life may be shown by standard life tables ... 876
61. admissibility of parol evidence to vary note ... 889
62. evidence to establish and contradict uncontradicted allegations ... 893
63. refusal to allow witness to answer question—necessity on appeal for avowal of what witness would state ... 893
64. error in admitting whole of certain conversation not prejudicial .. 893
65. stockholder testifying for corporation does not testify for himself . 924
EXAMINING TRIALS—See Practice in Criminal Cases, 9.
EXECUTIONS—See Appeals to Circuit Court, 1, 2; Judicial Sales, 13—
1. sale under fieri facias of only life estate in land where execution defendant own fee simple confers no title ... 500
2. receipt of chose in action by a sheriff not a payment of execution —debtor not released thereby ... 670
3. bank check not payment of execution or pre existing debt until cashed ... 670
4. transfer of amount of check to credit of sheriff by bank a payment to him ... 670
5. interest in land of purchaser at judicial sale who has no deed not subject to sale under execution ... 871
6. execution sale of land conferred lien on purchaser—sale by execution defendant after levy on land and before sheriff's sale ... 726
EXECUTORS AND ADMINISTRATORS—See Assignments, 1; Devise, 2; Jurisdiction, 7; Pleadings, 3; Set-off, 2; Trusts, 23, 27, 28—
1. executor not allowed more than statutory 5 per cent. in certain case, although he was also statutory guardian for testator's infant children ... 124
2. executor liable for acts and default of his co-executor as a principal and not as a surety with the sureties on the joint executorial bond ... 124
3. one of two joint executors having wasted estate, the other executor entitled to have value of defaulting executor's service in management of estate credited on amount of default ... 124
4. executor may pay over money to legatee vested with only life estate—when ... 189
5. parties, infants when suit was brought, but adults at time of judgment, concluded by judgment in action to settle executor's accounts ... 189
6. compensation of executors—what may be allowed—certain allowance not excessive ... 238
7. compensation allowed to—no allowance made on real estate not in any way distributed by the executor ... 332
8. right of nonresident executor to sue in this State before executing bond ... 600
9. defendant waived right to object to competency of alleged certificate of qualification of executor in another State ... 600
10. executors, who are also trustees under a will, not released from duty to the estate by a settlement as executor ... 811
11. extent of liability of indemnitor of surety of personal representative ... 819
EXEMPTIONS—See Assignment for Benefit of Creditors, 9; Decedent's Estate, 4—
1. unmarried woman who had aunt and sister living with her, but not dependent upon her for support, not "a housekeeper with a family" ... 79

Digitized by Google

EXEMPTIONS—Continued. Page.
2. mortgage of by debtor not an unlawful preference 204
3. word "family" defined 228
4. man, with dead wife's mother living with and dependent on him, a housekeeper "with a family" 228
5. under chapter 38, article 13, section 6, General Statutes (ed. 1873), only such crops as are suitable for breadstuffs and animal food are exempt 668
6. crop of tobacco not exempt under said law 668
7. surety paying note becomes creditor of principal when he makes payment to payee, and date thereof determines whether statute of May 1, 1886, applies or not 894
EXPERT EVIDENCE—See Evidence, 23.
FALSE REPRESENTATIONS—See Fraudulent Representations.
FALSE SWEARING—See Indictments, 15; Instructions, 32.
FELLOW SERVANTS—See Railroads, 55, 56—
1. one hauling stone to railroad co-employe with servant who received and measured stone on car 621
2. switchman not fellow-servant of foreman or engineer of switching crew, to which all belonged 632
3. switch engineer and switch foreman in yard of railroad both superior employes to switchman and coupler 716
FEME SOLE—See Husband and Wife, 8; Married Women, 5.
FERRY—See Constitutional Law, 28.
FERTILIZERS—See Constitutional Law, 18, 19, 20; Contracts, 7.
FINAL ORDER—
1. order suppressing a deposition merely interlocutory and may be set aside at a subsequent term 40
2. order that if plaintiff's debt was not paid within one year fraudulent conveyance would be set aside and land subjected therefor, not a final judgment 78
3. plaintiff in such action dying and no order of revivor being made within one year, in which it might have been entered—action was properly dismissed 78
4. certain order not final because it suspends any proceedings to enforce it until the further order of the court and permits party to amend pleadings 527
5. order determining priorities of attaching creditors and ordering sale of attached property not final where it provides that proceeds of sale shall be held subject to further order of court 621
FINAL PASSAGE OF A BILL BY LEGISLATURE—See pages 529, 556.
FORCIBLE DETAINER—
1. right to trial in circuit court completed by filing of traverse and execution of bond in time allowed by law 48
2. failure of justice to file papers in circuit court no ground for dismissal of traverse 48
3. entry by tenant under void parol contract of lease—in action of forcible detainer tenant entitled to claim value of improvements made by him and can not be evicted until his claim is settled 79
4. failure to claim value of improvements in such proceedings no bar to future action for value thereof by tenant 79
5. traverse bond must be sufficient to cover costs and damages in all courts to which traverse may be taken 157
6. justice can not be compelled by mandamus to approve traverse bond that he deems insufficient 157
7. defendant entering under verbal lease and erecting improvements may rely upon claim for improvements to defend his possession in proceeding of forcible detainer 250
8. certain party can not maintain writ of, since he never had actual or constructive possession of the land, possession of which he seeks 348
9. after traverse of warrant defendant not allowed to prove by constable that return on warrant was incorrect 896
10. evidence shows demand for possession by landlord before warrant was taken out 896
FORFEITURE OF OFFICE—See Jailer, 1.
FORFEITURE OF STOCK RUNNING AT LARGE ON STREETS OF CITY—See Constitutional Law, 10, 11.
FORGERY—See Bills and Notes, 20.

Digitized by Google

FRAUD—See Attachments, 8, 9; Conveyances, 3, 15, 16; Corporations, 26, 27; Escrow, 1; Estoppel, 1, 8, 9; Husband and Wife, 8; Pleadings, 31; Sales of Personal Property, 8— Page.
1. judicial sale of land obtained by fraud of creditor—measure of damages of owners deprived of title thereby ... 350
2. judgment holding signature to note obtained by fraud sustained by evidence ... 671
3. charge of fraud in obtaining execution of county bonds comes too late seventeen years after issue of bonds ... 745
FRAUD, STATUTE OF—See Dedication, 4; Husband and Wife, 2; Insurance, 43; Judicial Sales, 7; Mortgages, 10; Pleadings, 36; Trusts, 29—
1. certain receipt for money a sufficient "memorandum" of contract of sale of land ... 321
2. writing signed by vendor alone sufficient written memorandum of the contract of sale of land in certain case ... 321
3. parol sale of partnership land by one partner not enforcible ... 399
4. parol contract of sale of land not void—conveyance made in conformity therewith relates back to time of contract ... 399
5. certain receipt for purchase money not sufficient memorandum of contract of sale of land to support action thereon ... 448
6. contract not to be performed within one year—what contracts are considered as "not to be performed within one year," etc ... 478
7. promise is not to "answer for the debt of another" unless other also remain liable therefor—not applicable if original debtor is discharged ... 478
8. where parol contract of sale of land has been executed, statute of frauds does not apply ... 620
9. verbal agreement between adjoining land owners fixing disputed division line, not within statute ... 651
10. verbal agreement by holder of legal title that another shall have an interest in it, or to hold for benefit of another, within statute. 681
11. particular written contract of sale of land sufficient, although land is defectively described ... 782
FRAUDULENT ASSIGNMENTS—See Assignment for Creditors, 3.
FRAUDULENT CONVEYANCES—See Conveyances, 15, 16—
1. in absence of grounds of attachment, return of nulla bona necessary before action to set aside ... 78
2. conveyance, without consideration by insolvent debtor to trustee for his son, held to be fraudulent as to creditors and void ... 310
3. conveyance of farm by insolvent debtor to his brother fraudulent. 316
4. executory agreement of the brother to pay certain debts of the insolvent grantor for which he was surety, not sufficient consideration to sustain such conveyance as a valid one ... 316
5. evidence not sufficient to show that particular conveyance by a father to his son was fraudulent as to the grantor's creditors ... 340
6. grantees have right to show that consideration was paid in good faith ... 400
7. fact that grantor was known to be heavily in debt no ground for setting aside conveyance supported by adequate valuable consideration ... 400
8. certain conveyance by husband, to his mistress fraudulent and void as to his wife ... 629
9. deed to a mother not set aside at instance of son's creditors—the evidence showing that the mother's funds paid for the house, and that son put none of creditor's money therein ... 636
10. certain conveyance to wife at husband's instance fraudulent as to husband's creditors ... 730, 741
11. certain conveyance of land by son to mother, after levy of execution on it and just before sale by sheriff, not fraudulent—lien of purchaser at such execution sale ... 726
12. conveyance of all property and rights by contractor constructing railroad to one who agrees to complete the road and hold all contractor's estate for equal benefit of all creditors not an unlawful preference of the creditor to whom the conveyance was made ... 263
FRAUDULENT REPRESENTATIONS—
1. what fraudulent representations by seller to surety of purchaser releases surety ... 68, 69
2. fraudulent representation by creditor to surety of purchaser concerning value of article sold ... 69

Digitized by Google

FRAUDULENT REPRESENTATIONS—Continued. Page.
3. false representation by seller of unexecuted intention no release of surety ... 69
4. representation to surety as to time when certain notes matured material ... 69
5. instruction concerning false representation by seller too general and indefinite in certain case ... 69
6. expressions of opinion as to value by vendor, even if exaggerated, not a false representation ... 742
7. representation by vendor of town lot, concerning future improvements to be made by others, not ground for relief of vendee ... 805
8. contract not rescinded for fraudulent representation unless they concern material elements of the contract ... 812
9. fraudulent representation of value of article sold after inspection —effect of ... 812
GAMING—See Criminal Law, 2, 3, 4; Indictments, 14.
GARNISHMENT—See Attachments, 6.
GRAND JURY—
failure to swear sheriff summoning grand jury—jury being discharged and officer sworn and jury resummoned—previous error corrected. 16
GUARDIAN AD LITEM—See New Trial, 6; Sales of Infants' Real Estate, 8—
1. to be allowed reasonable fee to be paid by plaintiff and taxed as costs ... 616
2. when same person is guardian ad litem for infant defendant to original petition, and also to cross petition, a reasonable fee is allowable for defense to each petition ... 616
GUARDIAN AND WARD—See County Judge, 1, 2, 3, 4; Sales of Infants' Real Estate, 6, 7; Vendor and Vendee, 1—
1. county court has no jurisdiction to appoint statutory guardian for infant that resides in another county ... 119
2. presumed that particular county court had jurisdiction to appoint such guardian twenty years after the appointment was made where the evidence is conflicting as to the residence of the infant at such time ... 119
3. right of guardian to fix ward's domicile ... 240
4. receipt in full given by ward shortly after attaining majority to guardian, not a bar to action to surcharge guardian's account ... 379
5. liability to ward of guardian who himself takes possession of and cultivates ward's land ... 380
6. manner of settling accounts of certain guardian ... 380
7. action to surcharge guardian's accounts—sufficiency of allegations of petition ... 481
8. when action to surcharge final settlement of guardian is barred by limitation ... 481
9. expenditures in excess of ward's income—when allowable ... 481
10. when income remaining in guardian's hand becomes part of principal of trust estate ... 481
11. when receipt in full, executed by ward, concludes him to surcharge accounts ... 482
12. ward held to have ratified, after attaining his maturity, extravagant expenditures which guardian permitted ... 482
13. liabilities of guardian for costs ... 615
14. guardian not entitled to ward's services and can not maintain action for loss of such service ... 667
15. guardian can not recover from wrongdoer expenses incurred in nursing and curing ward injured by wrongdoer ... 667
HOMESTEAD—See Burden of Proof, 6; Husband and Wife, 2; Res Adjudicata, 5—
1. how made liable for building materials used in erection of dwelling thereon ... 88
2. partial payment on open account owing by husband applied by law to oldest items in the account, so as to satisfy all items thereof incurred before homestead right accrued ... 88
3. in husband's land waived by wife signing a mortgage, in the granting clause of which her name was not mentioned ... 342
4. owner of two houses on adjoining lots, each worth over $1,000, can be allowed homestead only in house and lot in which he resides ... 440
5. even if house he resides in is mortgaged for full value, and adjoining house is unencumbered, he can not elect to claim homestead in the latter ... 440

Digitized by Google

HOMESTEAD—Continued. Page.
6. widow's right to, in land occupied by husband at time of his death, not postponed in favor of certain of decedent's children by a former wife, except on clearest proof of their superior rights 512
7. mortgage of homestead by debtor not an unlawful preference..... 696
8. damages for being kept out of the use of—set-off 862
HUSBAND AND WIFE—See Conveyances, 11, 12; Evidence, 12; Fraudulent Conveyances, 8, 10, 11; Married Women, 5, 6, 8, 9; Pleadings, 31; Res Adjudicata, 4—
1. proceeds derived from timber growing on wife's land belonged to her, and if loaned out by her husband for her the notes therefor, payable to her, were her separate estate 107
2. use of wife's money by husband to erect dwelling on his land under parol agreement to transfer title to her—husband dying without doing so, wife's rights postponed to the rights of his creditors 116
3. contract by wife with husband to pay his debts being executed by her in part, his personal property conveyed to her in consideration therefor can not be taken from her without reimbursing her 237
4. relinquishment by husband of his interest in a note payable to his wife and himself 335
5. statements of relinquishment made by husband to strangers not competent evidence of such relinquishment where only payee's rights are involved 335
6. husband's rights in wife's personal estate which he has reduced to possession 310
7. neglect of driver of carriage, employed by husband, imputed to wife as well as husband 663
8. husband trading in name of feme sole wife—rights of husband's creditors 667
9. conveyance to wife by husband fraudulent, although the husband received and reduced to possession and sold personal property inherited by the wife 741
10. by ante nuptial contract wife may acquire separate use of all her estate free from husband's control 764
11. wife can not be compelled to convey her inchoate right to dower in land her husband has agreed to convey, she not being party to contract 782
12. contract between, void 912
13. when an equity that will be upheld may arise out of a contract between husband and wife 912
14. personalty of wife in her agent's or trustee's hands is constructively in husband's possession 922
15. husband entitled to whole of wife's personalty at her death 923
16. waiver by husband of his marital rights as to his wife's personal estate 923
IMBECILES—See Trusts, 18.
IMPROVEMENTS—See Forcible Detainer, 3, 4, 7.
INDEMNITY—
extent of liability of indemnitor of surety of personal representative. 819
INDEX TO RECORD—
insufficient in certain case 834
INDICTMENTS—See Criminal Law, 11; Limitations, 6, 7; Practice in Criminal Cases, 5—
1. may charge in separate counts that each of two parties committed murder and also that the other aided and abetted 10
2. indictment for misdemeanor dismissed and referred to grand jury—new indictment only continuance of former prosecution and no new summons against defendant necessary 47
3. when new indictment is such continuance of the former one, which was dismissed and re-referred to grand jury, as to avoid statute of limitation 47
4. when indictment must allege offense to be within time fixed by statute of limitation 47
5. offense of grand larceny and of receiving stolen goods may be united in one indictment 165
6. for murder or voluntary manslaughter, must allege that the crime was committed feloniously 179

Digitized by Google

INDICTMENTS—Continued. Page.
7. on trial for murder by poisoning—accused entitled to instruction in his favor in the event deceased poisoned himself or accused did not know liquor that deceased drank contained poison ... 183
8. dismissal of indictment and re-reference to grand jury—when new indictment is continuation of former prosecution so as to avoid plea of limitation ... 197
9. general rule is that indictment must allege offense within time fixed by statute of limitation—exceptions to general rule ... 197
10. necessary averments of indictment for arson ... 216
11. indictment against city for permitting a nuisance—impassable streets—certainty ... 238
12. indictment for attempted rape—sufficiency of ... 248
13. indictment against officer of election for making false return of votes received by candidates, which avers false numbers so returned, should allege the true number of votes actually received ... 250
14. certain indictment for gaming sufficient ... 301
15. certain indictment for false swearing sufficient ... 590
16. for unlawful detention of female need not aver that act was done "willfully" or "maliciously" ... 729
17. certain indictment for grand larceny sufficient ... 731
18. indictment under section 2, article 17, General Statutes, sufficient if it follows the language of the statute ... 764
19. sufficiency of description of statutory offense in an indictment ... 812
20. sufficiency of for maintenance of a common nuisance by permitting acts not malum per se ... 894

INFANTS—See Executors and Administrators, 5; Instructions, 20; Master and Servants, 6; Neglect, 17, 18, 20, 21; New Trial, 6; Railroads, 29, 30—
1. may complain on appeal because of errors, although no exceptions were taken therefor in the lower court ... 328
2. jury must determine whether child is too young to exercise care for its own safety ... 426
3. infancy a personal plea ... 622
4. suit by next friend—interest of infant must be protected by court and all proper parties to suit brought before it by order ... 765

INJUNCTIONS—See County Courts, 2; Local Option, 1—
1. final injunction to prevent erection of certain house prima facie inequitable when preliminary injunction of same character was refused and house has been erected in the meantime ... 109
2. teacher of common school may enjoin county school superintendent from paying part of school fund to teachers of an incorporated academy who claiming it under a void act of the legislature ... 129
3. such action can be maintained before the expiration of common school term for which the teacher was engaged ... 129
4. by abutting land owner to prevent condemnation of right of way over county road for a railroad ... 135
5. no notice necessary of motion to dissolve made during term time ... 284
6. lies to prevent trespasses upon land when they have been long persisted in and a purpose to continue them appears ... 302
7. fact that clerk erroneously failed to issue a temporary injunction is no reason why court should refuse a perpetual injunction on final decree ... 303
8. appeal with supersedeas from order dissolving injunction continues injunction in force ... 334
9. neither party to judgment nor stranger to it can enjoin proceedings thereunder in any other court than that rendering the judgment ... 335
10. where petition prays for injunction against opening of culvert by turnpike company, the court can not enjoin such opening and also order defendant to dig certain ditch—such relief not being prayed for ... 460
11. final injunction to prevent erection of certain house prima facie inequitable when preliminary injunction of same character was refused and house has been erected in the meantime ... 502
12. violation of contract with gas company by city ... 845
13. injunction in this State to prevent maintenance of suit in another State ... 894
14. injunction to prevent city from making excavation and withdrawing plaintiff's right of lateral support ... 896

Digitized by Google

SANITY—See Evidence, 23, 28— Page.
1. fact that quiet citizen was made very quarrelsome by drink does not indicate that such person was insane when drunk 285
2. competency of evidence of non-expert witnesses concerning insanity of one accused of murder 308
STRUCTIONS—See Burden of Proof, 13; Criminal Law, 3, 8; Fraudulent Representations, 5; Practice in Civil Cases, 8, 9; Practice in Criminal Cases, 6, 7; Prejudicial Errors, 2; Railroads, 61, 64, 78—
1. no evidence to authorize an instruction concerning shooting in sudden heat and passion 10
2. when defendant is entitled to instructions concerning right of self-defense and when not 95
3. no evidence to authorize any instruction concerning duty of railroad to secure safety of the passengers on train in this action . 112
4. must not single out statement of one witness and give undue prominence to it 142
5. instruction in action against water company for failure to furnish sufficient water for protection against fire proper 142
6. assault by two acting in concert upon accused—murder—right of accused to instruction concerning right of self defense against each of the assailants 177
7. contract to furnish "high order of workmanship" in certain case—instruction that party must furnish "reasonably high order of workmanship" in such case erroneous but not prejudicial 201
8. action for damages for personal injuries inflicted by alleged neglect of another—instructions concerning duty of plaintiff to follow physician's directions 204
9. improper to instruct that heat and passion must have been caused by "considerable" provocation to reduce crime from murder to manslaughter 212
10. instruction concerning murder authorized by evidence in case .. 223
11. necessary averments in indictment for forcibly, etc. breaking into a railroad car with intent to steal therefrom 225
12. instruction concerning manslaughter should define that offense .. 246
13. instruction that if jury "have a reasonable doubt whether or not killing was done with malice aforethought, they will find defendant guilty of manslaaughter," is erroneous when no instruction defining manslaughter has been given 246
14. statutory penalty for a certain crime being confinement in the penitentiary for "not less than one year," an instruction fixing it at "not more than one year" not prejudicial to defendant ... 246
15. instruction defining larceny correct 290
16. where the instruction given embodied whole law of a case it was not error to refuse to give other instructions 290
17. use of words concerning "preponderance of evidence" on issue of fact 360
18. instruction which assumes that a certain place was a frequently traveled thoroughfare not erroneous, since that fact is established by evidence and admitted in pleadings 397
19. erroneous instruction no ground for reversal in civil case where appellant asked for instruction with similar error in it 400
20. error to assume in instruction that certain child was too young to exercise care for its own safety 426
21. instruction defining extraordinary care improper in certain case 426
22. may assume as true facts about which there is no conflict of evidence 467
23. assumption in instruction that place of accident "was more or less thronged with people" authorized by evidence 467
24. instruction defining compensatory damages correct 467
25. error if instructions so conflict that jury can not harmonize them. 477
26. but if, taking all instructions, jury could not have been misled by the conflict, error is not a prejudicial one 477
27. error to attach any qualifying clause to instruction concerning defendant's right of self-defense in certain case 492
28. concerning necessity for corroboration of confession not required in certain case 517
29. defendant not prejudiced by error in instructions concerning damages for breach of contract when verdict is returned for too small an amount 524

Digitized by Google

INSTRUCTIONS—Continued. Page.
30. explanation of meaning of "proper diligence," as used in one instruction, sufficient explanation of meaning of such words in all instructions given 576
31. use of "and" instead of "or" in particular instruction not prejudicial 576
32. on trial for false swearing instructions given were proper 590
33. instructions, if not objected to, fix law of case on appeal 694
34. based on hypothetical case, authorized by evidence, not erroneous as giving undue prominence to parts of evidence 664
35. contradiction of witness by contents of letter written by him—instructions 668
36. submission of severaal grounds of recovery of damages in separate instruction not prejudicial to defendant 672
37. propriety of certain instruction in response to question asked by jury 632
38. where appellees were entitled to peremptory instruction appellant can not complain of instructions actually given 766
39. willful and malicious striking, etc., with deadly weapon—proper instructions on trial for 797
40. error if instructions mention contributory neglect as that which "caused" the injury 808, 814
41. killing of stock on railroad track—hypothetical state of facts in instructions 893
42. no reversal if all instructions taken together are correct, although one considered alone was misleading 894
43. additional instruction given at request of jury 894
44. indefinite instructions—defendant should have asked for more specific instructions in civil case or waives his complaint 928
45. instruction as to punitive damages improper where there is no evidence of willful neglect 850

INSURANCE—See Benevolent Societies, 2; Pleadings, 11—
1. when policy of marine insurance is forfeited by nonpayment of premium note 21
2. marine insurance—perils insured against—when recovery may be had, notwithstandingg negligence of master 21
3. marine insurance—general average 21
4. abandonment as for total loss when allowed 21
5. attorney employed to collect premium note has no authority to waive forfeiture incurred by the insured 110
6. how waiver of a condition in policy by company must be shown 110
7. taking additional insurance—company being notified thereof must elect to forfeit policy within reasonable time, otherwise it waives its right to do so 110
8. certain company liable only for a proportionate part of loss in particular case 110
9. proceeds of policy payable to "widow and children" of the insured distributed by statutory rule for distribution of an intestate's personalty 139
10. grantee claiming under conveyance which is fraudulent as to grantor's creditors has an insurable interest 161
11. assignment of policy with consent of company constitutes new contract between assignee and company 161
12. concealment of material facts concerning title of property at time of such assignment of policy vitiates it 161
13. life insurance—prompt payment of premiums condition precedent to continuance of the risk 187
14. custom of company to receive premiums thirty days after they fell due not a waiver of right to forfeit for failure to pay promptly 187
15. rebate due on third annual premium did not keep policy alive after failure to pay second annual premium 187
16. life insurance—no evidence to show that insured committed suicide. 243
17. possession of policy of life insurance by plaintiffs, which is filed with their petition, sufficient to establish prima facie the truth of their allegation that they are beneficiaries therein named, although their allegation is traversed 243
18. authentication of proof of loss 573
19. notice of loss to an agent appointed to receive and forward applications and premiums sufficient 573

Digitized by Google

INSURANCE—Continued. Page.
20. effect of failure to furnish proof of loss within time stipulated in policy ... 573
21. agent of company may be required to testify as to his receipt of notice of loss ... 573
22. on question of amount of loss, testimony of other merchants of amount of their daily sales incompetent ... 573
23. action maintained in this State on contract of life insurance made in another State in which the assured died ... 600
24. statute of limitation of such State applies to such action ... 600
25. right of action on particular life policy lost by laches of beneficiary, although not barred by limitation ... 600
26. failure to furnish proof of loss—objection therefor waived unless raised in pleadings ... 603
27. failure to give notice or proof of loss—effect of ... 603
28. alteration of building—notice to agent ... 603
29. failure to disclose existence of certain lien of property not a material misrepresentation ... 603
30. failure of applicant for fire insurance to disclose existence of lien on property ... 757
31. life insurance contract completed, although insured died before delivery of policy ... 800
32. effect of false statement of applicant as to his temperate habits ... 800
33. contract of insurance may be reformed to express true intent of parties ... 810
34. transfer of policy by a part of beneficiaries does not divest other beneficiaries of interest ... 810
35. parties to action on policy—limitation ... 810
36. provision concerning right to arbitration after loss by fire construed ... 810
37. authority of attorney of insured to receive demand for arbitration. 810
38. award made not binding on mortgagee of insured property destroyed by fire ... 859
39. refusal of mortgagee to unite in action on policy—estoppel ... 859
40. admissions of attorney of mortgagee not admissible in action on policy ... 859
41. proof of loss to be made by owner and not mortgagee—premature action on policy ... 859
42. waiver by insured of defect in award as to loss ... 859
43. parol contract of fire insurance for one year not within statute of frauds ... 881
44. authority of agent to issue policy within vicinity of certain town—ratification of contract ... 881
45. parol contract of insurance not waived by subsequent written application for policy ... 881
46. policy valid, although agent violated instructions in issuing it ... 881

INTEREST—See Commissioners, 1; Bonds, 1, 2, 3; Usury, 1, 2, 3, 4, 5—
1. certain banks charged with interest on fund held and claimed by them pending litigation ... 32
2. certain parties not estopped to claim such interest against the banks ... 32

INTERFERENCE BETWEEN PATENTS—
junior patentee's possession constructively embraced whole of interference in certain case ... 852

INTERROGATORIES—See Pleadings, 1.

INTOXICATING LIQUORS—
sale of liquor to inebriate—who is an habitual drunkard—evidence ... 860

JAILERS—
failure to compel prisoner to labor on public works—office not forfeited thereby ... 496

JOINDER OF ACTIONS—See Indictments, 5—
libel and slander may be joined ... 382

JOINT OWNERS—
mode of distributing proceeds derived from sale of house held by sisters under a certain conveyance ... 795

JUDGES—
1. affidavit to compel judge to vacate the bench must state facts showing that judge can not properly try the case ... 564
2. appeal lies from refusal of judge to so vacate ... 564

Digitized by Google

JUDGES—Continued. Page.
3. where the judge improperly refuses to vacate the bench, the judgment in a criminal case will be reversed, even if the record shows no other error prejudicial to defendant ... 564
JUDGMENT—See Appeals, 21; Champerty, 2; Decedents' Estates, 2; Injunctions, 9; Married Women, 1; Parties to Actions, 5; Res Adjudicata, 4, 5, 6; Sales of Infants' Real Estate, 5; Trusts, 13—
1. can not be set aside by trial court if final at subsequent term and after an appeal therefrom has been granted ... 80
2. judgment dismissing a petition an entirety and can not be affirmed in part and reversed in part on appeal ... 107
3. judgment without service of process or appearance of defendant void, even though defendant had personal knowledge of pendency of proceedings ... 367
4. without service of process or appearance of defendant, void ... 391
5. judgment dismissing motion against sheriff and sureties, upon refusal of Commonwealth to amend motion, not a bar to future action or motion against the sureties ... 430
6. against nonresident void when based on void warning order ... 644
7. not binding on one not a party to action ... 576
8. no appeal from void judgment lies before motion to set it aside ... 767
9. sale of stock under void judgment—chancellor may compel restitution by purchaser ... 821
10. judgment void, although appeal therefrom considered before motion to set aside in lower court ... 821
11. error to render judgment against plaintiff in favor of defendant only constructively summoned, for which he made no prayer ... 910
JUDGMENT NOTWITHSTANDING VERDICT—
proper where no reply is made to plea of contributory neglect ... 855
JUDICIAL SALES—See Divorce, 3; Executions, 1; Sales of Infants Real Estate, 5—
1. sale not void because commissioner did not sell tracts of land in the order directed by the judgment of sale ... 97
2. report of sale being confirmed without objection, the parties to suit bound by the proceedings ... 97
3. sale set aside on exceptions by defendant because attorney for plaintiff acted as special commissioner for it ... 258
4. intermeddling by purchaser at sale so as to induce others not to bid ... 302
5. error to order sale of indivisible land to satisfy one lien note when other lien notes are not yet due ... 352
6. defendant not prejudiced by a sale of his allotted interest in land owned by himself and others, rather than a sale of his undivided interest ... 358
7. parol agreement by purchaser to extend time of redemption of land by defendant valid ... 465
8. such agreement to extend time of redemption not specifically executed unless clearly proven ... 465
9. sale of estate for life instead of fee simple estate rendered sale voidable, but not void in certain case ... 500
10. such sale being confirmed and no appeal taken, conclusive on defendant in certain case ... 500
11. prior right between parties claiming under different judicial sales. 500
12. resale of property proper when purchaser fails to pay purchase money notes ... 721
13. right of sheriff making sale under execution to cry bid of absent execution plaintiff ... 726
14. no agreement by purchaser to allow defendant to redeem land shown in certain case ... 786
15. stock sold under void judgment—chancellor may compel restitution by purchaser ... 821
16. innocent vendee of purchaser at judicial sale, who has obtained deed, not deprived of his property when sale on petition is set aside ... 897
JURISDICTION—See Appeals, 2, 3; Counties, 1; Decedents' Estate, 1; Injunctions, 9; Insurance, 23; Pleadings, 26—
1. of circuit court concerning the sales of property held for charitable educational purposes ... 101
2. action for $46 for goods sold and delivered in justices' and quarterly courts only ... 287

Digitized by Google

JURISDICTION—Continued. Page.
3. circuit court has no original jurisdiction of such action, even though plaintiff attempts to sue out attachment against defendant's land ... 287
4. on return of "nulla bona" of execution issued on judgment of a circuit court, that court has jurisdiction of an action to subject execution defendant's interest in land, regardless of the amount of the judgment or execution ... 358
5. court of county settling affairs of insolvent corporation may order sale of its lands located in other counties ... 444
6. of U. S. Circuit Court of removal causes ... 574
7. court of county in which personal representative qualifies has jurisdiction of action for sale of land in another county for settlement of estate ... 829
JURY—See Appeals, 21, 22; Fraud, 1; Practice in Civil Cases, 13; Practice in Criminal Cases, 8—
1. not assumed, in absence of any evidence thereof, that colored persons are excluded from grand or petit juries ... 246
2. action against two defendants to recover for injuries resulting from their joint negligence—defendants together can strike out only three names from list ... 397
3. sending jury to view premises—prejudicial error ... 575
4. view of place of accident by jury after case is submitted to them ... 834
5. may fix the value of work done without proof ... 862
6. authority of court where jury is waived in ordinary action ... 862
7. act of February 21, 1890, concerning selection of jurors in Jefferson county, not repealed by new Constitution ... 928
JUSTICES OF THE PEACE—See Forcible Detainer, 6.
KNIGHTS OF HONOR—See Benefit Societies, 1.
LANDLORD AND TENANT—See Forcible Detainer, 3, 4, 9, 10; Taxation, 11; Vendor and Vendee, 6—
1. parol evidence to vary or explain written contract of lease—when admissible ... 48
2. lease for one year with privilege of two—payment of second year's rent in advance condition precedent to tenants right to hold for last year ... 48
3. landlord's lien for supplies furnished tenant can be enforced only by suit in equity ... 78
4. remedies of distress and attachment not available to collect debt for such supplies ... 78
5. property exempt from execution also exempt from attachment or distress for rent ... 78
6 but no part of tenant's crop is exempt from landlord's lien for supplies furnished ... 79
7. lien of landlord on crop where he obtains money for tenant to enable him to raise crop by endorsing note for him ... 204
8. lease forfeited by transfer of premises to receiver ... 206
9. award by arbitration of certain amount to landlord against tenant —no landlord's lien therefor in certain case ... 238
10. assumpsit for use and occupation of land can not be maintained if relation of landlord and tenant has never existed ... 399
11. landlord's remedies against under tenant ... 399
12. abandonment by landlord of appeal from order discharging attachment for rent—right to maintain action to recover such rent ... 525
13. verbal subletting by tenant—verbal agreement by subtenant to pay rent - statute of frauds ... 621
14. construction of particular lease ... 623
15. failure to keep covering of cellar in sidewalk in repair—when landlord or tenant is liable for damage therefor ... 624
LARCENY—See Criminal Law, 23, 24.
LATERAL SUPPORT—See Easements, 3; Injunctions, 14; Support, 1, 2, 3, 4—
1. right of land owner to lateral support of adjoining lands ... 737
2. withdrawal of natural lateral support to land—damages ... 737
3. right to lateral support for land whose lateral pressure is increased by buildings thereon ... 737
4. injury to buildings by withdrawal of lateral support on land on which they are located—damages ... 738

Digitized by Google

LIBEL—See Slander, 3, 4, 5, 6— Page.
1. what written words are actionable 366
2. not necessary that the words used should impute a definite crime. 366
3. intention of one publishing libelous words without lawful justification or excuse immaterial 366
4. actions for libel and slander may be joined 383
5. defamatory words concerning one in his profession actionable per se 383
6. averment of defamatory words, and that one is a practicing physician, states prima facie cause of action 383
7. but if plaintiff alleges his authority to practice medicine, and it is sufficient, advantage thereof may be taken by demurrer 383
8. defamatory words concerning one as a physician, not authorized to practice as such, not actionable per se 383

LIENS—See Advancements, 4, 5; Appellate Jurisdiction, 1; Assignment for Benefit of Creditors, 7; Attachments, 11, 14; Descent and Distribution, 1; Executions, 6; Landlord and Tenant, 3, 4, 5, 6, 7; Lis Pendens; Parties to Actions, 3; Street Improvement, 1, 2, 3, 4; Sureties, 5; Vendor and Vendee, 1—
1. persons feeding or grazing stock for compensation entitled to lien on the stock, although it is exempt property 48
2. a promise by a debtor to pay a creditor out of a particular property does not create a lien on such property 176
3. property mortgaged or pledged by the owner to secure the debt of another occupies the position of a surety or guarantor, and is discharged of the lien by any act that would release a surety or guarantor 204
4. advancement of money to vendee to pay for land upon his written agreement that lien shall exist for money so advanced—agreement valid and lien enforced 209
5. one purchasing lien with notice of lien so acquired takes land subject thereto, although the agreement is unrecorded 209
6. execution levied upon land before defendant had title—actions ... 505
7. on abutting property for street improvement—claimant of lien must show strict compliance with law in all respects 642
8. acceptance of improvement by city conclusive evidence against abutting owner that contractor complied with contract with city. 642
9. any party interested in land can complain on appeal of judgment creating lien upon it 644

LIFE ESTATES—See Devise, 8, 9, 10; Executors and Administrators, 4; Married Women, 4—
1. right of life tenants to stock dividend declared by corporation—rights of remaindermen thereto 386
2. action of directors of corporation in declaring "stock" dividend not conclusive evidence that such dividend belongs to corpus of estate and not to life tenants 386
3. option of stockholders to buy at par stock of corporation worth more belongs to corpus of estate and not to life tenants 386
4. what "stock dividends" belong to life tenants and not to remaindermen 386
5. mode of investment of devised estate and proper manner of distribution between life tenants and remaindermen 386
6. devise of life estate in personalty to one with remainder to his children—right of life tenant to possession of corpus of such estate 490

LIFE INSURANCE—See Benefit Societies, 3, 4, 5.

MASTER AND SERVANT—See Fellow Servant, 1, 3; Husband and Wife, 7; Neglect, 8; Railroads, 38, 53.

LIFE TENANTS—See Dividends on Bank Stock, 1, 2.

LIMITATION—See Adverse Possession, 1, 4, 9; Bills and Notes, 19; County Judge, 1; Guardian and Ward, 8; Indictments, 8, 9; Insurance, 24, 25; Married Women, 2; Reformation of Written Instruments, 3; Specific Performance, 7; Trusts, 4, 12; Usury, 6, 7—
1. indictment dismissed and re-referred to grand jury—new indictment found—limitation 47
2. surety's cause of action against principal commences when he pays the debt, and is barred in five years 109
3. in mutual running accounts between parties the statute of limitation does not bar items of either account 142
4. trustee having failed to sue on note until action is barred by lapse of time, right of action thereon of cestui que turst is barred also. 369

Digitized by Google

LIMITATION—Continued. Page.
5. prosecution by Commonwealth to recover a penalty for violation of penal law must be commenced within one year after right to penalty accrued unless otherwise allowed by statute imposing penalty ... 400
6. where such prosecution may be barred by time, time of commission of offense must be averred in the indictment ... 400
7. averment of time of commission of such offense not sufficiently definite in certain case ... 400
8. absence of debtor from State suspends running of statute, although he had property in the State liable to attachment ... 623
9. contract to provide for one by will—action barred by five years' statute ... 624
10. when suit for taxes is barred by lapse of time ... 813
11. when statute begins to run against taxes due city of Louisville ... 813
12. new promise does not repel statute if made to a stranger ... 857
13. when new promise merely prolongs period of limitation and when becomes a new case for action ... 857
14. plea of new promise to repel bar—error in suing on new instead of old promise waived in certain case ... 859
15. when statute begins to run where note is paid by renewal note ... 890

LIS PENDENS—
1. what action to subject property will create lis pendens lien ... 36
2. such lien commences when petition is filed and summons sued out. 36

LIQUOR SELLING—
1. when sale is by agent—when purchase is by one for a friend—liability in each instance ... 174
2. one acting as agent for a seller, who is violating local option law, liable ... 175
3. local option law of one precinct of county repealed by subsequent act which prohibits sale of liquor in county ... 270
4. act prohibiting sale of liquor in a county does not deprive distillers of privileges granted him by general law to sell his own liquor at his residence ... 270
5. local option law does not upon its adoption in a locality repeal any law, but merely suspends inconsistent laws which are revived when local option law ceases to be operative ... 270
6. effect of entry by county clerk of certificate of result of election concerning local option in violation of an existing injunction ... 334
7. indictment for violation of local option law sufficient, and instructions and verdict proper in certain case ... 335

LOTTERIES—See Pleadings, 47.

MALICIOUS PROSECUTION—
1. defendant may prove that he did not swear out warrant until after statement of all the facts to justice who issued it and after advice by justice that he should prosecute case ... 479
2. question of plaintiff's guilt of offense for which he was prosecuted not involved—malice and want of reasonable cause for defendant's acts are in issue ... 480
3. when answer is mere traverse burden is on plaintiff ... 480

MARRIED WOMEN—See Mortgages, 4; Pleadings, 25; Res Adjudicata, 4, 5; Transfer of Suits, 1—
1. certain personal judgment against a married woman for costs void. 86
2. a married woman may, by her subsequent promises, prolong period of limitation for a debt for necessaries, which is binding on her estate ... 308
3. real estate of a married woman may be subjected to the payment of debts created by her for necessaries ... 303
4. life estate devised to married woman may be subjected to payment of her debts under certain will ... 303
5. a married woman, empowered to act as a feme sole, may sue alone without joining her husband ... 620
6. property purchased by married woman with power of a feme sole not liable for husband's debts ... 763
7. by antenuptial contract wife may be entitled to all her estate free from control of husband ... 764
8. married woman not liable as surety of husband merely because of mortgage of her property to secure his debt ... 872

Digitized by Google

MARRIED WOMEN—Continued. Page.
9. mortgaged property considered as merely pledged for debt in such case ... 878
10. how married woman may convey land held as her general estate to her husband or another ... 912
MANDAMUS—See Constitutional Law, 17—
1. writ of mandamus will not lie to compel justice of the peace to approve traverse bond in proceedings of forcible detainer ... 157
2. writ of mandamus can not be used to compel Cave Hill Cemetery Co. to give its written consent to a transfer of a lot in said company by its owner, the granting or refusal of such written consent being a matter entrusted to the discretion of the officers of the company for the promotion of the purposes of its incorporation ... 348
MASTER AND SERVANT—See Fellow Servants, 10, 11; Husband and Wife, 7; Pleadings, 25; Railroads, 39, 53 Neglect, 8—
1. unlawful discharge of servant employed for definite term—measure of damages ... 202
2. unlawful discharge by master of servant employed as traveling salesman—excessive verdict ... 202
3. master is liable for injuries of his servant suffered through gross negligence on the part of a fellow servant ... 336
4. what risks are assumed by servant in accepting employment ... 356
5. servant must take notice of familiar natural law ... 356
6. when infants are bound to use same degree of care as adult servants ... 356
7. injury of particular servant the result of his own contributory neglect ... 356
8. liability of employer for wrongs and nuisances committed by his independent contractor ... 486
9. duty of master to keep machinery in repair—apparent and latent defects therein—contributory neglect by servant ... 566
10. servant injured in unloading stone on car—master guilty of no neglect and not liable therefor ... 621
11. wrongful discharge of servant before expiration of contract of employment—measure of damages ... 716
12. injury to servant by defective machinery—liability of master ... 926
13. servant knowingly using defective machinery can not hold master liable for injury resulting therefrom ... 927
MATERIAL MAN'S LIEN—
1. how acquired for lumber furnished contractor and not owner ... 895
2. owner's promise to pay contractor's debt for lumber creates no lien. 895
MECHANIC'S LIEN—See Homestead, 1; Material Man's Lien, 1, 2.
MISTAKES—See Bills and Notes, 19; Reformation of Written Instruments, 1, 2, 3—
alleged mistake in deed must be clearly shown—can not be inferred from weight of evidence ... 863
MORTGAGES—See Contracts, 23; Homesteads, 7; Insurance, 38, 39, 40; Liens, 3; Married Women, 8, 9—
1. mortgage of goods to be acquired in future becomes effective between parties as soon as goods are acquired ... 112
2. property mortgaged to secure the debt of another released by renewal of the note or evidence of the debt secured ... 204
3. a mortgage to secure a pre-existing debt of another was without consideration in certain case ... 204
4. wife uniting in certain mortgage of her husband's lands thereby waived dower and homestead rights, although her name did not appear in granting clause of the mortgage ... 342
5. party appropriating to his own use mortgaged property liable to mortgagee for value thereof ... 451
6. provision for sale by mortgagee in chattel mortgage valid—mortgagee may sell without action ... 473
7. purchaser of land at a judicial sale considered merely a mortgagee under certain verbal agreement—statute of frauds ... 655
8. right of priority between surety of husband claiming under mortgage and wife of mortgagee claiming under deed from him ... 780
9. adverse possession by mortgagee for twenty years sufficient to show that mortgagor had parted with his title to mortgagee ... 825
10. verbal authority to sign name of one to mortgage to secure debt of another insufficient ... 884

Digitized by Google

MORTGAGES—Continued. Page.
11. proceeds of new note executed by sureties used to pay old note for which they were bound did not so extinguish old debt as to deprive them of benefit of mortgage executed to indemnify them as to it 897
12. no evidence to show fraudulent intent of sureties to enforce mortgage lien against parties without right 897
13. mortgage by wife to indemnify husband's sureties—release of lien. 897
MUNICIPAL CORPORATIONS—See Appellate Jurisdiction, 2; Constitutional Law, 5, 6, 7, 10, 11; Evidence, 8; Indictments, 11; Injunctions, 14; Liens, 7, 8; Neglect, 19; Pleadings, 10; Streets, 1—
1. ordinance granting right of way to railroad treated and construed as a contract 44
2. when city is liable for negligence of contractor building engine-house for it 145
3. not liable for error or mistake committed in performance of a legislative duty 208
4. not liable for error in defining by ordinance territory liable to assessment for a street improvement 208
5. street improvement—error in making apportionment—liability of city for interest prior to correction of apportionment 208
6. liability for injury to private property by making a fill which causes an overflow of water upon it 302
7. amount that the property is appreciated in value by the, fill not to be deducted from the damages suffered 302
8. extent of duty to keep sidewalks in repair and clear of unnecessary obstructions 304
9. right to place shade trees, lamp posts, etc., in sidewalks just within the curbing 304
10. liability for injuries to pedestrians resulting from location of shade trees, etc., in sidewalks 304
11. party knowing the location of such obstruction bound to take ordinary care to avoid them—contributory neglect 304
12. location of boundary line of city—construction of charter as to such line, which was acted on for twenty years, accepted as correct 420
13. change of grade of street—liability of city to owner of abutting lot, overflow by water resulting therefrom 476
14. when liable for injury done by falling of a decayed tree in its streets 575
15. right of mayor of Louisville to adjourn general council 586
16. adjournment of one board of general council by mayor void 586
17. validity of certain election of sinking fund commissioners of Louisville 587
18. publication of ordinance—amendment—no republication necessary. 648
19. contract of city void if beyond scope of its corporate powers 710
20. mayor of city has no authority to employ attorney for it 710
MUNICIPAL TAXATION—
1. authority of city to levy tax on steamboats having the city for their home port 29
2. validity of assessment for city taxes in Louisville for years 1881 to 1885, inclusive 171
3. assessment may be made after date fixed by charter for return of his lists by the assessor 370
4. taxpayer not excused from payment of taxes because taxes are being improperly expended by city 370
5. necessity for city tax to be determined alone by taxing committee raised by charter—taxpayer can not question necessity for such tax 370
6. indebtedness due citizen by city can not be set-off against taxes due by him 370
7. authority of city council to increase value of property as fixed by assessor for purposes of taxation—manner of so doing 371
8. city authorized to impose tax on "real and personal property * * * subject to taxation for State and county purposes"—State revenue law in effect when assessment is made applied, although enacted after charter 371
9. error committed by city in following State revenue law in force when charter was adopted, no ground for refusal of taxpayer to pay taxes unless he has been prejudiced thereby 371

Digitized by Google

MUNICIPAL TAXATION—Continued. Page.
10. where both lot and owner is by charter liable for municipal taxation, lot sufficiently described in assessment is liable therefor, even where assessment is not made against owner of legal title .. 432
11. extension of limits of town—validity of act as to suburban land owner 755
12. legislature must determine whether municipal advantages afford adequate compensation for municipal taxation imposed 755
13. taxation of railroads by cities—discrimination as to discount for prompt payment 813
14. act of May, 1884, relating to taxation in Louisville, operates as a repeal of the charter of the city in relation to the same subject... 814
15. surety on certain notes discharged by an agreement which amounted to a novation as to him 863
NATURALIZATION—See Elections, 2.
NAVIGABLE STREAMS—See Damages, 13—
certain stream is a navigable or floatable one 521
NEGLECT—See Bailment, 3; Burden of Proof, 5, 7, 10; Carriers, 1, 13; Conflict of Law, 1; Evidence, 53, 54; Infants, 2; Instructions, 8, 20, 21, 22, 23, 44; Master and Servant, 3, 4, 5, 6, 7, 9, 12, 13; Municipal Corporations, 14; Peremptory Instructions, 1; Pleadings, 25, 42, 43, 49; Railroads, 6, 14, 15, 22, 28, 29, 30, 32, 41, 42, 43, 53, 54, 73; Street Railways, 6, 7, 8, 9; Variance, 1—
1. depot being well constructed and lighted—passenger getting off train on opposite side from platform and injured not permitted to recover 19
2. contributory neglect of defendant may be pleaded in all actions except those of death resulting from willful neglect 108
3. party getting off train before it stopped guilty of contributory neglect, although baggage master advised him to do so—evidence of conversation with baggage master incompetent 108
4. injuries not resulting in death—contributory neglect a defense, although injuries were result of willful neglect 175
5. collision of street car with private vehicle—negligence of company —instructions 203
6. whether getting on or off of moving street car is an act of negligence is a question for the jury 204
7. attempt to board train in motion and leaving station was contributory neglect and proximate cause of injury in certain case 226
8. liability of owner of building rented for offices for neglect of janitor 271
9. error to instruct that plaintiff can not recover if his own neglect "caused" the injury—proper words in instruction concerning contributory neglect 272
10. when perilous position of one using track by license ought to have been discovered so as to avoid running over him, failure to do so is an act of neglect 292
11. not granted for newly-discovered evidence unless it would, in the opinion of the court, have a preponderating influence on a new trial 301
12. if such newly discovered evidence is merely cumulative, it is not a good ground for a new trial 301
13. gross neglect is want of slight care 336
14. ordinary neglect is want of ordinary care 336
15. negligence is a mixed question of law and fact for jury to determine 336
16. no evidence to show that certain brakeman was killed by willful neglect of railroad—peremptory instruction for defendant proper. 345
17. certain boy's death due to his own carelessness and not to neglect of street railway company 355
18. fact that boy's father had warned railroad employes to keep boy off car does not change rule 355
19. care required of a city as to the repair of its public bridges 395
20. when contributory negligence may be imputed to a child 395
21. degree of care required by law of a child 395
22. if motorman of electric railway, after discovery of danger of certain child on track, used all means at his command to stop the car, nothing more was required of him 426
23. failure of railroad to allow passenger reasonable time to leave train—contributory neglect 432

Digitized by Google

NEGLECT—Continued. Page.
24. railroad must use extraordinary care in operating road at intersection of streets in center of a populous city 455, 467, 477
25. making of a "running" or "flying" switch in such streets negligence per se 455
26. degree of care required of adult and of infant about to cross tracks on such street 455
27. injury to infant by railroad while making flying switch in such street 456
28. such infant not guilty of contributory neglect that will prevent his recovery in certain case 456
29. traveler approaching crossing, knowing that train is approaching, guilty of contributory neglect as to injury caused by his horse taking fright 476
30. contributory neglect of traveler advancing to track at crossing knowing that train is approaching 476
31. speed of train approaching crossing need not be decreased merely because traveler with team on highway is approaching such crossing 476
32. instruction concerning ordinary care approved 477
33. certain instruction requiring extraordinary care of one about to cross railroad at public crossing improper 477
34. gross neglect improperly defined 478
35. willful neglect not presumed—plaintiff must prove it 559
36. no proof conducing to establish willful neglect of railroad in certain case 559
37. sending of section hand out on road at night to signal a train, after a day's work by him, not an act of willful neglect 559
38. failure to furnish such section hand with red signal light not willful neglect in certain case 559
39. where evidence does not show what caused death of brakeman on train peremptory instruction for railroad is proper 579
40. injury to live stock by railroad—presumption of negligence overcome by evidence 629
41. failure of railroad to repair fence separating cut from highway—peremptory instruction 678
42. section hand going upon overcrowded hand car by order of foreman assumed increased hazard due to overcrowding 688
43. neglect if engineer places himself where he can not see signals given when brakeman goes between moving cars to uncouple them 689
44. slowness in discovering peril of brakeman neglect in particular case 689
45. forward movement of cars after peril of brakeman was discovered an act of neglect 689
46. contributory neglect no defense to action for willful neglect 689
47. contributory neglect—not such neglect as "causes" an injury—instructions 668
48. neglect of driver of husband's carriage imputed to wife as well as husband 668
49. death of certain employe of railroad not shown to have been caused by its willful neglect 734
50. employes held to have been guilty of contributory neglect 734
51. negligence per se for passenger to allow arm to protrude out of car window 768
52. but if arm is thrust out of window and injured by lurch of train railway is liable 768
53. employes on train not required to see that passenger does not sit with arm outside of window 768
54. passenger may occupy different seat or car from that assigned to him—contributory neglect 767
55. when failure to stop and listen before crossing railroad track is per se contributory neglect 788
56. contributory neglect—instructions that it must have caused accident erroneous 813, 814
57. injury caused to servant by defective machinery furnished by master—instructions 814
58. injury to live stock in reloading in transit by carrier—evidence—instruction 815

Digitized by Google

NEGLECT—Continued. Page.
59. evidence authorized finding of willful neglect in certain case..... 833
60. failure to have watchman at intersection of certain street by railroad negligence per se..... 833
61. drawhead of car injured in transit—not neglect to continue transportation of car to its destination..... 850
62. failure of conductor to warn brakeman of defective drawhead—contributory neglect..... 850
63. failure to give warning of approach of train where employe was at work on track..... 869
64. evidence of neglect not alleged incompetent in action to recover damages for injury inflicted by a railroad..... 877
65. right to file amended petition setting up additional acts of neglect that contributed to injury to plaintiff..... 877
66. certain instruction concerning risk of going between moving cars to uncouple them erroneous—contributory neglect..... 877
67. punitive damages recoverable where neglect of brakeman of railroad was quasi criminal..... 926
68. leaving of ditch under railroad track in yard uncovered, where employes push cars, act of neglect..... 928
69. punitive damages recoverable therefor in certain case..... 928
70. liability of owner failing to keep covering of cellar under sidewalk in repair..... 924
NEW TRIAL—See Appeals, 24—
1. newly-discovered evidence being merely cumulative, and there being no diligence shown, new trial properly refused..... 212
2. petition for new trial on account of unavoidable absence of attorney at trial—res adjudicata..... 241
3. when judgment granting new trial should be reversed..... 272
4. not granted after expiration of term at which judgment was rendered for errors that render judgment merely voidable, but do not render it void..... 415
5. newly-discovered evidence—sufficiency of—diligence..... 415
6. new trial not granted because defendant was infant when suit commenced and no guardian ad litem was appointed—judgment not being rendered until said defendant arrived at full age..... 416
7. additional grounds for new trial can not be filed after motion for new trial has been overruled..... 456
8. not granted for newly-discovered evidence where there has been lack of diligence..... 479
9. certain matters not to be made ground for new trial..... 479
10. grounds set up in motion for new trial, which was overruled, not sufficient to support petition for new trial..... 479
11. new trial properly refused..... 479
12. when allowed because party was prevented by sickness from attending trial..... 623
13. diligence—sufficiency of newly discovered evidence in certain case. 720
14. pendency of petition for new trial no bar to an appeal..... 760
15. not granted for newly-discovered evidence which is merely cumulative..... 764
16. time for making motion for in ordinary action submitted to court without a jury..... 811
17. where party appealing in such action fails to except to conclusions of law, only sufficiency of pleadings to support judgment can be considered..... 811
18. motion for not to be made before separation of conclusions of law and fact by the court..... 922
NOTICE—See Trusts, 6.
NON EST FACTUM—See Burden of Proof.
NUISANCE—See Indictments, 11—
1. blasting with gunpowder in a city or near property of others a nuisance per se..... 486
2. sufficiency of indictment for..... 894
3. evidence necessary to prove such offense..... 894
NOVATION—See Bills and Notes, 1.
OFFICE AND OFFICERS—(As to de facto office, see School Tax, 4)—
1. when public officer is declared a lunatic there is a "vacancy in office"..... 205
2. county judge has power to determine when a vacancy exists in office of assessor..... 205

Digitized by Google

OFFICE AND OFFICERS—Continued. Page.
3. burden of proof on officer to show right thereto in proceedings in name of Commonwealth against him for usurpation thereof..... 586
4. but where citizen claiming office sues in his own name burden is on plaintiff..... 586
OFFICIAL BONDS—See Commissioners, 2; Sheriffs, 1; Sureties, 9.
OPTIONS—See Contracts, 5.
OUSTER—
when entry upon land of another amounts to an ouster—trespass..... 398
PARENT AND CHILD—See Adverse Possession, 4, 6, 7; Conveyances, 20—
1. stepfather voluntarily assuming care and support of stepchild stands in loco parentis..... 233
2. right of father or stepfather to compensation out of child's estate for its maintenance and education..... 233
3. rights of child in estate of one who took it from Louisville Baptist Orphans Home and adopted it..... 236
PARTIAL PAYMENTS—See Accounts.
PARTIES TO ACTIONS—See Assignment for Benefit of Creditors, 4, 5; Infants, 4; Insurance, 35; Married Women, 5; Partnership, 12; Pleadings, 18; Street Improvements, 4; Vendor and Vendee, 7—
1. bank in which testator owns stock not necessary party to suit to settle his estate..... 17
2. suit by president and directors of corporation, as such equivalent to suit by corporation and failure to make corporation party, can not be taken advantage of by general demurrer..... 110
3. enforcement of liens by lienholders made party defendants—consolidated actions—service of process..... 306
4. in action between sheriff and one taxpayer, validity of act relating to location of county line, which affects many voters and much property, not determined—other citizens necessary parties to the suit..... 410
5. where trustee is not a party, but cestui que trust is, judgment concerning the trust is erroneous but not void..... 445
6. party waiting until after submission before presenting his petition to be made party plaintiff—laches..... 831
PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS—
parol evidence to show that a note merely evidenced an advancement by a father to a child admissible..... 859
PARTNERSHIP—See Corporations, 9, 10, 11; Pleadings, 12; Statute of Frauds, 3, 4—
1. right of partner to sue copartner for past due salary in absence of settlement of partnership accounts..... 113
2. right of partner to salary under particular articles of partnership. 114
3. acceptance of individual note of a partner in satisfaction of partnership debt—instructions..... 141
4. evidence shows existence of partnership during 1887 as well as 1886 in certain case..... 220
5. no evidence to show partnership between certain firm and a surety for it..... 268
6. partner not entitled to compensation for services to firm in absence of special agreement..... 335
7. evidence sufficiently shows such special agreement in certain case. 335
8. verdict finding that certain party was member of a certain firm erroneous because sustained by no evidence..... 451
9. one creditor of firm, who receives firm property which is mortgaged to another firm creditor, liable to such creditor for the value of such property..... 451
10. power to make assignment of partnership property—how conferred on one partner..... 480
11. particular settlement of accounts authorized by evidence..... 768
12. right of surviving partner to maintain action—waiver of defect of parties..... 895
PATENTS—
1. survey under treasury warrant not returned to register's office within one year from making of survey—title commences to run from date such survey was returned..... 49
2. another grant, under subsequent survey later in date, conferred superior title because grant issued before first survey was returned to register's office..... 49

Digitized by Google

PATENTS—Continued. Page.
3. failure to deposit survey with register for nearly ten years after it was made vitiates patent issued thereon 311
PAYMENTS—See Executions, 2, 3. 4—
1. plea of payment not sustained by evidence 207
2. when a renewal of note pays and discharges original note 890
PENALTIES—See Limitations, 5, 6, 7.
PEDIGREE—See Evidence, 37.
PEREMPTORY INSTRUCTIONS—See Neglect, 16, 39—
1. personal injuries resulting from alleged negligence of corporation —evidence being doubtful as to whether neglect of plaintiff or defendant was proximate cause of injury, no peremptory instruction should be given 226
2. not authorized where plaintiff's evidence makes out a prima facie case 272
3. not to be given if plaintiff's evidence conduces in any degree to establish a right of recovery 291
4. authorized in particular case 355
5. should be refused if there is scintilla of evidence to support plaintiff's cause of action 425
6. proper at conclusion of plaintiff's evidence—refused—defendant's evidence cured defects in plaintiff's case 477
7. should be given, if at all, at conclusion of plaintiff's evidence, but may be given after introduction of evidence by defendant 559
8. improperly given in certain case 566
9. trackman killed by reason of failure of railroad to give warning of approach—peremptory instruction improper 869
10. even when defendant's evidence tends to contradict or explain away plaintiff's instruction for defendant is improper 869
PHYSICIANS—See Constitutional Law, 8, 9: Libel, 6, 7, 8—
1. acts of legislature requiring physician to register in certain manner before practicing their profession, constitutional 376
2. under act of April, 1888, certificate and endorsement on diploma issued by medical school of another State by regent of a medical school of this State not sufficient to authorize one to practice herein; endorsement must be by the medical college itself 376
3. practice in this State for ten or any number of years since 1874 does not authorize one to practice in this State 376, 383
4. fact that county clerk registers authority of one to practice as a physician not conclusive evidence of such authority 383
PLEADINGS—See Allegation and Proof, 1; Auditor's Agent, 2; Bail, 8; Bills and Notes, 4, 5, 6, 7; Burden of Proof, 6; Consideration, 5, 6; Cross Petition, 2; Divorce, 9; Evidence, 59; Guardian and Ward, 7; Injunctions, 10; Insurance, 26; Judgments, 11; Libel, 6, 7; Limitation, 74; Municipal Taxation, 9; Neglect, 65; Parties to Actions, 2; Practice in Civil Cases, 1; Res Adjudicata, 2, 3; Slander, 6; Street Improvement, 1; Supersedeas Bond, 2; Sureties, 11; Variance, 1—
1. when necessary to answer interrogatories embodied in adversary's pleading 5
2. amended answer alleging defense known for two years—properly rejected 21
3. when process is necessary on an amended pleading setting up a cause of action 47
4. certain allegation of consent of municipality to erection of poles and wires in street not a mere conclusion of law 55
5. defendant by joining issue on petition waives right to object that caption did not contain word "petition" or "petition in equity". 80
6. quia timet—petition need not aver nature of hostile claim or point out its defects 85
7. petition defective in failing to allege that defendant's claim of title was adverse, cured by answer 85
8. denial of knowledge or information, etc., as to an assessment of distilled spirits for taxation not good 107
9. party not permitted to plead ignorance of a public record to which he has access 107
10. allegation that an ordinance was "duly passed" is an allegation of fact and not a conclusion of law 109
11. where pleading alleges waiver of forfeiture of insurance after taking of additional insurance, party not entitled to instruction concerning waiver prior to such period 110

Digitized by Google

PLEADINGS—Continued. Page.
12. amended petition asking settlement of partnership accounts offered after submission of action by partner for his salary properly rejected ... 114
13. certain persons became parties to a suit by filing general and special demurrers to petition ... 129
14. pleadings will be construed favorably to appellee on appeal in support of judgment ... 143
15. not presumed that answer, not in record on appeal, cured defects of petition ... 171
16. averment that an ordinance was in force a mere legal conclusion. 171
17. injunction to prevent collection of tax to repair schoolhouse—averment that costs of such repairs could not exceed $80 when tax of $170 had been levied—mere averment of pleader's opinion ... 173
18. amended petition asserting lien on property, title of which plaintiff claimed in petition, properly rejected in certain case ... 176
19. no abuse of discretion shown in permitting certain amended petition to be filed ... 191
20. affirmative allegation of certain answer a mere traverse of statements of petition ... 192
21. a delay for eighteen months, and until after a motion to submit before offering to file a reply, authorized the court to refuse to permit it to be filed ... 284
22. denials in answer of fact judicially known to be true properly struck out as sham pleading ... 314
23. allegation that the possession of property by a sheriff under a judgment of a court is "wrongful," not good ... 336
24. allegation that judgment is "fraudulent and void and of no effect whatever" a mere conclusion of the pleader ... 336
25. in action by servant to recover damages of master for personal injuries, an amended petition stating same injuries as original petition but different cause therefor, not a departure ... 305
26. sufficient if pleadings and exhibits make clear that land involved lies in county in which action is pending, although that fact is not formally alleged ... 358
27. denial by carrier of knowledge of injury to live stock during transportation by it not good ... 431
28. what defects in pleadings are cured by verdict ... 431
29. failure by defendant to remove debris of house blown down by tornado on defendant's property—petition must allege notice to remove and that defendant could have removed the debris ... 447
30. defect in petition to surcharge guardian's final settlement of accounts cured by answer ... 481
31. wife claiming land to prejudice of husband's creditors required to explain clearly in her pleadings how she acquired such land ... 505
32. where demurrer to one paragraph of petition ought to have been sustained and there is judgment for plaintiff, case will be reversed ... 525
33. error to strike from answer allegations explaining manner in which hearers of alleged libelous words understood them ... 525
34. improper designation of defendant in petition—amendment ... 575
35. failure of nonresident executor, plaintiff, to execute bond before institution of action—waived unless objection made by special demurrer ... 600
36. answer denying execution of contract raises issue as to whether it is evidenced as statute of frauds requires ... 621
37. petition for a tort—killing of live stock by railroad—amended petition on alleged compromise ought not to have been permitted filed—motion to require plaintiff to elect ought to have been sustained ... 622
38. certain reply no travers allegations of answer, which is considered as admitted ... 624
39. statement in answer that defendant denies each averment of petition not a traverse of petition ... 628
40. pleadings in certain suit in ejectment formed no issue and defendant not prejudiced by judgment rendered ... 652
41. when process on amended petition is necessary ... 668
42. error waived by failure to complain on former appeal ... 670
43. reply is necessary to plea of contributory neglect ... 672
44. reply waived in certain case ... 672

Digitized by Google

PLEADINGS—Continued. Page.
45. discretion of court concerning filing of pleadings out of time 719
46. denial that one "negligently and carelessly set fire" to a building, an admission that he set fire to it 750
47. answer averring that assigned check was executed in jest, and also that the plaintiff, assignee, and the maker had fraudulently conspired to secure delivery of check, not inconsistent defenses 768
48. certain action not founded on contract of purchase of lottery ticket when, after drawing, defendant fraudulently obtained possession of winning ticket and collected money thereon 847
49. defense to such action 847
50. failure to reply to plea of contributory neglect—judgment notwithstanding verdict 855
51. amended petition filed after dismissal of original petition can derive no support from original petition 923
52. when dismissal of petition on demurrer is bar to new action on same cause 924
POORHOUSES—See County Courts, 1, 2.
PRACTICE IN CIVIL CASES—See Appeals, 13, 14, 17, 26; Bills and Notes, 18; Corporations, 8; Instructions, 19; Jury, 2, 3, 4; New Trial, 7, 17; Peremptory Instructions, 1, 6—
1. amended petition being filed after issue joined—no answer was necessary in certain case 61
2. motion to dismiss action by plaintiff properly overruled—evidence not showing that written consent of plaintiffs was genuine 77
3. right of railroad company to abandon condemnation proceedings .. 79
4. liability of such corporation for costs and attorney's fees upon abandoning proceedings 79
5. on petition to be made a party—proper order 206
6. party can not complain of failure of court to give an instruction which he did not ask it to give 271
7. judgment of court on issues of fact in common law action, where jury is waived by the parties, considered on appeal as the verdict of a properly instructed jury 352
8. instruction not asked for—party can not complain because it was not given 368
9. instruction presenting all facts in issue not open to objection of singling out particular facts 368
10. view by jury of place of injury to plaintiff by railroad—discretion of court 456
11. misconduct of counsel in argument by quotation from decision of Court of Appeals 477
12. response by court in answer to question asked by jury after they had retired 672
13. no abuse of discretion by court in keeping jury together for a day and a half after they reported they were unable to agree, or in telling them that "the parties were entitled to a verdict" 764
14. holding of jury together for further consideration of case, after they have announced that they cannot agree, a matter almost wholly within discretion of trial judge 814
15. authority of court where jury is waived in ordinary action 862
16. agreement that pleadings and evidence in one appeal is same as another already decided—this appeal must be decided as the other was 862
17. right of plaintiff to remit part of excessive verdict 895
18. when remission of part of excessive verdict cures error 897
PRACTICE IN CRIMINAL CASES—See Indictments, 2—
1. affidavit for continuance—must statements of be admitted as true by Commonwealth to secure trial 15
2. instruction concerning murder not considered on appeal when defendant was convicted of only manslaughter 16
3. on appeal in criminal case, verdict not set aside as if no evidence supported it, when there is any evidence whatever to sustain it .. 165
4. defect in indictmnet not waived by failure to demur until after plea of not guilty and the swearing of the jury 179
5. indictment being dismissed and charge referred to next grand jury, which brings in new indictment—defendant summoned on first indictment remains before court on second 195

Digitized by Google

PRACTICE IN CRIMINAL CASES—Continued. Page.
6. rebuke of other jurors by court for small fines imposed for certain crimes not presumed to have influenced jury in case under trial to impose severer penalty 217
7. qualification concerning defendant's right of self-defense in instruction being erased by court after argument of counsel and instruction then read to jury—presumed that jurors understood that erasure had been made 217
8. questions that may be asked jurors concerning their scruples against capital punishment 223
9. one indicted for crime by grand jury can not complain that he had no examining trial 246
10. verdict not reversed on appeal if any evidence conduces to sustain it 253
11. fact that Commonwealth's attorney elects to prosecute under a particular statute, under which indictment is not good, does not authorize the trial court to sustain a demurrer to the indictment when it is good under another statute 301
12. defendant accused of murder compelled by sickness to leave courtroom momentarily not prejudiced by failure to suspend his trial during his absence 308
13. verdict on first trial should be erased from indictment before jury on second trial retired with it to consider their verdict 517
14. defendant's objection in that regard must be made before second jury retires 517

PREJUDICIAL ERRORS—See Burden of Proof, 4; Dying Declarations, 4; Instructions, 7, 14, 19, 25, 26, 29; Practice in Criminal Cases, 6, 7; Questions for Court and Jury, 2, 8—
1. trespasser ejected from train in cruel manner—particular instruction not prejudicial even if erroneous 108
2. defendant, who is guilty of murder beyond all doubt, not prejudiced by erroneous instruction on trial 160
3. no reversal unless ruling of court was clearly prejudicial as well as erroneous 624
4. particular error in instructions not prejudicial 624
5. where plaintiff was entitled to sale of attached property under contract lien asserted by him, fact that attachment was void not a ground for reversal 719

PRINCIPAL AND AGENT—See Actions, 2; Agents, 1; Juries; Municipal Corporations, 2; Questions for Court and Jury, 4—
1. right of agent to commission on a sale which his principal refuses to carry out 860
2. agent entitled to no compensation where services were volunteer and with understanding that no charge was to be made 895
3. but actual expenses of agent may be allowed him in such case 896
4. such agent being allowed no compensation—not charged with interest on funds in his hands 896
5. costs divided where neither principal nor agent was without fault in controversy between them 896

PRESUMPTIONS—See Appeals, 35; Evidence, 11; Guardian and Ward, 2; Taxation, 3.

PRIVILEGED COMMUNICATIONS—
statements made by client to attorney at time he examined title to property client, was about to purchase are privileged communications 191

PROCESS—
when necessary on amended petition 668

QUESTIONS FOR COURT AND JURY—See Criminal Law, 28; Negligence, 6; Sureties, 4—
1. question whether execution defendant had "a family," within meaning of exemption law, one for a jury in this case 79
2. evidence on this question being clear, court's action in hearing and deciding question not prejudicial 79
3. where party is entitled to easement in a highway unlawfully taken by railroad, instructions should so state to jury 526
4. question as to duty of agent making a sale to report to principal offers made properly referred to jury 861

Digitized by Google

QUIA TIMET—See Pleadings, 6, 7— Page.
1. to maintain such action plaintiff must have possession and legal title ... 85
2. plaintiff's possession adverse for such period as vests legal title in him, and action maintainable by him ... 85
RAILROADS—See Bonds, 1, 2, 3, 4; Burden of Proof, 10; Carriers, 4; Conflict of Law, 1; Constitutional Law, 21; Dedication, 5, 6; Evidence, 3, 49, 53, 54; Fellow Servants, 3; Instructions, 23; Municipal Corporations, 1, 29, 30; Municipal Taxation, 18; Neglect, 7, 16, 24, 25, 26, 2, 28, 29, 30, 31, 32, 33, 34, 39, 40, 41, 59, 60, 61, 62; Practice in Civil Cases, 3, 4, 12; Questions for Court and Jury, 3; Streets and Alleys, 3, 4; Taxation, 10, 11, Verdict, 1—
1. duty to trespasser in ejecting him from train ... 108
2. injury to abutting property by operation of road—rails and ties left above general grade of street—instructions ... 111
3. not absolutely bound to put ties and rails on level with general surface of streets of city ... 111
4. injury to abutting property—evidence of decrease of rental value since construction of road incompetent in certain case ... 111
5. liability of purchaser of railroad for contract made by vendor with certain land owner ... 111
6. fire from escaping sparks—negligence—evidence ... 144
7. construction and operation of in street of a city—chancellor not authorized to impose unnecessary restrictions on road as condition precedent to right to construct such road ... 151
8. certain restriction by chancellor as to number of freight trains to be run each day in a city unreasonable ... 151
9. road not prejudiced by order requiring it to construct road of a certain guage in street of a city ... 151
10. railroad may be required to construct road in such street so as to insure safety of persons using street ... 151
11. not act of neglect to dig ditch for pipe for water tank near station and leave it unconvered temporarily during sudden rain ... 226
12. killing of stock on track—first duty of road is to safety of passengers and freight on train ... 239
13. killing of stock on track—error to disregard engineer's duty to train and passengers in instructions ... 239
14. certain employe who habitually crossed a bridge of the railroad when going to his work not regarded as a trespasser thereon ... 291
15. trainmen must look out for such person on bridge at the hours he habitually crosses it ... 291
16. duty to trespassers on track ... 324
17. personal representative of one who was not an employe of a railroad may maintain action under section 1 of chapter 57, General Statutes ... 327
18. who is an "employe" within purview of said chapter ... 327
18. duty to passengers alighting from cars ... 367
19. carriage of passenger beyond his destination—ejectment from car—measure of damages ... 367
20. injury to passenger by employe of railroad—exemplary damages ... 367
21. duty of railroads as to passengers alighting from cars between stations ... 367
22. negligence of one railroad company while assisting another in moving its cars—liability to one injured thereby ... 397
23. damages to abutting property by construction and operation of road—taking away of ingress and egress thereto a permanent injury ... 417
24. owner may in one action recover all past and future damages resulting therefrom ... 417
25. owner may recover such damages even though he sold property immediately after completion of the railroad ... 417
26. lessee of railroad, who is operating it, liable to owner for such damages as well as its original constructor ... 417
27. passengers must be allowed reasonable time to leave the train ... 432
28. duty to trespasser on track in switchyard ... 437
29. duty to such trespasser not changed because of his infancy ... 437
30. certain infant injured by own contributory neglect while trespassing on track in switchyard—peremptory instruction properly given ... 437
31. certain lease of railroad for 1,000 years in effect a sale of it ... 442

Digitized by Google

RAILROADS—Continued. Page.
32. care required as to employe accustomed to use track in going to work ... 477
33. hand car so loaded as to be gross negligence as to employes walking on road going to work ... 478
34. killing of stock—mode of proving pedigree of such stock ... 526
35. injury to property of abutting land owner to highway taken by railroad and abandoned as a highway ... 526
36. measure of damages to such abutting property owner ... 526
37. value of improvement on such abutting property to be considered in certain case ... 527
38. certain party, employed by the day and not working on the day he was killed, not an employe of railroad at that time ... 568
39. claim being that person was killed by rear section of a certain train no instruction necessary that no recovery could be had if he was killed by the front section thereof ... 568
40. evidence of unsafe condition of roadbed near place of accident sometimes competent ... 611
41. railroad first introducing such evidence not heard to complain because other party also produces such evidence ... 611
42. liability of company for injuries caused by accident resulting from defective roadbed ... 611
43. duties of road to passenger on a freight train ... 611
44. destruction of spring by railroad—damages ... 622
45. injury to abutting property—measure of damages—evidence ... 624
46. purchase of railroad by director—no trust created in favor of stockholders ... 606
47. injury to abutting property by construction and operation of road —instructions as to ownership of property ... 671, 672
48. measure of damages for such injury ... 671, 672
49. what abutting owners' rights are in street on which road is operated ... 671
50. evidence of value of property before and after construction of road admissible ... 671, 672
51. admissions by owner to assessor as to value of such property competent ... 671
52. when liable to brakeman injured because cars are improperly loaded—contributory neglect ... 672
53. employe not bound by rule of company not brought to his attention or habitually violated with knowledge of officers of company. 716
54. rule concerning use of coupling stick was never enforced, and employe not guilty of contributory neglect in violating it ... 716
55. employes of a railroad company on different trains are not fellow servants ... 717
56. such employes are entirely distinct the one from the other, and are not co-equal, superior or subordinate ... 717
57. liability for diverting accumulated water on another's land ... 719
58. destruction of buildings erected near railway by fire caused by escaping sparks ... 750
59. where fire to building is caused by burning of depot, which was ignited by sparks escaping from locomotive through negligence, railroad is liable for damages done ... 750
60. competency of evidence of combustible character of depot in such action ... 750
61. certain instruction in such action not misleading or prejudicial to railroad ... 751
62. degree and nature of care required of railroad in transportation of passengers ... 767
63 liable for injury to passenger resulting from defective roadbed ... 767
64. ejectment of passenger—error to base instruction on negligent act not made ground of complaint by plaintiff ... 770
65. when failure to stop and listen before crossing track is per se neglect ... 788
66. undertaking by grantor of right of way to fence land—duty of company as to stock on track ... 807
67. duty to trespassers walking on track ... 816
68. not liable to brakeman for injury caused by neglect of fellow servant ... 877
69. injury to brakeman by neglect of superior employes—railroad liable only where neglect was gross ... 877

Digitized by Google

RAILROADS—Continued. Page.
70. grant of a right of way by a married woman—deed not recorded .. 919
71. consent of married woman that road might be built on one way does not estop her to claim damages for different right of way taken 919
72. acquiescence in construction of railroad over one's land—estoppel. 919
73. injury to passenger in alighting from train—instructions 925
74. such passenger may prove his injured condition immediately after his arrival at home 926
75. killing of stock on track—verdict not flagrantly against the evidence 926
76. duty of road as to giving of "timely warning" of approach of train at public crossing 927
77. not required to keep continuous watch during night at depot in small town 927
78. killing of stock on track—instruction as to whether evidence overcome presumption of neglect improper 893
RAPE—See Evidence, 21; indictments, 12—
instruction that if the female "was intimidated into submission by threats or by the force of the surrounding circumstance," then accused was guilty of rape, is too indefinite and misleading 254
REAL ESTATE AGENTS—
1. commission for lease of property under particular contract determined 718
2. right to commission—when principal sells to purchaser secured by agent 719
RECEIPTS—See Guardian and Ward, 4.
RECEIVER—
being directed by court to pay out funds in his hands can not set off his individual claim against party to whom court directed payment to be made 574
RECORD—
index to insufficient in certain case 834
REDEMPTION OF LAND—See Judicial Sales, 7.
REFORMATION OF WRITTEN INSTRUMENTS—See Insurance, 33—
1. mistake of party as to legal effect of contract not ground for its reformation 480
2. antenuptial contract not reformed in favor of wife's heirs where proof of mistake on part of wife in its execution is not clear 480
3. action to reform deed for alleged mistake barred eleven years after cause accrued 591
4. contract will not be reformed unless the mistake was mutual 717
5. what evidence is sufficient to authorize the reformation of a written contract 717
REMAINDERS—See Descent and Distribution, 6; Devises, 12—
1. land in which there are contingent remainders may be sold for reinvestment under act of August 23, 1862 364
2. such act is constitutional 364
REMOVAL OF SUITS—
1. to authorize removal of a suit from a State court to U. S. Circuit Court amount in dispute must be $2,000, exclusive of interest and costs 574
2. certain cause does not really involve construction of any act of Congress and is not removable to Federal Court on that ground .. 574
3. removal under the "local prejudice act"—necessary allegations ... 574
RENTS—
1. value of rents and improvements correctly ascertained in certain case 143
2. apportionment of where a life tenant rents out land and dies before the rent becomes due 303
REPEAL OF STATUTES—See Municipal Taxation, 13—
when provisions of Civil Code are considered as a repeal of provisions of General Statutes 798
REPLEVIN BOND—See Sheriffs, 11.
RES ADJUDICATA—See Contracts, 10; Executors and Administrators, 5; Judgments, 5; Judicial Sales, 10; New Trials, 2; Pleadings, 51; Taxation, 15—
1. dismissal without prejudice of suit to rescind contract no bar to action to recover damages for breach of such contract 112

Digitized by Google

RES ADJUDICATA—Continued. Page.
2. when judgment on demurrer to petition is conclusive as to rights of parties and bar to another suit 122
3. on second appeal in a case appellant not estopped to complain of rejection of an amended petition, of which he made no complaint as appellee on first appeal 305
4. judgment by default against husband and wife conclusive on wife after expiration of term at which it was rendered 342
5. wife suffering judgment of sale of land by default thereafter concluded to claim homestead against such judgment 342
6. judgment by default in action to quiet title conclusive on defendants, even though many years afterwards they offer to prove allegations of fact in the petition were untrue 445
7. on second appeal court is bound by law of case as laid down on former appeal 720

REVIVOR OF ACTIONS—See Final Order, 3—
representative of plaintiff may revive action by filing amended petition on which process is issued 810

ROADS AND PASSWAYS—See Appeals, 39, 40; Contracts, 35; Dedication, 1, 2—
1. failure to give notice of application for opening new county road—judgment establishing road reversed 117
2. such application must state necessity of road to applicants, etc 117
3. report of viewers must give name of owners of land over which proposed road runs 117
4. on appeal to circuit court from order of county court establishing such road, circuit court can not hear additional testimony 117
5. reversionary interest of abutting land owner in county road 135
6. when title to such road reverts to such land owner 135
7. right to passway not abandoned by closing of certain gate 227
8. fifteen years adverse possession of public road gives title thereto 575
9. statute forbidding opening of lateral road within one mile of turnpike constitutional 823
10. closing of such lateral road by order of county court—damages—res adjudicata 823
11. filling of depression in county road under order of county court—liability for damages to abutting lot owner 875

REVERSION—See Roads and Passways, 5, 6.

SALES OF INFANTS REAL ESTATE—
1. purchaser acquired good title under proceedings in certain case to sell infants' real estate for reinvestment 149
2. certain infants concluded by judgment, their guardian being party to suit 282
3. action for on account of its inuivisibility—indivisibility being shown on face of petition and by description of land, judgment of sale was not void because no evidence to show that the land was indivisible was offered 312
4. other joint owners of such land, who are plaintiffs and asking its sale, have not such adverse interest to the infant defendants as would render their evidence inadmissible against the infants 312
5. title passed to purchaser at judicial sale even if evidence of the indivisibility of the land was not sufficient 312
6. guardian appointed for infant by court of another State not authorized to sue for sale of ward's land in this State unless authorized to act as guardian in this State 463
7. sale of infant's land in action by such guardian not authorized to act in this State confers no title on purchaser 463
8. sufficiency of certain report of guardian ad litem 874
9. report of sale not required to state amount to be realized by sale 874
10. clerical misprision in judgment which has been, on motion, corrected, does not render sale voidable or void 874

SALES OF PERSONAL PROPERTY—See Evidence, 2—
1. when title to certain lumber, on which advances were made, passed 175
2. sale of personal property without change of possession by one member of a family to another 237
3. failure to deliver quantity sold—measure of damages 271
4. representations as to quality of article to be delivered in futuro—effect of acceptance after opportunity of inspection 300

Digitized by Google

SALES OF PERSONAL PROPERTY—Continued. Page.
5. such representations as to quality, when quality can be ascertained at the time of delivery, not regarded as a warranty 300
6. right of vendor to resell and recover difference between contract price and the price obtained when purchaser unreasonably refuses to accept article sold 300
7. right to recover expense of resale in such case 300
8. possession obtained by vendee by fraud—vendor may rescind and recover possession 858
9. vendor rescinding contract in such case may recover and retain possession from assignee for creditors of vendee 858
SCHOOLS—See Constitutional Law, 2; Instructions, 4—
fact that common school building in certain district is too small to accommodate all the children does not authorize legislature to appropriate part of fund to an academy in said district 129
SCHOOL COMMISSIONERS—
compensation for visiting schools in 1884 and for reporting school districts 767
SCHOOL TAX—See Pleadings, 17—
1. tax to repair schoolhouse—assessment made by county assessor for current year sufficient 173
2. no objection to such tax that title to schoolhouse lot is not in trustees—trustees may merely have lease on such land 173
3. tax to repair or furnish schoolhouse—assessment 863
4. certain deputy sheriff treated as de facto collector of school tax—failure to give bond 867
5. statute relating to liberally construed after election held in school district and tax imposed thereby 240
6. "object of the proposed tax" determined by notice of such election—sufficient if in substantial compliance with statute 240
7. such statute does not require a formal levy by the school trustees—order of election and apportionment of collector sufficiently indicate the levy in certain case 240
8. no assessment for such tax necessary other than that made by county assessor for current year 240
9. tax to enlarge schoolhouse—necessary steps essential to validity of. 240
10. effect of failure of collector to execute bond 240
11. unconstitutional to impose school tax on colored taxpayers if they are not allowed to vote at election to determine if such tax shall be imposed 562
12. white taxpayers not heard to complain on account of this denial of right to colored voters 562
13. notice of election concerning school tax should state rate of proposed taxation 562
14. mode of fixing rate of taxation imposed by trustees in aid of schools 562
15. elections as to school tax—transfer of voters from one district to another on day of election 562
SELF DEFENSE—See Instructions, 2.
SEPARATE ESTATE—See Husband and Wife, 1, 10—
disposition of separate estate by married woman prior to her death—trusts—descent and distribution 173
SEPARATION OF CONCLUSIONS OF LAW AND FACTS—See Appeals, 40, 44; New Trial, 17, 18—
1. in ordinary action submitted to court—failure to separate conclusions and no motion for new trial—only question on appeal is whether pleadings authorize judgment 340
2. exception to a judgment which was entered contemporaneously with statement of conclusion of law and fact of court in an ordinary action does not, on appeal, raise question of correctness of such conclusions 398
3. where there are no exceptions to such conclusions of law, appellate court will consider only sufficiency of pleadings to sustain judgment and whether evidence supports conclusions of fact 398
SET-OFF—See Homestead, 8; Municipal Taxation, 6; Receiver, 1—
1. firm note held by bank which has assigned for benefit of creditors—members of firm may set-off against note in assignee's hands balance due them as depositors in the bank 111
2. suit by administrator as such—individual debts of administrator can not be pleaded as set-off 527

Digitized by Google

SET-OFF—Continued. Page.
3. claim for unliquidated damages not allowed as set off in equity when defendant has adequate remedy at law against plaintiff therefor 792
SHERIFFS—See Executions, 2, 3, 4; Judgment, 5; Judicial Sales, 13; Sureties, 9—
1. validity of county levy bond executed before county judge during adjournment of session of court of claims, by which county levy was subsequently fixed 150
2. punishment of deputy sheriff for speculating in county claims 207
3. instruction on trial of deputy for such offense 207
4. refusal to settle accounts concerning county levy—remedy of county court 482
5. proceedings against sheriff and sureties by notice and motion under General Statute, being summary, must, in all respects, comply with statute 480
6. notice to sureties of "J," sheriff, and motion against sureties of M, sheriff, a fatal variance and judgment on said notice and motion void 490
7. commissions on taxes realized on property reported by him for assessment omitted by assessor 476
8. action against for failure to make money on execution—what evidence is hearsay 576
9. verdict in such action not flagrantly against the evidence 576
10. receipt of choses in action or property in satisfaction of execution not a payment—debtor not protected or released thereby 670
11. liability for taking insufficient replevin bond 892
SLANDER AND LIBEL—See Pleadings, 33—
1. charge that one accepted a bribe to withdraw from a race for the legislature not actionable per se 315
2. allegation of special damages from such charge too remote and speculative in certain case 315
3. charge by employer that he had discharged employe "for stealing" slanderous and actionable per se 525
4. certain statements published in newspaper about said employe by employer libelous, no colloquium or inuendo necessary 525
5. certain charge that one had "robbed" another in connection with other language used did not impute an indictable offense 525
6. words otherwise slanderous, being explained at time of speaking them, not actionable without allegation of special damage 525
SPECIAL JUDGES—
1. agreement of one accused of misdemeanor that certain attorney may act as special judge a waiver of requirement that such judge must take the oath prescribed, etc 272
2. presumed that special judge was qualified in absence of evidence to contrary 898
SPECIFIC PERFORMANCE—See Husband and Wife, 11; Judicial Sales, 8; Vendor and Vendee, 2, 3, 4, 5—
1. of contract—when to be granted by court of equity 642, 670
2. not granted where there was a mutual mistake between parties as to quantity of land sold 658
3. vendor entitled to specific performance of contract of sale of land, although his title was defective on the day he was to convey, the defect having been cured subsequently 782
4. destruction by fire of building on property to be conveyed, after contract and before premises were to be delivered, does not release vendee 782
5. right to specific performance of contract is not absolute in either party—rests in discretion of court 507
6. when specific performance of contract will be decreed 507
7. party guilty of such laches as to make it inequitable to compel specific execution of contract by other party, although right thereto is not barred by limitation 507
STATUTES—
1. repeal of by implication not favored 270
2. question of repeal of one statute by subsequent one largely a question of intention of legislature 270
3. act prohibiting sale of liquor in an entire county repeals local option law in force in one precinct of county, penalty prescribed by the two laws being different 270

Digitized by Google

STEAMBOATS—See Municipal Taxation, 1. Page.
STREETS AND ALLEYS—See Burden of Proof, 8; Railroads, 7, 8, 9, 10, 49—
1. street can be recovered only by ejectment from one in possession of it claiming it as his own ... 487
2. liability for failure to keep covering over cellar in sidewalk in repair ... 924
3. construction and operation in streets of a city being duly authorized, chancellor can not impose arbitrary limitation on the railroad ... 151
4. limitation of number of freight trains to be run per day on track in city held to be unreasonable ... 151
5. evidence shows dedication of certain alley and its acceptance by city ... 648
6. one filling "sag" in street, under authority of city, not liable to abutting lot owner for damages to his lot thereby incurred ... 875
STREET IMRPOVEMENT—See Assessment for Street Improvements, 1; Municipal Corporations, 3, 4, 5—
1. action to enforce lien for in Louisville—not necessary to file with petition copies of record of proceedings of council authorizing the improvement ... 398
2. action to enforce lien for—defect in petition cured by verdict ... 432
3. lien of contractor for street improvement on abutting property not impaired by a sale of such property ... 432
4. action to enforce lien for against purchaser—duty of purchaser to make his vendor party if he so desires ... 432
5. assessment for—contractor not required to repair work ... 720
6. abutting owner liable, even if contractor failed to repair improvement during certain period ... 720
STREET RAILWAYS—See Corporations, 1, 2; Istructions, 20; Neglect, 17, 18; Negligence, 22—
1. failure of driver to give passenger correct change—right of passenger to remain in car when change so given is too small ... 272
2. carriers of passengers may make and enforce rules, provided they are reasonable ... 272
3. rule that conductor of standard railway cars must have complete control of cars and passengers, and be obeyed, not recognized in this State and not applicable to street railway cars ... 272
4. injury to child—liability ... 426
5. injury to child by street railway—instructions ... 426
6. contributory neglect by child not an element in certain action against street railway ... 426
7. duty as to persons driving on street ... 663
8. certain party driving on track guilty of contributory neglect ... 663
9. duty to person driving on track ... 663
SUBROGATION—See Descent and Distribution, 1; Executors and Administrators, 3.
SUBSCRIPTIONS—
1. to one of two turnpike roads of same name—parol evidence admissible to show which road subscription was for ... 174
2. contract of subscription must be mutually binding ... 174
3. subscriber to capital stock of corporation becomes thereby a stockholder—not necessary to tender to him certificate of stock before filing suit on subscription ... 208
4. to turnpike road—change of route—ratification ... 924, 925
SUMMONS—See Appeal Bond, 1; Process, 1—
1. when necessary by reason of the filing of an amended pleading setting up a cause of action ... 47
2. in action to subject land on execution returned "nulla bona," failure to endorse purpose of action on summons not fatal ... 359
3. not necessary on amended petition which merely sets out grounds for specific attachment ... 719
4. service on corporation—manner of ... 767
SUPERSEDEAS—See Injunction, 8—
1. obligors on bond, where judgment is affirmed, liable for full amount thereof and not for merely the actual damages resulting from the supersedeas ... 202
2. not necessary for order of supersedeas to be served as a summons. 202
3. in particular case sureties liable on supersedeas bond because all remedies on judgment were thereby suspended ... 202

Digitized by Google

SUPERSEDEAS—Continued. Page.
4. one prosecuting appeal with supersedeas bond estopped in action on bond to claim that order grantng appeal was void 202
SUPERSEDEAS BOND—
1. signing by attorney in fact—evidence 862
2. action on bond—failure to allege that bond was taken by clerk of Court of Appeals waived 862
SUPPORT—
1. right of lateral support of lot owner from adjacent land 145
2. such right does not extend to lateral support of building placed on lot 145
3. withdrawal of support of neighbor's house and lot—notice to neighbor 145
4. damages resulting from such withdrawal and failure of neighbor to protect his house after notice 145
SURETIES—See Assignment for Benefit of Creditors, 1; Bail, 7, 8; Consideration, 3, 4; Executors and Administrators, 2, 3; Fraudulent Representations, 1, 2, 3, 4, 5; Judgments, 5; Liens, 3; Limitations, 2; Married Women, 8, 9; Mortgages, 2, 11, 12, 13; Sheriffs, 5, 6; Supersedeas, 3—
1. release by creditor of a lien on debtor's property releases debtor's surety 141
2. value of property on which such lien exists not material in such case 141
3. surety paying debt after he is released from legal obligation has no right of action against principal to recover sum paid 141
4. authority of one to sign name of another to note a question for jury 205
5. surety for debt released when creditor releases a lien on the debtor's property 266
6. surety for a debt of one who assigns all his property for the benefit of creditors released if the creditors released to the debtor any part of the estate assigned by him 266
7. surety who pays a debt after being released from legal obligation has no right of action against principal 266
8. surety on note for money advanced by tobacco warehouseman to principal to buy tobacco released by payment of proceeds of tobacco by warehouseman to the principal after it was sold without first reimbursing themselves 334
9. on bond of deputy sheriff for one term—error to put all credits deputy is entitled to on his second term, and thus throw whole burden of defalcation of first term and sureties on bond therefor. 400
10. in an official bond only for the term for which the bond was executed 573
11. petition against such sureties, not alleging that any sums were collected after execution of bond, states no cause of action 573
12. suit for contribution—competency of evidence concerning agreement between plaintiff and the principal in the debt 764
13. surety not bound as principal, although he did not state that he was bound merely as surety when note was executed 766
14. extent of liability of indemnitor of surety of personal representative 819
15. parol authority to one to sign name of another to note or mortgage as surety insufficient 884
16. surety on note released unless bank appropriates general deposit of principal to payment of note—specific deposits 923
TAXATION—See Appeals, 41; Attachments, 6; Burden of Proof, 9; County Courts, 2, 3; Decedents' Estates, 5, 6; Devises, 5; Limitation, 10; Municipal Taxation, 3, 4, 5, 6, 7, 8, 9; Pleadings, 8—
1. auditor, treasurer and secretary of State are ex-officio board of valuation and assessment of taxes on distilled spirits, and it is not necessary that they should take oath as members of such board .. 107
2. such board must file with auditor their assessment and valuation. 107
3. presumed that board discharged their duty in absence of allegation to contrary 107
4. increase by State Board of Equalization of taxable value of property of a county affects assessment for county as well as State purposes 142

Digitized by Google

TAXATION—Continued. Page.
5. exemption of railroad of certain company a personal privilege, which does not pass with sale of road to another company—lease of road for 1,000 years equivalent to its sale 442
6. gas company furnishing gas by contract, for compensation, to city, performs no public service sufficient to exempt it from taxation 464
7. payment of license or specific tax to a city by a gas company does not exempt it from payment of ad valorem tax on its property to the city 464
8. lists given to assessor by taxpayer prima facie correct—burden on auditor's agent to show such list to be incorrect 478
9. valuation fixed on property by assessor and by board of supervisors conclusive on Commonwealth as well as taxpayer 479
10. certain land held by railroad as lessee not exempt from taxation by reason of exemption of road's property for five years after its completion 681
11. where railroad as lessee agreed, as part of rent, to pay taxes on such land, it can not claim its exemption from taxation as to the leased property 681
12. information by auditor's agent—duty of county court as to assessment of property 732
13. tax bills prima facie evidence in certain case 814
14. jurisdiction of county court to correct errors in assessment and to determine whether property should be assessed 886
15. determination of county court that certain property was not subject to taxation a judicial act binding on State until reversed 886
TAXES—(Claimant under tax sales)—See Burden of Proof.
TAX SALES—
1. claimant enforcing legal rights under required to prove substantial regularity of all steps of sale 86
2. lien of purchaser at tax sale for amount paid, when title acquired fails 142
3. sale of land for taxes by sheriff to himself void and passes no title. 740
TIME—See Assignment by Operation of Law, 17.
TITLE BOND—See Boundary.
TRANSFER OF SUITS—
1. married woman not prejudiced by the transfer of a suit against her upon a note to equity in which she is not held to any personal liability thereon and in which all the other issues are equitable 302
2. transfer of—not error to transfer common law action concerning numerous items of mutual accounts to equity 206
TRESPASS—See Damages, 14—
1. when injunction may be resorted to to prevent repeated trespass upon land 302
2. when entry upon land is an ouster of owner and when it is a mere trespass 398
TRUSTS—See Devises, 1, 8, 10, 15, 16; Executors and administrators, 10; Frauds, Statute of, 10; Limitations, 4—
1. certain lands held by trustee in individual right and not as trustee. 61
2. under contract of employment trustee did not lose his own right in lands claimed by his principal 61
3. contract employing agent construed 61
4. land held adversely by trustee in his own right—statute of limitation runs against cestui que trust, who claims same land 61
6. holder of legal title to land, having by agreement with debtor discharged trust created by parol, not liable to one claiming trust interest as assignee, no notice of such assignment having been given 58
7. chancellor will interfere with trustee's discretion only because of his failure or incapacity to act or abuse of power 199
8. trustee's manner of distributing fund for benefit of cyclone sufferers who belonged to a certain order not interferred with or changed 199
9. manner of settling estate in the hands of one creditor for the benefit of all creditors 262
10. beneficiaries of trust creating county seminary may sue trustees in equity for an accounting—not required to proceed only by action on bond of trustees 412

Digitized by Google

TRUSTS—Continued. Page.
11. liability of one trustee for acts and defaults of co-trustee 412
12. stale claim against trustee not enforced 412
13. failure to make trustee party to suit, cestui que trust being party, judgment is not void but erroneous 445
14. parol declaration of trust in personal property raises trust, even when possession of property is not charged 584
15. evidence necessary to show such declaration of trust 584
16. purchase of railroad by director—no fraud shown and no trust exists in favor of stockholders 606
17. when a trustee or director of corporation dealing with corpus of trust estate for his own benefit is held liable as a trustee 606
18. neglect of trustee for imbecile—compensation for services 669
19. certain verbal agreement to hold land for benefit of another within statute of frauds 681
20. suit by creator of trust to compel its execution 765
21. purchaser at execution sale of land held in trust, sold for court costs incurred by trustee, must show authority of such trustee to institute the suit and bind the trust estate for costs 772
22. trust estate should be subjected for court costs by an order of the chancellor and not by execution sale 772
23. agent or trustee who places his own interest in opposition to his duty as trustee can not demand compensation for his services 811
24. how express trusts are created—limitation 811
25. where trustee buys property for himself with trust funds a constructive trust arises—limitation 811
26. purchaser from trustee with notice of trust holds himself as trustee, 811
27. estate devised to executor in trust—executor a trustee 908
28. where there are contingent remainders in estate, unproductive real estate will be sold for reinvestment in action by executor for that purpose 908
29. when one of two purchasers takes title in himself, trust by implication arises in favor of other—statute of frauds does not apply to such trust 925

TURNPIKES—See Subscription, 1, 2—
1. company entitled to have chancellor construe contract under which many persons are claiming right to use road free of toll 110
2. free use of road in consideration of privilege conferred by land owner—right to free toll a personal right which does not run with the land 110

UNDUE INFLUENCE—See Wills, 4, 5—
instructions concerning proper 360

UNLIQUIDATED DAMAGES—
claim for—when allowed to defendant as set-off in action in equity .. 792

USURY—
1. recovery of usury from third parties 5
2. loan of money to pay usurious note—debt of party making loan not purged of any usury 5
3. payment of usury in consideration of indulgence 5
4. interest for one year included in face of note—not usurious 5
5. repeal of statute allowing 10 per cent. interest—debts previously made continue to draw 10 per cent 5
6. renewal of note with new sureties—usury paid at such renewal may be pleaded by maker even after a year has elapsed since the renewal 126
7. so long as any part of the original debt exists, usury previously paid thereon may be extracted from the balance due 126

VACANCY IN OFFICES—See Offices, 1, 2.

VARIANCE—See Sheriffs, 6; Evidence, 56—
1. allegation of certain facts and character of negligence—no recovery allowed on proof of different state of negligence 142
2. no variance between pleading and exhibit shown in certain case .. 398

VENDOR AND VENDEE—See Boundary, 1, 2; Contracts, 5; Fraudulent Representations, 7; Judicial Sales, 5; Liens, 4, 5; Specific Executions, 1, 2, 4; Statute of Frauds, 1, 2, 8; Warranty, 1—
1. guardian of vendor not allowed lien on land sold by vendee to subvendees when enough land remains in vendee's hands to satisfy guardian's claim 282
2. vendee may bring action to enforce contract of purchase, although entire cash payment was not made before filing of suit in certain case 321

Digitized by Google

VARIANCE—Continued. Page.
3. acceptance of part of cash payment by vendor shows that reasonable time was to be allowed vendee of such cash payment 321
4. nonresidency of vendor a sufficient excuse for failure to tender cash payment before institution of suit in certain case 321
5. deposit in court after filing of suit sufficient 321
6. option of vendor to treat contract of sale as a lease 399
7. in action by vendor on purchase money notes claimants in possession of land at date of conveyance were proper parties 782
8. vendee in possession not permitted to dispute right to convey of vendor, who had been in actual adverse possession for thirty years. 828
VENUE—
1. of action against common carrier on contract for transportation of live stock 431
2. court of county where suit is brought to settle affairs of insolvent corporation has jurisdiction to order sale of corporation's land located in other counties 444
VENUE, CHANGE OF—
1. must be granted defendant when 739
2. discretion of trial court concerning 729
VERDICT—
1. killing of live stock by railroad—verdict not against evidence 112
2. in certain case a fair adjustment of rights of the parties and not contrary to evidence 143
3. court may direct formal changes made in verdict returned in criminal case 495
4. not set aside unless flagrantly against the evidence 800
5. remission of part of excessive verdict 895
6. remission of part of excessive verdict induced by passion and prejudice does not cure the error 927
VERIFICATION OF PLEADINGS—See Appeals, 48—
when answer must be verified by oath 858
WAIVER—See Insurance, 5, 6, 7, 8; Pleadings, 11.
WAREHOUSES—See Sureties, 8—
1. instruction by consignee of tobacco to warehouseman as to insurance supercedes custom among warehousemen concerning insurance 580
2. finding of jury that owner instructed warehouseman not to insure tobacco sustained by evidence 580
WARNING ORDERS—
1. need not run in the name of "The Commonwealth of Kentucky". 1
2. may be made by court on its order book as well as by the clerk 1
3. not void because granted by court instead of by clerk 77
4. void if it requires nonresident to appear within less than sixty days after its entry 641
WARRANTY—See Sales of Personal Property, 2—
1. measure of recovery for breach of warranty of title to land 760
2. party not allowed to recover for breach of warranty in a sale which has been rescinded by consent of the parties 863
WATER COURSES—
gully with no well-defined bed or channel, and simply outlet for surface water at certain seasons, not a natural water course 430
WAY, RIGHT OF—See Constitutional Law, 23—
1. when grant of right of way may be presumed from adverse user... 784
2. evidence must show clearly that user was adverse and not merely permissive or grant will not be presumed 784
WILLS—See Contracts, 33; Limitation, 9; Undue Influence, 1—
1. will of man revoked by his subsequent marriage, notwithstanding antenuptial contract with his wife 73
2. jury to find how much, if any, of contested will is valid 81
3. device to draftsman of will is not void, ipso facto 81
4. facts which prove such devise to draftsman was result of undue influence—burden of proof 81
5. how draftsman may repel such presumption of undue influence ... 81
6. evidence to show testator's intention not admitted when there is no ambiguity in the will 107
7. general intention of testator controls in construction of will 336
8. where clauses in a will are so repugnant as to be irreconcilable the latter clause will control 336
9. construction of particular will—repugnant clause 336

Digitized by Google

WILLS—Continued. Page.
10. no attesting witnesses necessary to holographic will 360
11. evidence sufficiently proves execution of holographic will..... 360
12. verdict in favor of mental capacity of a testator supported by the evidence 360
13. not prejudicial error to permit a devisee under a will to testify in its favor after disinterested witnesses have been introduced 360
14. rule of construction where devise is to one in fee, but if he die without issue then to another 364
15. devise to one with power conferred on another to cancel or change beneficiary of devise within certain time a valid power 434

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google